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VOLUME

16

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CITE THIS VOLUME 16 A.L.R.

AMERICAN LAW REPORTS ANNOTATED

Editors in Chief

BURDETT A. RICH AND M. BLAIR WAILES

Consulting Editor

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ASSISTED BY THE EXCEPTIONALLY EXPERIENCED EDITORIAL
ORGANIZATIONS OF THE PUBLISHERS

VOL. XVI.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY	-	ROCHESTER, N. Y.
EDWARD THOMPSON COMPANY	- - - - -	NORTHPORT, L. I., N. Y.
BANCROFT-WHITNEY COMPANY	- - - - -	SAN FRANCISCO, CALIF.

1922

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EDWARD THOMPSON COMPANY

BANCROFT-WHITNEY COMPANY

E. R. ANDREWS PRINTING Co., ROCHESTER, N. Y.

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UNIV. OF CALIFORNIA

AMERICAN LAW REPORTS

ANNOTATED

VOL. 16

ALLIE L. WOOLEY, Respt.,

v.

JAMES T. HAYS et al., Appts.

Missouri Supreme Court (Div. No. 1) — December 30, 1920.

(— Mo. —, 226 S. W. 842.)

Will — per capita.

1. The brothers and children of deceased sisters take equally per capita under a will by a bachelor, leaving his property to his lawful heirs, share and share alike.

[See note on this question beginning on page 15.]

Evidence — of intention in will.

2. Parol evidence of testator's statements of intention with respect to disposing of his property is inadmissible, whether they are made before or after execution of the will.

[See 28 R. C. L. 269, 280.]

— meaning of "lawful heirs."

3. Parol evidence is not admissible as to the meaning of the words "lawful heirs" in a will.

— circumstances surrounding testator.

4. Testimony is admissible as to the circumstances surrounding the testator when he made his will, such as the amount and character of his property, his relations with his relatives who were the natural objects of his bounty, and their situation and circumstances.

[See 28 R. C. L. 270.]

Will — construction — devise to heirs.

5. Under a devise to heirs or lawful heirs, without more, they take per 16 A.L.R.—1.

stirpes or per capita the same as they would had testator died intestate.

[See 28 R. C. L. 268.]

— effect of "share and share alike."

6. Under a devise to heirs or lawful heirs, "share and share alike," the beneficiaries, although related in different degrees to testator, are treated as constituting but one class of devisees who will take equally per capita unless by the will they are separated into different classes, or there is something in the will showing a different intent.

[See 28 R. C. L. 267.]

— giving meaning to every word.

7. Every word and phrase must be given effect in construing a will, unless the court is satisfied that no special effect was intended to be given to a particular word or phrase, under a statute directing all courts to have due regard to the directions of the will and the true intent and meaning of the testator.

[See 28 R. C. L. 217.]

APPEAL by defendants from a judgment of the Circuit Court for Nodaway County (Dawson, J.) in favor of plaintiff in a suit for the partition of certain real estate. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Cook & Cummins for appellants.

Messrs. Shinabargar, Blagg, & Ellison, for respondents:

The intention of the testator must be gathered from the four corners of the will itself, without recourse to extrinsic evidence, unless the language of the instrument is ambiguous or provokes an ambiguity when applied to the external facts; and even then the evidence is admissible only to explain the will, and not to contradict it.

30 Am. & Eng. Enc. Law, 2d ed. 673; 40 Cyc. 1427-1436; Gibson v. Gibson, 280 Mo. 519, 219 S. W. 561; Middleton v. Dudding, — Mo. —, 183 S. W. 443; Griffith v. Witten, 252 Mo. 627, 161 S. W. 708; Brown v. Tuschoff, 235 Mo. 449, 138 S. W. 497; Lehnhoff v. Theine, 184 Mo. 346, 83 S. W. 469; Roberts v. Crume, 173 Mo. 572, 73 S. W. 662; Krechter v. Grofe, 166 Mo. 385, 66 S. W. 358; Webb v. Hayden, 166 Mo. 39, 65 S. W. 760; Hurst v. Von de Veld, 158 Mo. 239, 58 S. W. 1056; McMillan v. Farrow, 141 Mo. 55, 41 S. W. 890; Garth v. Garth, 139 Mo. 456, 41 S. W. 238; Mersman v. Mersman, 136 Mo. 244, 37 S. W. 909; Nichols v. Boswell, 103 Mo. 151, 15 S. W. 343; Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; Hall v. Stephens, 65 Mo. 670, 27 Am. Rep. 302; Asbury v. Shain, 191 Mo. App. 667, 177 S. W. 666; State ex rel. Gordon v. McVeigh, 181 Mo. App. 566, 164 S. W. 673; Snyder v. Toler, 179 Mo. App. 376, 166 S. W. 1059; Missouri Baptist Sanitarium v. McCune, 112 Mo. App. 332, 87 S. W. 93; Kirkland v. Conway, 116 Ill. 438, 6 N. E. 59; Rapp v. Reehling, 124 Ind. 36, 7 L.R.A. 498, 23 N. E. 777; Re Denfeld, 156 Mass. 265, 30 N. E. 1018; Foster v. Smith, 156 Mass. 379, 31 N. E. 291; Priest v. Lackey, 140 Ind. 399, 39 N. E. 54; Engelthaler v. Engelthaler, 196 Ill. 230, 63 N. E. 669; Vestal v. Garrett, 197 Ill. 398, 64 N. E. 345; Best v. Berry, 189 Mass. 510, 109 Am. St. Rep. 651, 75 N. E. 743; Lomax v. Lomax, 6 L.R.A. (N.S.) 942, and note, 218 Ill. 629, 75 N. E. 1076; Nice v. Nice, 275 Ill. 397, 114 N. E. 140; Wheeler v. Wood, 104 Mich. 414, 62 N. W. 577; De Freese v. Lake, 109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; Gilmore v.

Jenkins, 129 Iowa, 686, 106 N. W. 193, 6 Ann. Cas. 1008; M'Allister v. Tate, 45 S. C. L. (11 Rich.) 509, 73 Am. Dec. 119; Hill v. Felton, 47 Ga. 455, 15 Am. Rep. 643; Wilson v. Storthz, 117 Ark. 418, 175 S. W. 45; Wyatt v. Henry, 121 Ark. 479, 181 S. W. 297; Calloway v. Calloway (Calloway v. White) 171 Ky. 366, L.R.A. 1917A, 1210, 188 S. W. 410; Carroll v. Cave Hill Cemetery Co. 172 Ky. 204, 189 S. W. 186.

The expression "lawful heirs" means the same as heirs at law or heirs.

Hockaday v. Lynn, 200 Mo. 456, 8 L.R.A. (N.S.) 117, 118 Am. St. Rep. 672, 98 S. W. 585, 9 Ann. Cas. 775; Harrell v. Hagan, 147 N. C. 111, 12 Am. St. Rep. 539, 60 S. E. 909; Wool v. Fleetwood, 136 N. C. 460, 67 L.R.A. 444, 48 S. E. 785; Stisser v. Stisser, 235 Ill. 207, 85 N. E. 240.

The word "heirs" has a definite meaning.

Re Cupples, 272 Mo. 465, 199 S. W. 556; Tevis v. Tevis, 259 Mo. 19, 167 S. W. 1003, Ann. Cas. 1917A, 865; Waddle v. Frazier, 245 Mo. 391, 151 S. W. 87; Rozier v. Graham, 146 Mo. 352, 48 S. W. 470; Jarboe v. Hey, 122 Mo. 341, 26 S. W. 968.

When used in a will, the word "heirs" is to be given its usual legal significance except where the context compels some other interpretation.

30 Am. & Eng. Enc. Law, 2d ed. 671; 40 Cyc. 1459; Gillilan v. Gillilan, 278 Mo. 99, 212 S. W. 348; Tevis v. Tevis, 259 Mo. 37, 167 S. W. 1003, Ann. Cas. 1917A, 865; Eckle v. Ryland, 256 Mo. 424, 165 S. W. 1035; Brown v. Tuschoff, 235 Mo. 449, 138 S. W. 497; Roberts v. Crume, 173 Mo. 572, 73 S. W. 662; Records v. Fields, 155 Mo. 314, 55 S. W. 1021; Drake v. Crane, 127 Mo. 85, 27 L.R.A. 653, 29 S. W. 990; Emmerson v. Hughes, 110 Mo. 627, 19 S. W. 979; Maguire v. Moore, 108 Mo. 267, 18 S. W. 897; Walker v. Peters, 139 Mo. App. 681, 124 S. W. 35; Gibbons v. Ward, 115 Ark. 184, 171 S. W. 90; Hunting v. Jones, — Tex. Civ. App. —, 183 S. W. 858; Scruggs v. Mayberry, 135 Tenn. 586, 188 S. W. 207; Graig v. McFadden, — Tex. Civ. App. —, 191 S. W. 203; Johnson v. Brasington, 156 N. Y. 181, 50 N. E. 859; Hoke v. Jackman, 182 Ind. 536, 107 N. E. 65; McGinnis v. Campbell, 274 Ill. 82, 113 N. E. 102.

The fact that two living persons, John W. Barber and William F. Barber, are excepted from the class designated by the will as "lawful heirs," does not call for an interpretation of the word "heirs" different from its usual legal significance.

Minot v. Harris, 132 Mass. 528; *Keeler v. Keeler*, 39 Vt. 550.

A devise to "heirs" or the members of one designated class, "share and share alike," entitles the individuals indicated to take per capita, or equally.

30 Am. & Eng. Enc. Law, 2d ed. 731-733; 40 Cyc. 1490; *Allison v. Chaney*, 63 Mo. 279; *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78; *Maguire v. Moore*, 108 Mo. 267, 18 S. W. 897; *Rixey v. Stuckey*, 129 Mo. 377, 31 S. W. 770; *Garesche v. Levering Invest. Co.* 146 Mo. 436, 46 L.R.A. 232, 48 S. W. 653; *Records v. Fields*, 155 Mo. 314, 55 S. W. 1021; *Re Mays*, 197 Mo. App. 555, 196 S. W. 1039; *Bisson v. West Shore R. Co.* 143 N. Y. 125, 38 N. E. 104; *Laisure v. Richards*, 56 Ind. App. 301, 103 N. E. 679; *Kling v. Schnellbecker*, 107 Iowa, 636, 78 N. W. 673; *Johnson v. Bodine*, 108 Iowa, 594, 79 N. W. 348; *Knutson v. Vidders*, 126 Iowa, 511, 102 N. W. 433; *Kalbach v. Clark*, 133 Iowa, 215, 12 L.R.A. (N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 647; *Parker v. Faxworthy*, 167 Iowa, 649, 149 N. W. 879; *Doe ex dem. Kean v. Roe*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Farmer v. Kimball*, 46 N. H. 435, 88 Am. Dec. 219; *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716; *Dukes v. Faulk*, 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122; *Mooney v. Purpus*, 70 Ohio St. 57, 70 N. E. 894.

Even if the will be regarded as ambiguous, parol testimony as to directions or declarations of the testator respecting his intention is incompetent.

Mudd v. Cunningham, — Mo. —, 181 S. W. 386; *Snyder v. Toler*, 179 Mo. App. 376, 166 S. W. 1059.

Small, C., filed the following opinion:

I. Appeal from the circuit court of Livingston county. In this suit for partition, there is but one question for our determination, and that is whether, by the will of John G. Hays, bachelor, deceased, he devised the lands to his three brothers and the children of three of his deceased sisters, per capita, as contended by

plaintiff, or per stirpes, as contended by defendants. The deceased had a fourth sister, Clarissa, who was also deceased, and left two children, John W. and William F. Barber, to whom the testator gave the sum of \$1, "they having been amply provided for." There is no controversy as to this provision of the will.

The will to be construed, omitting the formal introduction and the last clause appointing the executors, is as follows: "After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give and bequeath to my lawful heirs, share and share alike. Except John W. Barber and William F. Barber, heirs of my sister, Clarissa, who I give the sum of \$1 each. They having been amply provided for."

The defendants in their answer set up that it was the intention of the testator that the three brothers and the children of the three deceased sisters should take per stirpes; that the will was written during the last illness of the testator, and within a few hours of his death; that W. H. Montgomery, a banker and friend of the deceased, drew the will, and was not familiar with the technical meaning of legal phrases; that the testator informed the scrivener that he desired his estate equally divided among his brothers and sisters, except as to his deceased sister, Clarissa, whose heirs were to have \$1 each, because they were already provided for; that said scrivener undertook to follow the testator's instructions and to so word the will as to divide the estate in six equal parts among the testator's three brothers and three deceased sisters, and that said scrivener, believing that the three living brothers and three deceased sisters would, in law, constitute the lawful heirs of the testator, and for the purpose of carrying out the instructions of the testator, wrote the will in the words hereinbefore set out, and the testator executed said will in the confident belief that the meaning of the words of his will was such as, in law, would

carry out his intention to divide his estate into six equal parts, one share to each of his three living brothers, and one share to the respective heirs of each of his three deceased sisters; that if, by the use of the words "lawful heirs" in the will, such intention of the testator was not clearly expressed, such failure was caused by the mistake of the testator and the scrivener as to the technical meaning of the words "lawful issue." Wherefore the defendants prayed that the will be construed to devise the property per stirpes, and that it be so divided, etc.

On the trial, W. H. Montgomery, over the plaintiff's objections and subject to the reservation on the part of the court to strike out his testimony if the court concluded it was inadmissible, testified substantially as follows, on direct examination: That the testator told him that "he wanted his property divided among his family, with the exception of John and Will Barber, who were provided for as it was, and that, when he (Montgomery) wrote the will and used the words 'lawful heirs,' he used the words to designate the brothers and sisters of John G. Hays, testator, and was attempting to carry out the instructions of said Hays, as he understood them, and witness put the words 'lawful heirs' in said will to mean the brothers and sisters of said Hays, or their representatives."

On cross-examination, the witness said he did not know whether testator's sisters, except the one (Belle) who died without issue, were dead or not at the time the will was written.

Q. The point about it all is that the directions that he gave you, as I understood your testimony, prior to the making of this will, were that he wanted his property to go to his family?

A. Yes, sir.

Q. And you wrote the will, and wrote it as it is here in evidence?

A. Yes, sir.

Q. And read it over to him, and he said it was all right without any changes?

A. I didn't change it any.

Q. Didn't I understand you to say that you asked him if it was all right?

A. He said it was. There was no change made in the will.

James Hays, a brother of the deceased, under same objection and reservation, testified that, immediately after making the will, the testator talked to him about it, and said: "It is all fixed, Jim. I cut out the Barbers. I want my estate to go to my brothers and sisters."

The evidence further showed that besides the two Barber boys, grandchildren of the testator's deceased sister, Clarissa, the testator left the following nieces and nephews; Mrs. A. C. Barber, only child of his deceased sister, Ann Coston; Allie L. Wooley, Ernest Hudson, and Lillie Ferrell, only children of testator's deceased sister, Mary Hudson; Richard Coston, Edith Baker, and Mabel Bateman, only children of testator's deceased sister, Mattie Coston. Testator's surviving brothers were William R. Hays, James T. Hays, and Joseph Hays. Joseph Hays was of unsound mind in the insane asylum. The testator was about seventy-two years old at the time of his death and at the date of his will, February 19, 1916. He died in St. Louis, where he had gone on business, and was suddenly taken ill and died of pneumonia. He was a farmer and lived on his farm with the family of the son of his brother James, about 1½ miles north of Skidmore, Nodaway county. He lived there with his nephew about a year before he died; prior to that, his maiden sister, Belle, who died in 1915, kept house for him. None of the children of Mrs. Hudson lived in Nodaway county when testator died. One of them, Mrs. Wooley, lived in Kansas City, and another, Lillie Ferrell, lived near Weston, Missouri, and the son lived somewhere north. They had been gone from Nodaway county from three to five years. They were on good terms with the testator. He went to see them several times. Two of the Mattie Cos-

ton children lived in Colorado, one in the state of Washington. The two girls were married and had families. The boy was not married. Mrs. A. C. Barber, the only child of testator's sister, Ann Coston, lived at Skidmore. Testator was on friendly terms with his three brothers, as well as with Mrs. Barber. They visited one another frequently. Testator cared for his twin brother, Joseph, who was of unsound mind, most of the time after he became insane, and had been his guardian. James T. was Joseph's guardian part of the time, and secured a pension and increase of pension for him, of \$18 per month. Joseph's board cost \$20 per month. The other two brothers, James and William, were comfortably situated financially. One of them, James, had seven children and four grandchildren. The other, William, had four children. Joseph was a bachelor and had nothing but his pension. The nieces and nephews, except the Barber boys, were in comparatively poor circumstances.

The abstract of the record does not show the value of the property of the deceased; but in their statement of the case appellants' learned counsel say that he left a large tract of land in Nodaway county, which respondent's learned counsel say was worth, after paying all debts, about \$45,000.

The circuit court, in rendering its decree, struck out the testimony of Montgomery as to the directions of the testator and his understanding and intention in the use of the words "lawful issue" in the will, and also struck out that part of the testimony of James T. Hays, showing the declarations of the testator as to how he had disposed of his property by his will. Thereupon the court ruled that, in and by said will, the estate in question was divided per capita, and that each of the testator's brothers and each of his nieces and nephews received the same portion thereof, to wit, one tenth.

Failing to obtain a new trial, defendants appealed to this court.

II. A will is required to be in writing, and therefore parol evidence as to what the testator said as to his intention, either before or after his will was made, is clearly incompetent. ^{Evidence of intention in will.} Consequently, the lower court made no error in striking out the oral testimony of the witnesses Montgomery and James T. Hays, which it excluded. *Hurst v. Von de Veld*, 158 Mo. loc. cit. 247, 58 S. W. 1056.

In the cases cited by learned counsel for appellants, to wit, *Riggs v. Myers*, 20 Mo. 243; *Creasy v. Alverston*, 43 Mo. 13; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023, and other cases, parol testimony was permitted to identify the property of the testator, or the correct name of a devisee, so as to put the court in the testator's position in order to interpret the words of his will correctly. No parol testimony of what the testator said as to his intention or what the scrivener meant by the words used in the will was admitted. To admit such testimony would be to permit wills to be made by parol, and would, in effect, repeal the statute requiring them to be in writing.

Nor do the words "lawful heirs" create any ambiguity, latent or otherwise. Those words are as certain in their meaning as any words of the English language can be. Indeed, the Statute of Descent and Distribution very clearly fixes and defines their meaning. Consequently, direct parol evidence, such as was ^{—meaning of lawful heirs.} offered below, was not admissible to explain or vary their import or use in the will in this case.

III. But the circumstances surrounding the testator when he made his will, such as the amount and character of his property, his rela-

tions with his relatives who were the natural objects of his bounty, and their situation and circumstances, were admissible, to place the court as nearly as may be in the testator's situation, so that his true intent and meaning, as shown by his will, viewed as he viewed it, can be ascertained and followed as required by our statute (§ 583, Rev. Stat. 1909). *Hall v. Stephens*, 65 Mo. 677, 27 Am. Rep. 302; *McMahan v. Hubbard*, 217 Mo. 638-640, 118 S. W. 481; *Willard v. Darrah*, 168 Mo. 667, 90 Am. St. Rep. 468, 68 S. W. 1023.

IV. It is true that in will cases precedents are of little value, because each will, and the circumstances under which it was made is generally different from every other will, and made under different circumstances. But the primary meaning of certain words and phrases, by often-repeated rulings of the courts, may become so fixed as to compel the belief that in other cases such words and phrases were used in their established sense. The whole difficulty in this case arises from the use of the words "share and share alike," in the second clause of the testator's will. It seems that it is well established by the decided cases that where the testator devises his property to "his heirs" or "lawful heirs," without more, they take per

Will-construction—devise to heirs.

stirpes or per capita, the same as they would had the testator died intestate. 30 Am. & Eng. Enc. Law, 2d ed. p. 730, and cases cited. But where the devise is to the testator's "heirs" or "lawful heirs," "share and share alike," or using other words importing an equal division, the "heirs" or "lawful heirs," although related in different degrees to the testator, as brothers and sisters and nieces and nephews, are treated as constituting

—effect of "share and share alike."

but one class of devisees who will take equally per capita unless by the will they are separated

into different classes, or there is something in the will showing a different intent. 30 Am. & Eng. Enc. Law, 2d ed. p. 731, and cases cited: 40 Cyc. p. 1490; *Records v. Fields*, 155 Mo. 314, 324, 325, 55 S. W. 1021; *Re Mays*, 197 Mo. App. 555, 560-564, 196 S. W. 1039; *McIntire v. McIntire*, 192 U. S. 116, 48 L. ed. 371, 24 Sup. Ct. Rep. 196; *Kling v. Schnellbecker*, 107 Iowa, 636, 78 N. W. 673; *Johnson v. Bodine*, 108 Iowa, 594, 79 N. W. 348; *Kalbach v. Clark*, 133 Iowa, 215, 12 L.R.A. (N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 647; *Doe ex dem. Kean v. Roe*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Farmer v. Kimball*, 46 N. H. 435, 88 Am. Dec. 219; *Dukes v. Faulk*, 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122; *Mooney v. Purpus*, 70 Ohio St. 57, 70 N. E. 894; *Laisure v. Richards*, 56 Ind. App. 301, 103 N. E. 679; *Ramsey v. Stephenson*, 34 Or. 408, 56 Pac. 520, 57 Pac. 195; *Walker v. Webster*, 95 Va. 377, 28 S. E. 570; *Richards v. Miller*, 62 Ill. 417; *Hill v. Bowers*, 120 Mass. 135. The rule is illustrated by the decision of this court in *Records v. Fields*, 155 Mo. 314, 55 S. W. 1021, supra. There, the will provided that the testator's property should be "equally divided between the heirs of William and James, deceased," both of whom were brothers of the testator. It was held that two classes of devisees were created,—one, the heirs of William, and the other, the heirs of James,—and they each took half of the estate; but that the children and grandchildren of William constituted but one class as between themselves, and took equally per capita. In *Re Mays*, 197 Mo. App. 555, 196 S. W. 1039, supra, the St. Louis court of appeals had occasion to consider the law on this subject quite thoroughly, and announces its conclusion, in which we concur, on page 564 of 197 Mo. App., as follows: "The common-law rule prevailing throughout this country [is] to the effect that the settled legal construction of the words 'equally to be divided,' or equivalent terms, when used in a

will, are to cause an equal division of the property per capita and not per stirpes, whether the devisees be children and grandchildren, brothers or sisters, or nieces and nephews, or strangers in blood to the testator."

V. Appellants do not seriously deny that this is the usual rule established by the case law, but contend that under our statute (§ 583, Rev. Stat. 1909), which commands, "All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them," an extra injunction is placed upon the conscience of the court to disregard mere technicalities and artificial rules of construction and follow the real spirit and intent of the testator, as shown by his whole will and circumstances. In this we concur.

—giving meaning to every word.

But every word and phrase must also be given effect lest we miss the true intent and meaning of the testator—unless, indeed, we are satisfied that no special effect was intended to be given to a particular word or phrase, and its use was a mere formality signifying nothing, or its meaning was qualified or neutralized by other provisions of the will, which we cannot find is the case here.

It is suggested, in this case, that the sole purpose of the testator in making a will at all was simply to disinherit the two Barber boys, because they were otherwise amply provided for, and that, but for this fact, the testator would have made no will, but permitted his property to descend according to law, in which case his lawful heirs would have taken per stirpes, and not per capita; that he intended to make no change in the lawful course of distribution of his property after his death except as to the two Barbers; that he made no special legacies nor bequests whatever, but devised his property generally to his lawful heirs, share and share alike, and thereby intended it to go to them

share and share alike, per stirpes, and not per capita. While the argument is plausible, it is not sufficiently firmly founded on the language of the will and the circumstances of the testator to take this case out of the general rule noted in the preceding paragraph of this opinion. Indeed, the language of the clause devising the property to his lawful heirs "share and share alike," except the two Barbers, who shall only receive \$1, in itself bears some indication that the testator thought they would get an equal share under his will with the rest of his heirs, unless they were excluded. But, however that may be, clear it is that they were excluded because they were "amply provided for." The will expressly so states. The evidence shows that his surviving brothers were fairly well off financially, except the insane one, who had a pension which was nearly sufficient to support him at the asylum. He was an old man nearly seventy-two years old, needed little in his unfortunate condition, and would not need that little long. His "per capita" or one-tenth share, or \$4,500, would, with his pension, comfortably attend to his wants, no doubt, the remainder of his days. But all the nieces and nephews, except the Barbers, with all of whom, as well as his brothers, he was on perfectly good terms, were young and comparatively poor. Showing, as his will does, on its face, that he did not mean to give to them "that had," but to them "that had not," we are unable to say that the testator did not attach to his words, "lawful heirs, share and share alike," their usual legally established meaning, so that his nieces and nephews would each get an equal share with his —per capita. brothers. We are therefore constrained to, and do, hold that at the time he made his will he intended to have his "lawful heirs" take equally per capita, as a single class of devisees, and there is nothing in any provision of the will or the surrounding circumstances to the contrary.

It is possible he would have distributed his property per stirpes, or differently than he did, had he taken further time and thought, but death was hurrying him out of the world when he made his will, and, after having it read over, he signed it and let it go—as it was written. We cannot disturb it now.

The judgment of the Circuit Court is affirmed.

Brown and Ragland, CC., concur.

Per Curiam:

The foregoing opinion of **Small, C.**, is adopted as the opinion of the court.

Blair, P. J., and Graves and Goode, JJ., concur.

Woodson, J., dubitante.

NOTE.

The general question as to when beneficiaries under wills take per stirpes, and when per capita, is discussed in the annotation appended to the case of **DOLLANDER v. DHAEMERS** (reported herewith) post, 15, the particular aspect involved in **WOOLEY v. HAYS** (reported herewith) ante, 1, being particularly discussed in subd. III. a, therein.

MANDUS DOLLANDER et al.,

v.

LEONIE DHAEMERS et al., Appts.

Illinois Supreme Court — April 21, 1921.

(297 Ill. 274, 130 N. E. 705.)

Will — gift to children and grandchildren — taking per stirpes.

1. The grandchildren take per stirpes under a will giving the property to the testator's children by name and the children of a deceased named child without naming them, "share and share alike."

[See note on this question beginning on page 15.]

Witness — scrivener of will — intent of testator.

2. The scrivener of a will is not competent to testify as to the intention of testator in the use of language contained in the will.

[See 28 R. C. L. 281.]

Will — rule for construction.

3. The paramount rule in the construction of a will is to ascertain the intention of testator from the words and expressions used in the will itself, and follow it, unless it is contrary to some settled rule of law.

[See 28 R. C. L. 211.]

APPEAL by defendants from a decree of the Circuit Court for Henry County (Graves, J.) in favor of plaintiffs in a suit to construe the will of their deceased father. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Sturtz & Ewan for appellants.

Messrs. C. H. Christopherson and Henry Waterman, for appellees:

The rule that a gift to A and the children of B requires a per capita distribution to the children of B applies only in the absence of anything showing a contrary intention, and the per capita construction yields to a very

faint glimpse of a different intention in the context.

Baker v. Baker, 152 Ill. App. 620; **McCartney v. Osburn**, 118 Ill. 403, 9 N. E. 210; **Best v. Farris**, 21 Ill. App. 49; **Eyer v. Beck**, 70 Mich. 179, 38 N. W. 20; 2 Jarman, Wills, 5th Am. ed. p. 575, Bigelow, 6th ed. *1050.

Words indicating an equality of division, such as "to be divided equal-

ly," etc., do not necessarily mean a per capita division, but they apply just as readily and appropriately to a per stirpes equality.

Baker v. Baker, 152 Ill. App. 620; *Kelley v. Vigas*, 112 Ill. 242, 54 Am. Rep. 235; *Alston's Appeal*, 8 Sadler (Pa.) 451, 11 Atl. 368; *Swinburne's Petition*, 16 R. L. 208, 14 Atl. 850; *Eyer v. Beck*, 70 Mich. 179, 38 N. W. 20; 1 *Pope, Legal Definitions*, p. 467.

Where a will is susceptible of two constructions, that one should be adopted which will result in an equal distribution between heirs of the same class.

30 Am. & Eng. Enc. Law, 669; 40 Cyc. 1411; *Straw v. Barnes*, 250 Ill. 481, 95 N. E. 471.

The fact that a will is inartificially drawn will be taken into consideration by the court in arriving at the testator's intention, and other rules of construction are relaxed when it is apparent what the actual intention of the testator was, even though it be not fully or properly expressed.

Johnson v. Askey, 190 Ill. 58, 60 N. E. 76; *Blackmore v. Blackmore*, 187 Ill. 102, 58 N. E. 410; 30 Am. & Eng. Enc. Law, 672; 40 Cyc. 1396.

Where words are susceptible to two constructions, that construction should be adopted which is most favorable to the heir nearest in relationship to the testator, and so as not to result in discrimination.

Baker v. Baker, 152 Ill. App. 620; 30 Am. & Eng. Enc. Law, 669.

If from the words and context of the will there is good reason to doubt the intention of the testator, that doubt is to be solved in favor of a distribution according to the statute, as for intestacy.

Best v. Farris, 21 Ill. App. 49; 30 Am. & Eng. Enc. Law, 669.

Carter, J., delivered the opinion of the court:

Leopold Dollander owned at his death considerable farm land and some town property in Henry county. He died testate April 22, 1914, leaving his widow, Rosalie Dollander, and his seven children, the appellees, and the five appellants, who are the children of his deceased daughter, Mary Duyvetter. The only question raised in this case is whether the grandchildren take per stirpes or per capita under the

second section of the will. The master and the trial court decided in favor of appellees, holding that the grandchildren took per stirpes and not per capita.

The second section of the will reads as follows: "I give, devise, and bequeath unto my beloved wife, Rosalie Dollander, the use of all my real and personal property during her life or so long as she remains my widow. Upon her death or in event of her remarriage all my said property shall be vested in my children, Leonie Dhaemers, the children of Mary Duyvetter, deceased, Nellie Cathlyn, Angelina Almose, Charles, Martin, Jacob, Frank, and Mandus Dollander, share and share alike."

The testator signed by mark in the presence of three witnesses. The only other provisions of the will were the first paragraph, which provided for the payment of just debts and funeral expenses, and the third paragraph, which named the executor and revoked all former wills. The widow relinquished her interests in and to the property before the beginning of this proceeding.

It is argued by counsel for appellees that the will indicates that it was drawn by someone not well versed in the drafting of a will. However, we do not think the form or wording of the will, outside of § 2, gives any assistance in the construction of said section. If the will be construed so that appellants take per capita, the share of each grandchild would be one twelfth; if it be construed, as held by the trial court, that they take as a class, each grandchild's share would be one fortieth. The real and personal property amounted to between \$40,000 and \$50,000.

On the hearing before the master in chancery the executor, who drafted the will, testified as a witness, and was asked if there was any question, when he was drawing the will, as to who were the children of the deceased daughter, Mary Duyvetter, and what was said about that, and the witness was permitted to answer, subject to objection, that

the testator wished those children to have their deceased mother's share. There is no argument by counsel for

**Witness—
scrivener of
will—intent of
testator.**

appellees that this testimony was competent, and we think it was clearly

incompetent. *Hawhe v. Chicago & W. I. R. Co.* 165 Ill. 561, 46 N. E. 240; *Alford v. Bennett*, 279 Ill. 375, 117 N. E. 89. The paramount rule to be followed in construing a will is to ascertain the intention of the tes-

**Will—rule for
construction.**

tator, and follow the intention thus ascertained, unless

contrary to some settled rules of law. *Howe v. Hodge*, 152 Ill. 252, 38 N. E. 1083; *Wardner v. Seventh Day Baptist Memorial Bd.* 232 Ill. 606, 122 Am. St. Rep. 138, 83 N. E. 1077. This intention is to be gathered from the words and expressions used in the will itself. Yet a court in construing a will is not bound to shut its eyes to the state of facts under which the document was made. "On the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator. To this end it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret, and, guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from a strict construction of the testator's language without allowing conjectural interpretation to usurp the place of judicial exposition." 1 *Jarman, Wills*, Sweet's 6th ed. 503; *Abrahams v. Sanders*, 274 Ill. 452, 113 N. E. 737, and authorities there cited; 30 Am. & Eng. Enc. Law, 2d ed. 666.

Counsel concede that the testator left seven children and the children of a deceased daughter. The wording of the second section would seem to indicate that he had his children particularly in mind by this section. The will gives the names of all of his children, but does not give the

particular names of any of the grandchildren. It simply groups them all together as "the children of Mary Duyvetter," and the arrangement of the names of his children, interwoven with the reference to the children of his deceased daughter as a class and without naming them, would indicate that he was thinking of the grandchildren as a class, representing the deceased daughter, rather than as individuals who were to receive separate and exclusive shares of his property.

The authorities as to the construction of wills which provide that property shall be divided equally among the named children of the testator and the unnamed children of a deceased child are in hopeless conflict. *Perdue v. Starkey*, 117 Va. 806, 86 S. E. 158, Ann. Cas. 1916C, 409, and cases cited in note. When the bequest is to an individual or several named individuals, and to others as a class, the latter generally take per stirpes; but this rule yields when the testator used language indicating an intention that the members of the class should share equally with the named individuals. 30 Am. & Eng. Enc. Law, 2d ed. 727. To the same effect is 40 Cyc. 1491:

"The nature of descent and distribution under the statute is important, because, unless the intention of testator is clearly manifest in his will, the courts construe a will by which property is to be divided among a specified class as contemplating a division in analogy to the Statute of Descent and Distribution." Page, *Wills*, 1901 ed. 643, 644, and cases cited in note—among others, *Kelley v. Vigas*, 112 Ill. 242, 54 Am. Rep. 235.

The author then goes on to say: "Thus, when the persons designated stand in equal degree or degrees of relationship to testator, and the devise or bequest is to inure to the benefit of all of them, the court will order a division per capita, . . . while, if the devisees or legatees stand in unequal degrees of relationship to testator, the law favors a

construction which results in a distribution per stirpes among the beneficiaries."

See also, to a similar effect, the reasoning in 1 Schouler on Wills, 5th ed. § 540. When the words "equally," "equal among," "share and share alike," or other similar words, are used to indicate an equal division among a class, the persons among whom the division is to be made are usually held to take per capita, unless a contrary intention is discoverable from the will. This would seem to be the fair conclusion drawn from the decisions in this court. See *Kelley v. Vigas*, supra; *Pitney v. Brown*, 44 Ill. 363; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Auger v. Tatham*, 191 Ill. 296, 61 N. E. 77; *Welch v. Wheelock*, 242 Ill. 380, 90 N. E. 295; *Straw v. Barnes*, 250 Ill. 481, 95 N. E. 471. The presumption, however, in favor of a per capita distribution, yields readily in favor of a faint indication of the testator that the distribution shall be per stirpes. If from the will, as a whole, a different intention appears, such intention will control, notwithstanding such words. A leading authority on this question is doubtless *Jarman on Wills*, who states: "Where a gift is to the children of several persons, whether it be to the children of A and B, or to the children of A and the children of B, they take per capita and not per stirpes; . . . but this mode of construction will yield to a very faint glimpse of a different intention in the context." 2 *Jarman, Wills*, *Bigelow's 6th Am. ed.* 205, 206.

A reference to decisions in various states will show that the courts have frequently departed from the general rule on the very slightest indication in the will that a per stirpes distribution was intended as to some of the legatees rather than a distribution per capita. In the case of *Eyer v. Beck*, 70 Mich. 179, 38 N. W. 20, there was a provision in the will dividing the property equally "among my heirs, to wit: John Beck, the children of Christian Beck,

Jr., deceased, Elizabeth Eicher, Gottlieb Beck, Peter Beck, Magdalena Eyer." In that case it was said, on page 180 of 70 Mich.: "The arguments on both sides were based on decisions in England and America, some of which were in point on each theory; a part holding that such a legacy went by representation, and a part that it made a distribution per capita among children and the three grandchildren. It appears incidentally that at the time of the distribution in the probate court one of the daughters of testator had died, leaving six children, who were testator's grandchildren, each of whom, under the order of the circuit court, gets only one sixth of the amount allowed to each of the three grandchildren referred to in the will. . . . The cardinal principle of interpretation of wills is to carry out the intention of the testator, if it is lawful, and if it can be discovered. If the language used has been so fully established by construction as to make a rule of property, courts cannot very well depart from the settled interpretation, although testimony, if introduced, might show the testator did not really so understand it. But this is a rule of law, and not of interpretation, and is enforced only on that account. It would be an untrue presumption, in point of fact, in most cases, because we all know that the abstruse rules set up by precedents are often not much known to even the legal fraternity who have not had their attention called to them, and the unprofessional world is not familiar with law books."

The opinion then goes on to discuss other branches of the case and the decisions thereon, and states, on page 181 of 70 Mich.: "They are very generally based either on an unreasoned acceptance of rulings which they deem analogous, or upon considerations outside of the language itself. And it is worthy of remark that the leading cases which sustain a distribution per capita intimate that a very small indication of an intent to the contrary would

change the rule. This will does not name the three grandchildren who are claimed to stand on the footing of children. It gives no reason why they are nearer to the testator in affection than his other grandchildren, and he must have known that his named children might all, or any of them, die during his lifetime, leaving descendants. In case there was any real preference for one set over the rest, it would seem that the testator would have expressed it so as to show that he deliberately preferred them. . . . But where he makes a difference between those presumptively equal in his regard, it seems to us that it ought to be made clear by his language. . . . The laws of inheritance are generally understood by intelligent people. It is understood that, when there are children and grandchildren to take, the grandchildren by one child take in the aggregate only that child's portion."

The only difference between the will construed by the Michigan court, and the will here construed, is that the Michigan will used the word "heirs," and this one used the word "children," and it would seem clear, from what has been already stated, that the testator was trying to put the children in a class by themselves and the grandchildren in another class. There is nothing in the will itself to indicate that the testator intended to favor his deceased daughter's children more than he did the children of any of his other children.

In *Lyon v. Acker*, 33 Conn. 222, the will provided: "I give, devise, and bequeath to my three daughters and the children of my son Samuel A. Lyon, viz., to Mary F. Acker, wife of Abram Acker, Susan E. Voorhis, wife of William Voorhis, Josephine Lyon, and the children of my son, Samuel A. Lyon, my house and homestead where I now reside, to them and their assigns forever, share and share alike."

It was argued in that case that to give effect to the words "share and share alike" could only be done by

holding that the grandchildren were to take per capita. The court said (page 224): "The names and number of these children do not appear in the will. They are referred to only as a class, a fact which seems to indicate that she intended to make all the grandchildren only equal to one of the daughters. At least, it seems to us that this view of the case gives effect to the words in question as well as the other. If so, they do not require us to adopt the construction contended for by the petitioners. The effect of such a construction would be to give to the children of Samuel four sevenths of the property devised, and to the three daughters the remaining three sevenths. That the testatrix intended to discriminate against her daughters and in favor of her son's children will certainly not be presumed; and when we look at the language of the will or the circumstances of the case we fail to discover anything to indicate the existence of any such intention. Had she made her son the devisee, it would require clear and unmistakable language to give him four sevenths of the property. Has she done any more, or did she intend to do any more, than to give the father's share to the children? We think not. Again, the claim of the respondents is in accordance with the general laws of distribution. We think it a sound rule that, when a devise or legacy is given to heirs or their representatives, courts will apply the general principles governing the descent of estates, unless a contrary intention appears."

The same may be said on all the questions here raised. In *Page on Wills*, 1901 ed. § 554, it is said: "By the terms of a will one person may be balanced against a class. Thus, a provision that an income should be 'equally divided' between the widow of testator and the heirs of testator's mother was held to mean that the widow should receive half the income."

See to a similar effect, *Lachland v. Downing*, 11 B. Mon. 32, where

the will provided: "All the residue of my estate, whether real, personal, or mixed, not herein otherwise disposed of, I desire may be equally divided after my death between my brother John Downing, my two sisters Elizabeth Cameron and Nancy Gibson, and the children of sister Nelly Lachland, to them and their children forever, it being my desire that the portions allotted to my brother John and my two sisters and the children of my deceased sister Nelly Lachland shall be made as nearly equal as possible, both in kind and in amount."

See also *Balcom v. Haynes*, 14 Allen, 204, where the will provided: "Sixthly, I give and devise to my brothers, John W. Haynes, Amos Haynes, and Charles Haynes, and my sisters, Susan Boyd, wife of Stephen Boyd, Ruth Boyd, wife of Warren Boyd, and the heirs of Lydia Walkup, and their heirs, respectively, all the rest and residue of my real and personal estate, . . . to be divided in equal shares between them."

It was held that the heirs of Lydia Walkup, who was the testator's sister, should be treated as a class, and receive only the amount that would have gone to the sister had she been living. In that case the context of 2 Jarman on Wills, heretofore quoted, was referred to, and it was held that the construction of the will yields to a very faint glimpse of a different intention on the part of the testator. The same court, in *Perkins v. Stearns*, 163 Mass. 247, 39 N. E. 1016, construed a will of somewhat similar character, holding that certain legatees took per stirpes, as a class, and not per capita. A similar reasoning is to be found in *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885; *Raymond v. Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688; *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457; *Henry v. Thomas*, 118 Ind. 23, 20 N. E. 519; *Risk's Appeal*, 52 Pa. 269, 91 Am. Dec. 156; and *White v. Holland*, 92 Ga. 216, 44 Am. St. Rep. 87, 18 S. E. 17.

In *MacLean v. Williams*, 116 Ga. 259, 42 S. E. 486, 59 L.R.A. 125, the court said (page 127): "If all the heirs at law stand in the same relation to the decedent, they take equally per capita. If some stand in different degrees from others, they take per stirpes, but they take equally nevertheless. The estate in either event is divided into shares, and equal shares, although in the one case each share goes to an individual, and in the other case the equal shares go to a class of individuals. The Statute of Distributions sets forth the settled policy of the law as to where the estate of a decedent shall go. While a testator is allowed to ignore, either in part or altogether, the rules laid down in that statute, it will not be presumed that it was the intention of the testator to disregard the law as it is contained in the statute in any part, unless the terms of the will are such as to make this intention manifest."

The opinion cites, as upholding this doctrine, *Page on Wills*, § 556.

An interesting discussion of the old rules of law as laid down in Jarman on Wills, with reference to taking per stirpes or per capita under similar provisions, is found in *Roome v. Counter*, 6 N. J. L. 111, 10 Am. Dec. 390, where the writer of the opinion states that most of the earlier authorities were based upon *Blackler v. Webb*, 2 P. Wms. 383, 24 Eng. Reprint, 777, in which the lord chancellor intimated that he was in doubt as to the proper decision; and also upon the case of *Phillips v. Garth*, 3 Bro. Ch. 64, 29 Eng. Reprint, 410, where Buller, sitting as justice for the lord chancellor, recognized the case of *Blackler v. Webb* as good law, and decreed accordingly, but on appeal to the lord chancellor, and finding, upon the argument, that he leaned much the other way, the cause was compromised by the parties, with the advice, no doubt, of the able counsel who advocated the cause. The writer of the opinion in *Roome v. Counter* reached the conclusion that neither of those decisions should

necessarily be followed or have weight, except in cases that were exactly like the cases there decided, and in that case, in construing a will which provided "that all the remainder of my movable estate shall be equally divided: That is to say Henry Counter, and the heirs of my son Peter Counter, Anna Roome, Susannah Berry, Elizabeth Dodd, and Sarah Counter"—it was held that the heirs of Peter Counter, the deceased son, should take per stirpes.

A reading of the authorities in the note already cited in *Perdue v. Starkey*, 117 Va. 806, 86 S. E. 158, Ann. Cas. 1916C, 409, in the notes to *Jarman on Wills*, *Page on Wills*, and *Schouler on Wills*, in 30 Am. & Eng. Enc. Law, and in 40 Cyc., will show that the decisions on this question are in irreconcilable conflict. The decisions of this court in *Kelley v. Vigas*, 112 Ill. 242, 54 Am. Rep. 235; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Welch v. Wheelock*, 242 Ill. 380, 90 N. E. 295, and *Straw v. Barnes*, 250 Ill. 481, 95 N. E. 471, all indicate that the courts generally will depart from the rule laid down by *Jarman on Wills* if there is the faintest intention to show that the class—in this case, the grandchildren—might be considered as taking per stirpes rather than per capita. Where there is an ambiguity existing in a will, unless there is a manifest intention to the contrary, "the presumption that the testator intended that his property should go in accordance with the Laws of Descent and Distribution will be applied as an aid in construing the will; hence, such a construction should be given the will as favors the heirs at law or next of kin in preference to disinheritance, or to strangers or persons not so closely related to the testator." 40 Cyc. 1412. See to the same effect, 30 Am. & Eng. Enc. Law, 2d ed. 668, and cases cited. The reasoning in *Straw v. Barnes*, supra, would tend to support the same conclusion.

In *Ferrer v. Pyne*, 81 N. Y. 231, the court said (page 283): "In

Powell on Devises (vol. 2, p. 331) it is said that where a gift is made to a person described as standing in a certain relation to the testator, and to the children of another person standing in the same relation, as to my brother A, and the children of my brother B, A only takes a share equal to one of the children of B, and this position is abundantly sustained by the authority of English cases [citing them], and to some extent by the courts of this country. Yet, if the case stood upon the words of the residuary clause alone, we should find great difficulty in confirming, by the sanction of this court, a construction opposed to the apparent meaning of the language used by the testator, and at variance with the natural disposition of mankind. We find the testator calling to mind his children, their names, their relations to others by marriage. . . . The living children are named by him, while the children of the daughters who are dead are spoken of, not by name, but 'as the son of Isabel,' or 'the children of Irene,' evidently giving to them the place as recipients of his bounty which Isabel or Irene, if living, would have filled. He designates the children of Irene as a class, and not as individuals, remembers them not in their own persons, but as representatives of their parent, and substitutes them in her place. We are unable to discover any intent to bestow upon them any greater or more numerous marks of his affection than their parent would, if living, have received. The rule referred to has, in modern times, been applied with reluctance by some courts, because it had become a rule of property, and by others out of deference to its supposed authority; but in many, if not in all, cases with open protest, while by others it has been wholly rejected."

The reasoning of this opinion on this point is quoted with approval in the note to *Perdue v. Starkey*, supra, Ann. Cas. 1916C, on page 414.

While, perhaps, the conclusion we

have reached may not be supported by the majority of the American and English authorities, judging them only by number, we think it is fully supported by the weight of authority where the question has been exhaustively considered, and by the sounder reasoning; that is, that in a

will worded as is this one, the grandchildren are to be considered as a ^{-gift to children and grand-} class, and should take, under the will, ^{children-taking per stirpes.} per stirpes and not per capita.

The decree of the Circuit Court will therefore be affirmed.

ANNOTATION.

Taking per stirpes or per capita under will.

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I. Introduction.

a. Generally.

It is a common remark that the decisions on the question as to when beneficiaries under a will are to take per capita, and when per stirpes, are in hopeless confusion. Analysis and comparison, however, show that their diversity of result is due not to a difference as to the principles of construction, but as to the amount of evidence of a contrary intent which will overcome the general presumption that, where the proportions in which the beneficiaries are to take are not specified, they take per capita.

The cause of this difference is due to the inclination of some courts—notably those of Connecticut, Georgia, Illinois, Indiana, Kentucky, New Jersey, and Pennsylvania—toward stirpital distribution wherever possible. In some jurisdictions the principle that a stirpital construction is to be favored is found only in cases in which the beneficiaries are lineal descendants of the testator; in others it is also found in cases of bequests to collateral relations. (See, as holding that the presumption that a testator's affection is proportionate to the degree of relationship does not extend to the case of collaterals, *Wessinger v. Hunt* (1856) 30 S. C. Eq. (9 Rich)

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- s. Under a bequest to one and his "family," 121.
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- w. Under a bequest to the "relatives," "heirs," or "next of kin" of the testator and of the testator's wife or husband, 145.
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459.) It has, however, no application where none of the legatees would take in the absence of a will.

Other courts—notably in Ohio, New Hampshire, Virginia, and West Virginia—consider the presumption that the testator had in mind such a distribution as the statute would make as being without much foundation, and in case of doubt adhere to a literal construction of the will.

Something may be said on both sides of the question. It is doubtless true, in many instances where a bequest has been made to relations of different degrees, that the testator had in mind a division among them per stirpes; and it is also true that the fact that he made a will does not prove that he did not make the same disposition of the property as the law would have done in the case of intestacy, since it is conceivable that a man may make a will solely for the purpose of naming an executor.

On the other hand, it is quite conceivable that a testator may have wished to provide more generously for his younger kindred than for those who, though more nearly related, were mature and settled in life. And while the intention of the testator overrides all rules of construction, it must be remembered that such intention must be that gathered from the

language of the will, construed, where ambiguous, in the light of the surrounding circumstances, and not solely (as seems to have been supposed in some instances: see, for example, *White v. Holland* (1893) 92 Ga. 216, 44 Am. St. Rep. 87, 18 S. E. 17), from testator's relationship to the objects of his bounty. To permit the courts to derive their views as to the intention of the testator from extrinsic circumstances alone, rather than from the language of the will, would be to permit them to make such a will for the testator as they think he should have made. As is said in *Collins v. Feather* (1902) 52 W. Va. 107, 61 L.R.A. 660, 94 Am. St. Rep. 912, 43 S. E. 323: "While ordinarily these rules of construction are not rules of property, but only means and agencies created by the courts to enable them to ascertain the intent of the testator and determine what he really meant by the words written in his will, yet, if they are to be disregarded and laid aside, the courts have nothing to guide them in disposing of questions of the gravest import and directly affecting vital interests of the citizens; nor is there anything by which the correctness of a decision may be tested or known. The courts would have but little to do in cases of this kind, other than to say whether or not, under the circumstances, they would have made the same sort of a will."

So, also, in *Crow v. Crow* (1829) 1 Leigh (Va.) 74, it is remarked that it often happens that the court in the first place forms an opinion as to what the testator ought in justice to have done, and then endeavors to find out reasons showing that what he ought to have done he has done. The impropriety of such a method is pointed out by the court as follows: "This is surely a very erroneous process; for, the testator having a perfect right to the property, his will is the sole law; we are to inquire what that will is; and in this inquiry what we think it ought to be should not have the least influence. The reasons, the calculations, the feelings, the whims even, which may have influenced the testator, are inscrutable to us; his words

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are the only safe guide to conduct us to his meaning." And in *Barksdale v. Macbeth* (1854) 28 S. C. Eq. (7 Rich.) 125, it is said: "The court is not at liberty to travel out of the will and speculate upon the probable intention of the testator, as deduced from the ordinary motives or feelings which would influence mankind in the case presented."

"Difficulties," said Parke, B., in *Doe ex dem. Sams v. Garly* (1845) 14 Mees. & W. 701, 153 Eng. Reprint, 656, "have arisen from confounding the testator's intention with his meaning. Intention may mean what the testator intended to have done, whereas the only question in the construction of wills is on the meaning of the words."

The various views which have been expressed on the question whether the court is to incline, in case of doubt, toward a stirpital distribution, are as follows.

b. View that stirpital distribution is to be favored.

In *Billinslea v. Abercrombie* (1832) 2 Stew. & P. (Ala.) 24, it is said that, if the words of the will leave the intention of the testator uncertain and ambiguous, a construction requiring the children of a deceased child to take per stirpes should be sustained, because the testator could not in equity and justice be supposed to intend giving such children more than their parent, if living, would have been authorized to expect from him.

In *Lyon v. Acker* (1866) 33 Conn. 222, the court said that it is a sound rule that, when a devise or legacy is given to persons who would be distributees in case of intestacy, the courts will apply the general principles governing the descent of estates, unless a contrary intention appears.

So, also, in *Raymond v. Hillhouse* (1878) 45 Conn. 467, 29 Am. Rep. 688, it is said that there is a presumption in favor of the natural heirs, or next of kin, of a distribution according to the statute in all cases where the language of the will is consistent with such a distribution, and the real intention of the testator is in doubt.

See also, to the same effect, *Heath*

v. Bancroft (1881) 49 Conn. 220; Geery v. Skelding (1893) 62 Conn. 499, 27 Atl. 77; Conklin v. Davis (1893) 63 Conn. 377, 28 Atl. 537.

This is a principle to be applied in aid of construction, rather than a rule to govern. It may properly serve to turn the scale in cases otherwise evenly balanced, and is always to be borne in mind in considering the language and structure of a will, and the relation, circumstances, and condition of the legatees. *Geery v. Skelding* (Conn.) *supra*.

In *Fraser v. Dillon* (1887) 78 Ga. 474, 3 S. E. 695, it is said that, in the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or to disturb this descent, or direct it in a different course, should require plain words to that effect.

In *Maclean v. Williams* (1902) 116 Ga. 259, 59 L.R.A. 125, 42 S. E. 486, it is said: "The Statute of Distribution sets forth the settled policy of the law as to where the estate of a decedent shall go. While a testator is allowed to ignore, either in part or altogether, the rules laid down in that statute, it will not be presumed that it was the intention of the testator to disregard the law as it is contained in the statute, in any part, unless the terms of the will are such as to make this intention manifest."

The Illinois courts have likewise declared that, if the intention of the testator is doubtful, that doubt is to be solved in favor of a distribution in accordance with the Laws of Descent and Distribution. *Best v. Farris* (1886) 21 Ill. App. 49; *DOLLANDER v. DHAEMERS* (reported herewith) ante, 8.

In *Henry v. Thomas* (1889) 118 Ind. 23, 20 N. E. 519, it is said: "It is the natural impulse of mankind to have a greater affection for, and be more willing to aid, those who are bound to them by the near ties of relation or kinship than those further distant, and the ties which bind kindred together are strong or weak,

owing to the degree of kinship. True, there are exceptions to this rule; social or business relations may be such as to bind one more closely to distant than to near relatives; but such are exceptions. Courts, in construing both wills and Statutes of Descent, will give due regard to the natural impulses and feelings of mankind, and take into consideration the general laws of descent and the rules for the disposition of estates."

The law favors a distribution of estates under the rule giving to the child or children of a deceased son such share as his parent would have taken, if living. *Kilgore v. Kilgore* (1890) 127 Ind. 276, 26 N. E. 56.

When a devise is to several persons belonging to different classes bearing different degrees of relationship to the testator, and the language of the will leaves the question of distribution in doubt, or the language does not exclude a distribution per stirpes, then the will must be construed as intending a distribution per stirpes, and not per capita. *West v. Rassman* (1893) 135 Ind. 278, 34 N. E. 991.

In cases of doubt, the Law of Descent and Distribution is followed, or the property is divided per stirpes. *Bethel v. Major* (1902) 24 Ky. L. Rep. 398, 68 S. W. 631.

Unless there are plain expressions to the contrary, it will be presumed that a testator intended equal division of his property amongst those sustaining the same degree of relationship to him, not preferring those of a remote degree over those sustaining a nearer relationship. *Prather v. Watson* (1920) 187 Ky. 709, 220 S. W. 532.

In *Eyer v. Beck* (1888) 70 Mich. 179, 38 N. W. 20, it is said to be worthy of remark that the leading cases which sustain a distribution per capita intimate that a very small indication of an intent to the contrary would change the rule.

If there is doubt as to whether the testator intended a distribution per stirpes or per capita, the court will incline toward a construction in favor of a per stirpes distribution, not only as being most probably in accordance with testator's intention, but also as

being in accordance with the policy of the law. *Stoutenburgh v. Moore* (1888) 87 N. J. Eq. 63, affirmed without opinion in (1884) 38 N. J. Eq. 281.

In *Clark v. Lynch* (1866) 46 Barb. (N. Y.) 68, it is said that in construing wills the courts take notice of the natural relation in which the testator stands to the objects of his bounty, and of the mode in which the law would dispose of the estate in case he had died without indicating a purpose; and thus they will interpret the will by these considerations and legal dispositions, unless such interpretation should be overcome by extrinsic facts clearly existing and obvious to the mind of the testator, or by the explicit and unmistakable terms of the will.

In *Fissel's Appeal* (1856) 27 Pa. 55, it is said that it must be presumed to be the intention of testators generally that distribution should be by classes, unless the contrary appears, "for all are supposed to assent to the general justice of the law on this subject. This is only another form of the rule that, in doubtful cases, the claim of the heir shall have the preference."

In *Minter's Appeal* (1861) 40 Pa. 111, it is said that when a man distributes his estate in whole or in part among persons who are his next of kin, and leaves the proportions in which they are to take doubtful, it is natural to suppose that he had the statutory or customary form of distribution in his mind, and to interpret his will accordingly.

See also, to the same effect, *Harris's Estate* (1873) 74 Pa. 452; *Dunlap's Appeal* (1887) 116 Pa. 500, 9 Atl. 936.

The principle of the *per stirpes* rule is to be preferred, not because adopted by the statutes of distribution, for it may be the very purpose of the testator, as it is his right, to take his estate out of the principles of the statute, but because it is a reasonable presumption that the mind of the testator was familiar with the statutory rule, and intended a distribution in accordance therewith. *Risk's Appeal* (1866) 52 Pa. 269, 91 Am. Dec. 156. In discussing this point the court said: "Why, then, should a testator

make a will at all, if he means it should operate as the statute would operate without it? He may desire to give legacies to those who would take nothing under the statute, or increased portions to some who would take; or, if content that the rules of the statute shall apply to his whole estate, he may still desire to appoint his own executors. For one or the other, or all of these reasons, he may have been moved to make a will. Whilst we are not to hesitate to allow him to alter the descents provided in the statute, we are not, on the other hand, to presume, from the fact that he made a will, that he meant its construction should be at all possible points inconsistent with the statute."

The Statute of Distribution governs in all cases where there is no will; and where there is one, and the testator's intention is in doubt, the statute is a safe guide. *Sipe's Estate* (1906) 30 Pa. Super. Ct. 145.

The Statutes of Distribution regulate succession and participation when none is determined by a will, and if in a will the testator makes a doubtful determination, the doubt will be solved in favor of the mode pointed out by the statute, which is the only rule to fall back upon. *Peale's Estate* (1876) 11 Phila. (Pa.) 147.

But the rule that, where property is bequeathed and the will is uncertain, the court, in ascertaining the purpose of the testatrix, will assume the intent, at least, to distribute the property in accordance with the law of succession, and, in the absence of a clear intent to make other distribution, will interpret the will accordingly, has no application where none of the legatees would take in the absence of a will. *Re Fisk* (1920) 182 Cal. 238, 187 Pac. 958.

c. The contrary view.

In *Collins v. Feather* (1902) 52 W. Va. 107, 61 L.R.A. 660, 94 Am. St. Rep. 912, 43 S. E. 323, it is said that the presumption that the testator intended a division in conformity with the Statute of Distribution is entitled to little, if any, weight.

In *Wessenger v. Hunt* (1856) 30

S. C. Eq. (9 Rich.) 459, it is said that to regard the faintest glimpse of intention that, under a gift to children and grandchildren, the latter should take per stirpes, would, perhaps, be going too far. "To give a strained construction to carry into effect a favorite theory would not be the most conducive mode of arriving at the true meaning of the will. The *jus disponendi* is absolute in the testator; and he has the right to dispose of his estate as his judgment or caprice may dictate. And if he has expressed his meaning plainly, no tortured interpretation should be resorted to for the purpose of defeating his purpose—even though he may be supposed to have made an unnatural will."

In *Guesnard v. Guesnard* (1911) 173 Ala. 250, 55 So. 524, it is said that it cannot be affirmed as a universal proposition that grandfathers do not intend to place children of deceased children on an equality with their children.

In *Broermann v. Kesseling* (1914) 6 Ohio App. 7, it is said that as a general rule, where the testator has left undetermined the proportions in which his beneficiaries are to take, the courts, favoring equality, will direct the distribution to be per capita rather than per stirpes.

In *Cuthbert v. Laing* (1909) 75 N. H. 304, 73 Atl. 641, it is said: "A will is made to avoid—not to carry into effect—the Statute of Distribution. If, as the appellees argue, the testator had intended to divide his estate as the statute would cause it to be divided, he could have omitted all of this clause of his will except the provision that the grandchildren's shares should be held in trust. If he had had the suggested familiarity with the statute, it could well be argued that he would not uselessly insert its provisions in the will."

In *Walker v. Webster* (1897) 95 Va. 377, 28 S. E. 570, it is said: "While the fact that one of two constructions of a provision in a will of doubtful meaning would only accomplish that which the law would do in the absence of such provision may not be entitled to much consideration in construing the

provision, yet it is a circumstance to be weighed against that construction of the provision which would make its insertion in the will a useless act, and in favor of a different disposition of the estate, manifested by the words of the provision, but which would not have been accomplished by the operation of the law if the testamentary disposition had not been made."

The fact that the testator made a will is a circumstance tending to show that in making a bequest to his "heirs" he intended thereby to make a provision for them different from that which the law would make. *Mooney v. Purpus* (1904) 70 Ohio St. 57, 70 N. E. 894.

But compare *Sipe's Estate* (1906) 30 Pa. Super. Ct. 145, where it is said that the fact that testator made a will is not of itself ground for any certain inference that he intended to depart from the statutory rule of distribution in all particulars, and to distribute his estate per capita.

II. In general.

a. Generally.

If a bequest is made to several persons by name in general terms, the individuals will, of course, take the same share, or per capita. *Maclean v. Williams* (1902) 116 Ga. 259, 59 L.R.A. 125, 42 S. E. 486; *Whittle v. Whittle* (1908) 108 Va. 22, 60 S. E. 748.

See also, as inferentially supporting the foregoing statement, the decisions cited in III. j, *infra*.

Where the gift is to a class the legatees take share and share alike, unless it clearly appears that the testator intended a different division. *De Laurencel v. De Boom* (1885) 67 Cal. 362, 7 Pac. 758; *Maclean v. Williams* (1902) 116 Ga. 259, 59 L.R.A. 125, 42 S. E. 486; *Records v. Fields* (1900) 155 Mo. 314, 55 S. W. 1021; *Jay v. Lee* (1903) 41 Misc. 13, 83 N. Y. Supp. 579; *Bassett v. Wells* (1907) 56 Misc. 81, 106 N. Y. Supp. 1068; *Re Title Guarantee & T. Co.* (1913) 159 App. Div. 803, 144 N. Y. Supp. 889, affirmed in (1914) 212 N. Y. 551, 106 N. E. 1043; *Campbell v. Wiggins* (1838) 14 S. C. Eq. (Rice) 10; *Allen v.*

Allen (1880) 13 S. C. 512, 36 Am. Rep. 716.

But where the gift is to a class the individuals of which can only be ascertained by a resort to the Statute of Distributions, then the provisions of the statute must also be resorted to for the purpose of ascertaining the proportions in which the donees are to take, unless in the instrument by which the gift is made a different rule of distribution shall be prescribed. *Allen v. Allen* (S. C.) *supra*.

And see also cases reviewed in III. a, b, and c, *infra*.

Although the fact that all the beneficiaries stand in the same degree of relationship is a circumstance tending to support a per capita division, and although it has been said that, if beneficiaries under a will are of different degrees of relationship, the presumption ordinarily is that the two classes should not be benefited equally unless the intention to do so may be clearly and unequivocally gathered from the instrument itself, the majority of cases regard the fact of inequality of relationship as insufficient to affect the construction imported by the language used. See III. q. 1, *infra*.

b. Right to resort to other parts of will in determining construction.

Notwithstanding the construction which would have to be given to a clause if standing alone, if it can be seen from other portions of the will that it was the testator's intention to dispose of his property per stirpes, and not per capita, it will be so construed. *Re Verplanck* (1883) 91 N. Y. 439; *Whitehead v. Ginsburg* (1921) 197 App. Div. 266, 188 N. Y. Supp. 739.

Thus, in *Re Union Trust Co.* (1915) 89 Misc. 69, 151 N. Y. Supp. 246, it is said that it does not seem to matter whether the hypothetical preference of the testator for a stirpital rather than a per capita distribution among his descendants is gathered from clauses remote from the particular limitation under construction, or whether it is contained in the body of the limitation itself. "For this purpose the intent found in one particular limitation of a will may, by relation,

be transferred to another part of the same will. The testator's intent or preference, once established for one purpose, pervades the entire will."

c. Effect of equality among legatees in other provisions.

The fact that the testator has made particular provisions for various nephews and nieces which are alike, except in the case of two who were to have more than the rest, does not show an intention that they shall share a residuary gift per capita rather than per stirpes. *Siders v. Siders* (1897) 169 Mass. 523, 48 N. E. 277.

The fact that the testator has made the same provision for the children of a deceased son as he has for a living son is an indication that, in a subsequent gift to the son and the children of the deceased son, they take per stirpes. *Gilliam v. Underwood* (1856) 56 N. C. (3 Jones, Eq.) 100.

It has been held, on the one hand, that the fact that the testator has provided for the equalization of his children and their families is indicative of an intention that, in a gift to children and grandchildren, the grandchildren shall be treated as a unit rather than as individuals (see *Spivey v. Spivey* (1841) 37 N. C. (2 Ired. Eq.) 100; *Henderson v. Womack* (1849) 41 N. C. (6 Ired. Eq.) 437; on the other, that the fact that the testator directs different families of children to be charged with advancements made by him to their parents, or to them individually, is no indication of an intent that the distribution shall be per stirpes and not per capita. *West v. Rassman* (1893) 135 Ind. 278, 34 N. E. 991.

d. Effect of resulting inequality.

The fact that a per capita division will operate to the prejudice of one of the branches of testator's family has been taken as indicative of an intention to make a per stirpes division. See *Fields v. Fields* (1893) 93 Ky. 619, 20 S. W. 1042; *Bivens v. Phifer* (1855) 47 N. C. (2 Jones, L.) 436; *Howell v. Tyler* (1884) 91 N. C. 207.

And the fact that a manifest purpose of providing liberally for one of the persons entitled to take under the

bequest would be defeated by a per capita division gives rise to the implication that one per stirpes was intended. *Bivens v. Phifer* (1855) 47 N. C. (2 Jones, L.) 436.

e. Where gift is substitutional.

Where the testator provides that children shall have the portion which would have fallen to their respective parents, they take per stirpes. *Tucker v. Boston* (1836) 18 Pick. (Mass.) 162; *Farmers' Trust Co. v. Borden* (1914) 83 N. J. Eq. 222, 89 Atl. 985; *Richey v. Johnson* (1876) 30 Ohio St. 288; *Rhode Island Hospital Trust Co. v. Harris* (1898) 20 R. I. 408, 39 Atl. 750.

So, where there is a gift to the children of several by way of substitution, the children will generally take per stirpes.

New Jersey.—*Bartine v. Davis* (1900) 60 N. J. Eq. 202, 46 Atl. 577; *Van Houten v. Hall* (1907) 73 N. J. Eq. 384, 67 Atl. 1052.

Ohio.—*Richey v. Johnson* (1876) 30 Ohio St. 288.

Pennsylvania.—*Miller's Appeal* (1860) 35 Pa. 323.

Rhode Island.—*Guild v. Allen* (1907) 28 R. I. 430, 67 Atl. 855; *Branch v. De Wolf* (1915) 38 R. I. 395, 95 Atl. 857.

England.—*Armstrong v. Stockham* (1845) 7 Jur. 230; *Shailer v. Groves* (1847) 16 L. J. Ch. N. S. 367, 11 Jur. 485; *Congreve v. Palmer* (1853) 16 Beav. 435, 51 Eng. Reprint, 846, 23 L. J. Ch. N. S. 54, 1 Week. Rep. 156; *Timins v. Stackhouse* (1858) 27 Beav. 434, 54 Eng. Reprint, 170; *Gowling v. Thompson* (1868) 19 L. T. N. S. 242, 16 Week. Rep. 1131, L. R. 11 Eq. 366, note; *Re Sibley* (1877) L. R. 5 Ch. Div. 494, 46 L. J. Ch. N. S. 387, 37 L. T. N. S. 180; *Re Hickey* [1917] 1 Ch. 601, 86 L. J. Ch. N. S. 385, 116 L. T. N. S. 556, 61 Sol. Jo. 368.

Ireland.—*Crone v. O'Dell* (1811) 1 Ball & B. 449; *Battersby's Trusts* [1896] 1 Ir. R. 600.

Scotland.—*Campbell v. Campbell* [1915] 52 Scot. L. R. 78.

Canada.—*Re Gardiner* [1902] 3 Ont. L. Rep. 343; *Re Waugh* [1918] 42 Ont. L. Rep. 87.

See also:

Georgia.—*Burch v. Burch* (1857) 23 Ga. 536.

Indiana.—*Wood v. Robertson* (1888) 113 Ind. 323, 15 N. E. 457.

Kentucky.—*Harris v. Berry* (1870) 7 Bush, 113; *Crozier v. Cundall* (1896) 99 Ky. 212, 35 S. W. 546.

Maryland.—*Slingluff v. Johns* (1898) 87 Md. 273, 39 Atl. 872.

New Hampshire.—*McLane v. Crosby* (1914) 77 N. H. 596, 92 Atl. 333.

New York.—*Barstow v. Goodwin* (1853) 2 Bradf. 413; *Bayley v. Lawrence* (1909) 133 App. Div. 888, 118 N. Y. Supp. 286, affirmed without opinion in (1910) 197 N. Y. 593, 91 N. E. 1110; *Baumann v. Boehm* (1917) 167 N. Y. Supp. 932.

Texas.—*Ladd v. Whitley* (1918) — Tex. Civ. App. —, 205 S. W. 463.

But see *Re Union Trust Co.* (1915) 89 Misc. 69, 151 N. Y. Supp. 246, in which it is denied that it follows that, where persons take under the provisions of a will solely because of the alternative provision in favor of an ancestor, then they are to take per stirpes. The decision in this case was, however, reversed in (1915) 170 App. Div. 176, 156 N. Y. Supp. 32, which is affirmed without opinion in (1917) 220 N. Y. 657, 116 N. E. 1080.

The rule that presumes a per capita division will give way, where adherence to it would result in a stirpital division among the issue of children dying after the making of the will, and a per capita division among the issue of children dying before the making of the will. *Re Farmers' Loan & T. Co.* (1914) 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340.

f. Effect of direction that legatees shall take equally.

When the words "equally," or "share and share alike," or "to be equally divided" are used to indicate an equal division among a class, they import a division per capita.

Alabama.—*Ballentine v. Foster* (1900) 128 Ala. 638, 30 So. 481; *Guesnard v. Guesnard* (1911) 173 Ala. 250, 55 So. 524.

Connecticut.—*Lord v. Moore* (1849) 20 Conn. 122; *Hoadley v. Beardsley* (1915) 89 Conn. 270, 93 Atl. 535.

Delaware.—Doe ex dem. Kean v. Roe (1836) 2 Harr. 103, 29 Am. Dec. 336; Re Nelson (1909) 9 Del. Ch. 1, 74 Atl. 851.

District of Columbia.—Follansbee v. Follansbee (1895) 7 App. D. C. 282.

Georgia.—Payne v. Rosser (1875) 53 Ga. 662; Almand v. Whitaker (1901) 113 Ga. 889, 39 S. E. 395.

Illinois.—Richards v. Miller (1872) 62 Ill. 417; Kelley v. Vigas (1884) 112 Ill. 242, 54 Am. Rep. 235; DOLLANDER v. DHAEMERS (reported herewith) ante, 8; Best v. Farris (1886) 21 Ill. App. 49; Copeland v. Copeland (1895) 64 Ill. App. 100; Baker v. Baker (1910) 152 Ill. App. 620.

Iowa.—Kling v. Schnellbecker (1899) 107 Iowa, 636, 78 N. W. 673; Johnson v. Bodine (1899) 108 Iowa, 594, 79 N. W. 398; Kalbach v. Clark (1907) 133 Iowa, 215, 12 L.R.A. (N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 647; Parker v. Foxworthy (1914) 167 Iowa, 649, 149 N. W. 879.

Kansas.—Neil v. Stuart (1918) 102 Kan. 242, 169 Pac. 1138.

Kentucky.—McFatrige v. Holtzclaw (1893) 94 Ky. 352, 22 S. W. 439; Hughes v. Hughes (1904) 118 Ky. 751, 82 S. W. 408; Kaufman v. Anderson (1907) 31 Ky. L. Rep. 888, 104 S. W. 340; Armstrong v. Crutchfield (1912) 150 Ky. 641, 150 S. W. 835; White v. White (1916) 168 Ky. 752, 182 S. W. 942; Prather v. Watson (1920) 187 Ky. 709, 220 S. W. 532; Fischer v. Lange (1921) 190 Ky. 699, 228 S. W. 684; Murray v. Huffaker (1886) 7 Ky. L. Rep. 766.

Maine.—Doherty v. Grady (1908) 105 Me. 36, 72 Atl. 869.

Maryland.—Brown v. Ramsey (1848) 7 Gilf. 347; Brittain v. Carson (1876) 46 Md. 186.

Massachusetts.—Morrill v. Phillips (1886) 142 Mass. 240, 7 N. E. 771.

Michigan.—Van Gallow v. Brandt (1912) 168 Mich. 642, 134 N. W. 1018.

Missouri.—Maguire v. Moore (1891) 108 Mo. 267, 18 S. W. 897; WOOLEY v. HAYS (reported herewith) ante, 1; Re Mays (1917) 197 Mo. App. 555, 196 S. W. 1039.

New Jersey.—Scudder v. Vanarsdale (1860) 13 N. J. Eq. 109; Welsh v.

Crater (1880) 32 N. J. Eq. 177; Security Trust Co. v. Lovett (1911) 78 N. J. Eq. 445, 79 Atl. 616.

New York.—Graves v. Graves (1889) 55 Hun, 58, 8 N. Y. Supp. 284, affirmed on opinion below in (1891) 126 N. Y. 636, 27 N. E. 411; Bisson v. West Shore R. Co. (1894) 143 N. Y. 125, 38 N. E. 104; Bodine v. Brown (1896) 12 App. Div. 335, 42 N. Y. Supp. 202, affirmed on opinion below in (1898) 154 N. Y. 778, 49 N. E. 1093; Re Farmers' Loan & T. Co. (1914) 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340; Murphy v. Harvey (1843) 4 Edw. Ch. 131; Myres v. Myres (1862) 23 How. Pr. 410; Lee v. Lee (1863) 16 Abb. Pr. 127; Everitt v. Carman (1880) 4 Redf. 341; Re Walker (1903) 39 Misc. 680, 80 N. Y. Supp. 653; Re Griswold (1903) 42 Misc. 230, 86 N. Y. Supp. 250.

North Carolina.—Hobbs v. Craige (1840) 23 N. C. (1 Ired. L.) 332; Freeman v. Knight (1841) 37 N. C. (2 Ired. Eq.) 72; Hill v. Spruill (1846) 39 N. C. (4 Ired. Eq.) 244; Henderson v. Womack (1849) 41 N. C. (6 Ired. Eq.) 437; Hackney v. Griffin (1863) 59 N. C. (6 Jones, Eq.) 381; Tuttle v. Pruitt (1873) 68 N. C. 543; Culp v. Lee (1891) 109 N. C. 675, 14 S. E. 74; Johnston v. Knight (1895) 117 N. C. 122, 23 S. E. 192. But compare Burgin v. Patton (1860) 58 N. C. (5 Jones, Eq.) 425, in which the word "equally" seems to have been disregarded.

Ohio.—Huston v. Crook (1882) 38 Ohio St. 328; McKelvey v. McKelvey (1885) 43 Ohio St. 213, 1 N. E. 594; Mooney v. Purpus (1904) 70 Ohio St. 57, 70 N. E. 894; Holmes v. Fackelman (1913) 20 Ohio C. C. N. S. 109; Stearns v. Brandeberry (1920) 9 Ohio App. 300.

Oregon.—Ramsey v. Stephenson (1899) 34 Or. 408, 56 Pac. 520, 57 Pac. 195.

Pennsylvania.—McNeillidge v. Galbraith (1822) 8 Serg. & R. 43, 11 Am. Dec. 572; Bender's Appeal (1856) 3 Grant, Cas. 210; Priester's Estate (1903) 23 Pa. Super. Ct. 386; Brundage's Estate (1908) 36 Pa. Super. Ct. 211; Wetherill's Estate (1909) 21 Pa. Dist. R. 305; Roney's Estate (1910)

19 Pa. Dist. R. 565; *Hertz's Estate* (1912) 22 Pa. Dist. R. 250.

Rhode Island.—*Perry v. Brown* (1912) 34 R. I. 203, 83 Atl. 8.

South Carolina.—*Allen v. Allen* (1879) 13 S. C. 512, 36 Am. Rep. 716; *Kerngood v. Davis* (1883) 21 S. C. 183; *Dukes v. Faulk* (1892) 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122; *Parrott v. Barrett* (1904) 70 S. C. 195, 49 S. E. 563; *Brantley v. Bittle* (1905) 72 S. C. 179, 51 S. E. 561; *Hagan v. Hanks* (1907) 80 S. C. 94, 61 S. E. 245.

Tennessee.—*Seay v. Winston* (1846) 7 Humph. 472; *Purveyar v. Edmondson* (1871) 4 Heisk. 43; *Alexander v. Wallace* (1881) 8 Lea, 569; *Parrish v. Grooms* (1874) 1 Tenn. Ch. 581.

Virginia.—*Walker v. Webster* (1897) 95 Va. 377, 28 S. E. 570; *Perdue v. Starkey* (1915) 117 Va. 806, 86 S. E. 158, Ann. Cas. 1916C, 409.

England.—*Thomas v. Hole* (1728) Cas. t. Talb. 251, 25 Eng. Reprint, 762; *Phillips v. Garth* (1790) 3 Bro. Ch. 64, 29 Eng. Reprint, 410; *Butler v. Stratton* (1791) 3 Bro. Ch. 367, 29 Eng. Reprint, 587; *Stevenson v. Gullan* (1854) 18 Beav. 590, 52 Eng. Reprint, 232; *Atkinson v. Bartrum* (1860) 28 Beav. 219, 54 Eng. Reprint, 349, 9 Week. Rep. 885; *Davies v. Edwards* [1910] 2 Ch. 74, 79 L. J. Ch. N. S. 500, 103 L. T. N. S. 130.

Canada.—*Chadbourne v. Chadbourne* (1882) 9 Ont. Pr. Rep. 317; *Re Labatt* (1916) 11 Ont. Week. N. 250.

A reason for this is that, where all the objects of the testator's bounty are comprehended in a single class, a direction for equal division cannot be given effect except by giving to each member of the class the same amount as to each of the others. *Re Griswold* (1903) 42 Misc. 230, 86 N. Y. Supp. 250.

Another reason is that, where the testator has introduced into the gift expressions requiring an equality of distribution, the statutory mode is in general excluded, and the class of heirs or devisees designated takes per capita. *Alexander v. Wallace* (1881) 8 Lea (Tenn.) 569.

The words "equally to be divided," when used in a will, mean a division

per capita and not per stirpes, whether the devisees be children and grandchildren, brothers or sisters, nephews or nieces, or strangers in blood to the testator. *Purnell v. Culbertson* (1876) 12 Bush (Ky.) 369.

Although it has been said that the use of the word "equally" plainly excludes any inference of an intention that the division should be per stirpes (*Whitehurst v. Pritchard* (1810) 5 N. C. (1 Murph.) 383; *Ex parte Brogden* (1920) 180 N. C. 157, 104 S. E. 177); and that the words "share and share alike" cannot be satisfied except by equality per capita (*Lane v. Lane* (1864) 60 N. C. (Winst. Eq.) 84), there is abundant authority to the effect that such expressions do not necessarily require a per capita equality of division, but they apply just as readily and appropriately to a per stirpes equality (*Raymond v. Hillhouse* (1878) 45 Conn. 467, 29 Am. Rep. 688; *Baker v. Baker* (1910) 152 Ill. App. 620; *Henry v. Thomas* (1888) 118 Ind. 23, 20 N. E. 519; *West v. Rassman* (1893) 135 Ind. 278, 34 N. E. 991 (obiter); *Laisure v. Richards* (1913) 56 Ind. App. 301, 108 N. E. 679; *Balcom v. Haynes* (1867) 14 Allen (Mass.) 204; *Hall v. Hall* (1885) 140 Mass. 267, 2 N. E. 700; *Cummings v. Cummings* (1883) 146 Mass. 501, 16 N. E. 401; *Coates v. Burton* (1906) 191 Mass. 180, 77 N. E. 311; *Allen v. Boardman* (1906) 193 Mass. 284, 118 Am. St. Rep. 497, 79 N. E. 260; *Thompson v. Thornton* (1908) 197 Mass. 273, 83 N. E. 680; *McClench v. Waldron* (1910) 204 Mass. 554, 91 N. E. 126; *Rood's Estate* (1898) 21 Pa. Co. Ct. 291; *Sipe's Estate* (1906) 30 Pa. Super. Ct. 145; *Alston's Appeal* (1887) 8 Sadler (Pa.) 451, 11 Atl. 366; *Collier v. Collier* (1850) 24 S. C. Eq. (3 Rich.) 555).

In *Kenworthy's Estate* (1898) 19 Pa. Dist. R. 986, it is said that the words "share and share alike" are not conclusive either one way or the other, but the expression is appropriate, not only to a division among individuals, but also to a division between classes, or to a division between an individual and a class.

In *Tucker v. Nugent* (1917) 117

Me. 10, 102 Atl. 307, it is said that the words "share and share alike" do not necessarily require an equal division among all the persons entitled, but especially where the will makes a division of property equally between two designated classes, since the words may be satisfied by being applied to the division between the classes, and not to that between the individuals.

In *Swinburne's Petition* (1888) 16 R. L. 208, 14 Atl. 850, it is said that the words "share and share alike" are usually intended not so much to direct equality between the legatees as to denote an intent to have the legatees take as tenants in common, instead of as joint tenants.

In *Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361, it is said that the phrase "equally between them" is no less appropriate to a division among classes than to a division among individuals.

And in *Osburn's Appeal* (1883) 104 Pa. 637, it was held that the expression "each to share and share alike" might be satisfied by a division between two classes.

The word "equally" may be satisfied by an equality between a class and legatees named. See *Risk's Appeal* (1886) 52 Pa. 269, 91 Am. Dec. 156.

And in *Lyon v. Acker* (1866) 33 Conn. 222, it is said that the words "share and share alike" may be given effect by giving the members of a class an equal share with the individuals named as cobeneficiaries.

The phrase "in equal proportions" may merely denote equality between classes. *Branch v. De Wolf* (1915) 38 R. L. 395, 95 Atl. 857.

In *Metropolitan Trust Co. v. Harris* (1919) 108 Misc. 34, 177 N. Y. Supp. 257, it is said that the phrase "in equal shares and proportions" is well chosen to express the idea of a share varying in size according to the representative position of the taker in a stirpital distribution.

The use of the term "pro rata" does not require a per capita division, being equally apt to denote a per stirpes division. *Conklin v. Davis* (1893) 63 Conn. 377, 28 Atl. 537.

The words "as tenants in common" are not exclusively applicable to equal interests, as are the words "equally" and "share and share alike." *Mattison v. Tanfield* (1840) 3 Beav. 131, 49 Eng. Reprint, 51, 4 Jur. 938.

The implication arising from the use of the words "equally," "share and share alike," etc., importing a per capita division, may be controlled by the context. *Kelley v. Vigas* (1884) 112 Ill. 242, 54 Am. Rep. 235; *Best v. Farris* (1886) 21 Ill. App. 49; *Fischer v. Lange* (1921) 190 Ky. 699, 228 S. W. 684; *Re Farmers' Loan & T. Co.* (1914) 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340; *Re Walker* (1903) 39 Misc. 680, 80 N. Y. Supp. 653; *Everitt v. Carman* (1880) 4 Redf. (N. Y.) 341; *Martin v. Gould* (1882) 17 N. C. (2 Dev. Eq.) 305; *Johnston v. Knight* (1895) 117 N. C. 122, 23 S. E. 92; *Priester's Estate* (1903) 23 Pa. Super. Ct. 386.

Thus, in *Alexander v. Wallace* (1881) 8 Lea (Tenn.) 569, it is said that, if it can be fairly gathered from the will that the testator intended that the property should go according to the Statutes of Distribution, even the express use of the words "equally divided," or "share and share alike," will not change the result.

For instances in which the words "equally," or "share and share alike," were controlled by the context, see:

Connecticut.—*Raymond v. Hillhouse* (1878) 45 Conn. 467, 29 Am. Rep. 688.

Georgia.—*Randolph v. Bond* (1852) 12 Ga. 362; *MacLean v. Williams* (1902) 116 Ga. 259, 59 L.R.A. 125, 42 S. E. 486.

Illinois.—*Kelley v. Vigas* (1884) 112 Ill. 242, 54 Am. Rep. 235; *Kirkpatrick v. Kirkpatrick* (1902) 197 Ill. 144, 64 N. E. 267; *Baker v. Baker* (1910) 152 Ill. App. 620; *DOLLANDER v. DHAEMERS* (reported herewith) ante, 8.

Kentucky.—*Fields v. Fields* (1893) 93 Ky. 619, 20 S. W. 1042; *Prather v. Watson* (1920) 187 Ky. 709, 220 S. W. 532; *Murray v. Huffaker*, (1886) 7 Ky. L. Rep. 766, 13 Ky. Ops. 1034.

Maryland.—*Slingluff v. Johns* (1898) 87 Md. 273, 39 Atl. 872.

New York.—*Re Farmers' Loan & T.*

Co. (1914) 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340; *Re Wilson* (1907) 53 Misc. 238, 104 N. Y. Supp. 480; *Whitehead v. Ginsburg* (1921) 197 App. Div. 266, 188 N. Y. Supp. 739.

North Carolina.—*Spivey v. Spivey* (1841) 37 N. C. (2 Ired. Eq.) 100; *Henderson v. Womack* (1849) 41 N. C. (6 Ired. Eq.) 437; *Rogers v. Brickhouse* (1860) 58 N. C. (5 Jones, Eq.) 301; *Burgin v. Patton* (1860) 58 N. C. (5 Jones, Eq.) 425.

Ohio.—*Godfrey v. Epple* (1919) 100 Ohio St. 447, 11 A.L.R. 317, 126 N. E. 886.

Pennsylvania.—*Minter's Appeal* (1861) 40 Pa. 111; *Hiestand v. Meyer* (1892) 150 Pa. 501, 24 Atl. 749; *Hoch's Estate* (1893) 154 Pa. 417, 26 Atl. 610; *Wootten's Estate* (1916) 253 Pa. 136, 97 Atl. 1066; *Alston's Appeal* (1887) 8 Sadler, 451, 11 Atl. 366; *Rood's Estate* (1898) 21 Pa. Co. Ct. 291; *Fleck's Estate* (1905) 28 Pa. Super. Ct. 466; *Kenworthy's Estate* (1898) 19 Pa. Dist. R. 986; *Kline's Estate* (1909) 38 Pa. Super Ct. 582.

South Carolina.—*Britton v. Johnson* (1836) 11 S. C. Eq. (2 Hill) 430; *Crim v. Knotts* (1852) 25 S. C. Eq. (4 Rich.) 340.

Tennessee.—*Stewart v. Drake* (1910) 1 Tenn. Civ. App. 332.

g. Use of word "between."

The use of the word "between," instead of "among," in a direction to divide the subject of a bequest, is some evidence of an intention to divide between two groups, or between an individual named and a group, rather than to divide it among the individuals per capita. See the following cases:

Connecticut.—*Lockwood's Appeal* (1887) 55 Conn. 157, 10 Atl. 517.

Iowa.—*Knutson v. Vidders* (1905) 126 Iowa, 511, 102 N. W. 433.

Maine.—*Tucker v. Nugent* (1917) 117 Me. 10, 102 Atl. 307.

Missouri.—*Records v. Fields* (1899) 155 Mo. 314, 55 S. W. 1021.

New Hampshire.—*Silsby v. Sawyer* (1888) 64 N. H. 580, 15 Atl. 601.

New Jersey.—*Stoutenburgh v. Moore* (1883) 37 N. J. Eq. 63, affirmed without opinion in (1884) 38 N. J. Eq.

281; *Van Houten v. Hall* (1907) 73 N. J. Eq. 384, 67 Atl. 1052.

Ohio.—*Godfrey v. Epple* (1919) 100 Ohio St. 447, 11 A.L.R. 317, 126 N. E. 886.

Oregon.—*Roelfs v. White* (1915) 75 Or. 549, 147 Pac. 753.

Pennsylvania.—*Young's Appeal* (1876) 83 Pa. 59; *Osburn's Appeal* (1883) 104 Pa. 637; *Green's Estate* (1891) 140 Pa. 253, 21 Atl. 317; *Ihrie's Estate* (1894) 162 Pa. 369, 29 Atl. 750; *Ghriskey's Estate* (1915) 248 Pa. 90, 93 Atl. 824; *Kenworthy's Estate* (1889) 19 Pa. Dist. R. 986.

Rhode Island.—*Branch v. DeWolf* (1915) 38 R. I. 395, 95 Atl. 857.

South Carolina.—*Archer v. Munday* (1881) 17 S. C. 84.

England.—*Re Walbran* [1906] 1 Ch. 64, 93 L. T. N. S. 745, 75 L. J. Ch. N. S. 105, 54 Week. Rep. 167.

Canada.—*Hutchinson v. La Fortune* (1897) 28 Ont. Rep. 329; *Re Puley* (1915) 8 Ont. Week. N. 306.

Thus, in *Lockwood's Appeal* (Conn.) supra, it is said: "The word 'between,' rhetorically considered, is more applicable to two classes than to a greater number of individuals. While this is not necessarily controlling, yet it is not without weight in a case where other considerations are equally poised; and will have the greater weight if the circumstances, aside from that, are such as to induce the belief that the word is used in its accurate sense."

And in *Van Houten v. Hall* (N. J.) supra, it is said that, although "between" may sometimes mean "among," yet, where other circumstances favor a division in two parts only, there is every reason for adhering to the primary meaning.

In *Kenworthy's Estate* (1898) 19 Pa. Dist. R. 986, it is said that while the word "between" may be interpreted as "among," and vice versa, as occasion demands or the will requires, yet such meaning is not to be given unnecessarily.

Before the word "between" can be construed as meaning "among," something must appear in the will indicating an intention which would be otherwise defeated. *Ghriskey's Estate* (1915) 248 Pa. 90, 93 Atl. 824.

The word "between" is, however, frequently used in the sense of "among." *Laisure v. Richards* (1918) 56 Ind. App. 301, 103 N. E. 679; *Rogers v. Morrell* (1908) 82 S. C. 402, 129 Am. St. Rep. 899, 64 S. E. 143; *Wetherill's Estate* (1909) 21 Pa. Dist. R. 305.

For instances in which it has been so used, see the following cases:

United States.—*McIntire v. McIntire* (1904) 192 U. S. 116, 48 L. ed. 369, 24 Sup. Ct. Rep. 196.

Alabama.—*Duffee v. Buchanan* (1845) 8 Ala. 27; *Guesnard v. Guesnard* (1911) 173 Ala. 250, 55 So. 524; *Taylor v. Cribbs* (1911) 174 Ala. 217, 56 So. 952.

California.—*Re Fisk* (1920) 182 Cal. 238, 187 Pac. 958.

Delaware.—*Doe ex dem. Kean v. Roe* (1836) 2 Harr. 103, 29 Am. Dec. 336.

Georgia.—*Rogers v. Smith* (1916) 145 Ga. 234, 88 S. E. 963.

Iowa.—*Kling v. Schnellbecker* (1899) 107 Iowa, 636, 78 N. W. 673.

Maryland.—*Brittain v. Carson* (1876) 46 Md. 186; *Courtenay v. Courtenay* (1921) — Md. —, 113 Atl. 717.

Mississippi.—*Edwards v. Kelly* (1903) 83 Miss. 144, 35 So. 418.

Missouri.—*Re Mays* (1917) 197 Mo. App. 555, 196 S. W. 1039.

New Hampshire.—*Farmer v. Kimball* (1866) 46 N. H. 435, 88 Am. Dec. 219.

New York.—*Myres v. Myres* (1862) 23 How. Pr. 410; *Re Klesman* (1908) 61 Misc. 560, 115 N. Y. Supp. 982.

Pennsylvania.—*Ghriskey's Estate* (1915) 248 Pa. 90, 93 Atl. 824; *Wetherill's Estate* (1909) 21 Pa. Dist. R. 305; *Herneisen v. Blake* (1850) 1 Phila. 131.

Virginia.—*Crow v. Crow* (1829) 1 Leigh, 74; *Senger v. Senger* (1886) 81 Va. 697.

England.—*Malcolm v. Martin* (1790) 3 Bro. Ch. 50, 29 Eng. Reprint, 402; *Re Harper* [1914] 1 Ch. 70, 83 L. J. Ch. N. S. 157, 109 L. T. N. S. 925, 58 Sol. Jo. 120.

Scotland.—*Cobban v. Cobban* [1915] S. C. 82, 52 Scot. L. R. 89.

Ireland.—*Heron v. Stokes* (1842) 2

Drury & War. 89, 1 Connor & L. 270, 4 Ir. Eq. R. 284.

In *Guesnard v. Guesnard* (1911) 173 Ala. 250, 55 So. 524, it is said that "there is no significance in the use of the word 'between' as indicating a reference to only two. Whatever may be the strict philological propriety of the use of the word, it is frequently used as applicable to more than two. The original Articles of Confederation were declared to be a league 'between' the states, and the last section of the Constitution of the United States declares that the ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution 'between' the states so ratifying the same."

And in *Graves v. Graves* (1889) 55 Hun, 58, 8 N. Y. Supp. 284, affirmed on opinion below in (1891) 126 N. Y. 636, 27 N. E. 411, it is said: "It is true that in very strict use of language the preposition 'between' is more properly employed where the reference is to two persons or things only, and 'among' where the reference is to more than two; but the distinction is too nice to furnish a rule of construction, and it is known to all that 'between' is very commonly used as synonymous with 'among,' in such connection."

So, also, in *Re Ianson* (1907) 14 Ont. L. Rep. 82, it is said that, though the word "between" is etymologically more appropriately used where a division into moieties is contemplated, the word is so commonly employed as the equivalent of "among" that little weight should be attached to its use, and particularly as indicative of a testator's intent as to mode of division.

In *Herneisen v. Blake* (1850) 1 Phila. (Pa.) 131, it is said that the strict meaning of the preposition "between" would be entirely too narrow a ground upon which to proceed in the construction of a will; since in popular and common use it is applied indiscriminately in cases of an ownership or partition among two or more.

And in *Kling v. Schnellbecker* (1899) 107 Iowa, 636, 78 N. W. 673, and *Senger v. Senger* (1886) 81 Va.

687, it is said that, where the words "between" or "among" follow the verb "divide," their general signification is very similar, and in practical use they are considered synonymous; though "among" denotes a collection and is never followed by two of any sort, while "between" may be followed by any plural number and seems to denote rather the individuals of the class than the class itself generally.

The word "between" cannot be taken as having been used in its usual and proper grammatical sense where, in any event, division must be made between more than two. *Almand v. Whitaker* (1901) 113 Ga. 889, 39 S. E. 395.

And in *Myres v. Myres* (1862) 23 How. Pr. (N. Y.) 410, it is said that "between" is often used as synonymous with "among," especially when employed to convey the idea of division or separate ownership of property held in common. "It is quite as appropriate to say that property is to be divided 'between' A, B, and C, as 'among' A, B, and C. So Webster says, 'We observe that "between" is not restricted to two,' and he illustrates thus: 'Twenty proprietors own a tract of land between them.'"

h. Use of word "among."

The use of the word "among" clearly indicates an intention that the beneficiaries shall take in equal shares. *Holder's Petition* (1898) 21 R. I. 48, 41 Atl. 576.

i. Use of word "and" in enumerating beneficiaries.

The use of the word "and," in enumerating the beneficiaries, has a tendency to show that the testator had them in mind as different groups, rather than as a single group. See *Lockwood's Appeal* (1887) 55 Conn. 157, 10 Atl. 517; *Geery v. Skelding* (1893) 62 Conn. 499, 27 Atl. 77; *Re Stocum* (1905) 94 N. Y. Supp. 588; *Re Myhill* (1912) 149 App. Div. 404, 134 N. Y. Supp. 467; *Fissel's Appeal* (1856) 27 Pa. 55; *Minter's Appeal* (1861) 40 Pa. 111; *Hiestand v. Meyer* (1892) 150 Pa. 501, 24 Atl. 749; *Hutchinson v. La Fortune* (1897) 28 Ont. Rep. 329.

j. Effect of use of the word "each."

The word "each" may have the effect to individualize the members of a class, who will accordingly take per capita. See *Re Turner* (1913) 208 N. Y. 261, 101 N. E. 905, Ann. Cas. 1914D, 245; *Penney's Estate* (1893) 159 Pa. 346, 28 Atl. 255. But compare *Rixey v. Stuckey* (1895) 129 Mo. 377, 31 S. W. 770.

Thus, the phrase, "each to take share and share alike," necessarily indicates a per capita distribution. *Scott's Estate* (1894) 163 Pa. 165, 29 Atl. 877; *Everitt v. Carman* (1880) 4 Redf. (N. Y.) 341.

Instances in which the use of the word "each" did not affect the character of the gift as one to a class, not falling within the scope of this note, may be found in a note on the question, "When may a testamentary gift be considered as one to a class," in 7 B. R. C. 800, footnote 71.

jj. Effect of repetition of preposition "to."

The repetition of the preposition "to" has been regarded as indicative of an intention that the legatees should take by classes (see *Fleck's Estate* (1905) 28 Pa. Super Ct. 466), but is by no means conclusive (see *Brown v. Ramsey* (1848) 7 Gill (Md.) 347; *Farmer v. Kimball* (1866) 46 N. H. 435, 88 Am. Dec. 219; *Campbell v. Clark* (1887) 64 N. H. 328, 10 Atl. 702; *McMaster v. McMaster* (1853) 10 Gratt. (Va.) 275; *Blackler v. Webb* (1726) 2 P. Wms. 383, 24 Eng. Reprint, 777; *Dowding v. Smith* (1841) 3 Besav. 541, 49 Eng. Reprint, 213 10 L. J. Ch. N. S. 235; *Boughen v. Farrer* (1855) 3 Week. Rep. (Eng.) 495; *Payne v. Webb* (1874) 31 L. T. N. S. (Eng.) 637, 22 Week. Rep. 43; *Bradley v. Wilson* (1867) 13 Grant, Ch. (U. C.) 642.

k. Effect of use of the word "respective."

The use of the word "respective" is indicative of a stirpital distribution (*Sutcliffe v. Howard* (1868) 38 L. J. Ch. N. S. (Eng.) 472, 17 Week. Rep. 819), but is not necessarily conclusive (see *Boughen v. Farrer* (1855) 3 Week. Rep. (Eng.) 495). Thus, the use of the word "respective," in a gift to

persons or their "respective" issue or children, points to a stirpital distribution. *Re Coulden* [1908] 1 Ch. (Eng.) 320, 77 L. J. Ch. N. S. 209, 98 L. T. N. S. 389, 52 Sol. Jo. 172. And a distribution per stirpes is imported by a direction that the share is to be divided into equal shares, if more than one "of such respective issue." *Davis v. Bennett* (1862) 4 De G. F. & J. 327, 45 Eng. Reprint, 1209, 31 L. J. Ch. N. S. 337, 8 Jur. N. S. 269, 5 L. T. N. S. 815, 10 Week. Rep. 275.

l. Effect of reference to Statute of Distribution.

A reference to the Statute of Descent and Distribution such as a direction that the subject of the bequest shall be divided "according to the laws of the state," is sometimes treated as pointing out not only the persons who are to take, but also the proportions in which they are to take.

Connecticut.—*Jackson v. Alsop* (1896) 67 Conn. 249, 34 Atl. 1106.

Illinois.—*Welch v. Wheelock* (1909) 242 Ill. 380, 90 N. E. 295.

Maine.—*Hopkins v. Keazer* (1896) 89 Me. 347, 36 Atl. 615; *Fairbanks's Appeal* (1908) 104 Me. 333, 71 Atl. 933.

Massachusetts.—*Re Paine* (1900) 176 Mass. 242, 57 N. E. 346.

New York.—*United States Trust Co. v. Nathan* (1920) 112 Misc. 502, 183 N. Y. Supp. 660, affirmed in (1921) 196 App. Div. 126, 187 N. Y. Supp. 649.

Tennessee.—*Alexander v. Wallace* (1881) 76 Tenn. 569.

England.—*Mattison v. Tanfield* (1840) 3 Beav. 181, 49 Eng. Reprint, 51, 4 Jur. 933; *Lewis v. Morris* (1854) 19 Beav. 34, 52 Eng. Reprint, 261.

See also *Woodward v. James* (1889) 115 N. Y. 346, 22 N. E. 150; *Re Barker* (1921) 230 N. Y. 364, 130 N. E. 579.

So, if a testator describes the object of gift by express reference to the Statute of Distribution, as next of kin under or in accordance with the statute, and does not expressly state how they are to take, they take according to the mode and in the shares directed by the statute, to wit, per stirpes and as tenants in common. *Davies v. Edwards* [1910] 2 Ch. (Eng.)

74, 79 L. J. Ch. N. S. 500, 103 L. T. N. S. 130—citing *Jarman, Wills*, 5th ed. p. 954.

Under a bequest "in such proportions as each may be entitled to under the statute," the statutory mode of distribution is to be followed. *Smith v. Pepper* (1859) 27 Beav. 86, 54 Eng. Reprint, 34.

So, where the bequest is "in such and the like manner as if the same had been to be paid under the Statute of Distribution." *Holloway v. Radcliffe* (1857) 23 Beav. 163, 53 Eng. Reprint, 64, 26 L. J. Ch. N. S. 401, 3 Jur. N. S. 198, 5 Week. Rep. 271.

Or where it is to be distributed "as the law directs." *Fielden v. Ashworth*, L. R. 20 Eq. (Eng.) 410, 33 L. T. N. S. 197.

Or "to my relations, by right of representation under the statutes of this commonwealth." *Thompson v. Thornton* (1908) 197 Mass. 273, 83 N. E. 880.

Or where testator has directed that his estate be divided among his heirs at law in accordance with the laws of the state applicable to persons who die intestate. *Lawton v. Corlies* (1891) 127 N. Y. 100, 27 N. E. 847.

The rule, however, is otherwise where the statute is referred to only for the purpose of defining the class, as where the will directs that they are to take equally. See *Davies v. Edwards* [1910] 2 Ch. (Eng.) 74, 79 L. J. Ch. N. S. 500, 103 L. T. N. S. 130; *Re Labatt* (1916) 11 Ont. Week. N. 250.

m. Effect of use of the word "devolve."

The word "devolve" may import a taking by succession, and hence per stirpes. See *Stonor v. Curwen* (1832) 5 Sim. 264, 58 Eng. Reprint, 336.

n. Effect of direction that children shall take parent's share.

A direction that children shall take their parent's share imports a division per stirpes. See *Hopkins v. Keazer* (1896) 89 Me. 347, 36 Atl. 615; *Re United States Trust Co.* (1901) 36 Misc. 378, 73 N. Y. Supp. 635; *Shinn v. Motley* (1857) 56 N. C. (3 Jones, Eq.) 490; *Pollard v. Pollard* (1880) 83 N. C. 96; *Stout's Estate* (1900) 16 Montg. Co. L. Rep. (Pa.) 193;

Powell v. Powell (1873) 28 L. T. N. S. (Eng.) 730, 21 Week. Rep. 725.

So, where the testator directs that "each grandchild draws in equal proportion of what their ancestors would have drawn had they have lived."

Hamilton v. Lewis (1850) 13 Mo. 184.

And a direction that "each set of grandchildren is to have their father's pro rata part" is a bequest to them per stirpes. Thomas v. Thomas (1910) 97 Miss. 697, 53 So. 630.

In this connection, it may be noted that in *Cushney v. Henry* (1834) 4 Paige (N. Y.) 345, it was held that a provision that if any of the original remaindermen should die during the continuance of the precedent estate, and leave issue, and such issue should be living at the time of the termination of such estate, "then such issue shall stand in the place of, and take such part of any estate as his, her, or their parent would have been entitled to, if living," applies as well where all of the original takers die during the continuance of the precedent estate as where only a part of them do so.

o. Inferences to be drawn from gifts over.

A gift of one share in certain events, to the other legatees per stirpes, will import a division per stirpes. *Nettleton v. Stephenson* (1849) 18 L. J. Ch. (Eng.) 191, 13 Jur. 618.

And a gift of the share of a child dying, not to the other members of the class, but to the brothers and sisters of the child, is indicative of a per stirpes distribution. *Archer v. Legg* (1862) 31 Beav. 187, 54 Eng. Reprint, 1109, 10 Week. Rep. 703; *Fleck's Estate* (1905) 28 Pa. Super. Ct. 466.

Where the testator directs that an equal division be made, and directs also that the share of a beneficiary dying before the time of distribution shall go, not to all the members of the class, but to part of the class only, it is evidence of his intention that the division should be per stirpes, because the shares of part of the class would be augmented by the death of a beneficiary, and an equal division of the fund among the beneficiaries would therefore be impracticable; and hence

it must be presumed that when the testator directed an equal division he meant an equal division per stirpes. *Benedict v. Ball* (1884) 38 N. J. Eq. 48 (obiter).

p. Effect of provision that legatees shall take by representation.

A provision that persons named as legatees shall take by "right of representation" imports an intention to distribute the subject of the gift per stirpes. *Siders v. Siders* (1897) 169 Mass. 523, 48 N. E. 277.

And the designation of legatees as "representatives" of their deceased parents is indicative of an intention that they should take by families. *Harper v. Sudderth* (1867) 62 N. C. (Phill. Eq.) 279.

q. Bequest to individual and unascertained class.

In *Cole v. Creyon* (1833) 10 S. C. Eq. (1 Hill) 311, and *Conner v. Johnson* (1834) 11 S. C. Eq. (2 Hill) 41, it is said that if there is a bequest to an ascertained individual and to a class of unascertained individuals, to be ascertained at any future time after the death of the testator, it vests one half in the said individual, and the other half in the individuals of the class collectively, when they are ascertained.

r. Direction that parents and children are to share in equal proportions.

A direction that parents and children are to be classed together, and share in equal proportions, will not import a distribution per stirpes. *Turner v. Hudson* (1847) 10 Beav. 222, 50 Eng. Reprint, 568, 16 L. J. Ch. N. S. 180.

s. Effect of provision for stirpital division elsewhere in will.

The fact that the testator, in express terms, provides for a distribution per stirpes in other items of the will, does not necessarily give rise to an inference that, in an item in which he did not provide for such a distribution, he intended the distribution to be per capita. *MacLean v. Williams* (1902) 116 Ga. 259, 59 L.R.A. 125, 42 S. E. 486. But com-

pare *Whitehead v. Ginsburg* (1921) 197 App. Div. 266, 188 N. Y. Supp. 739, where a majority of the court regarded a direction for division per stirpes of the principal of a trust fund, as ground for a stirpital division of the income also.

t. Effect of circumstance that parents of legatees are named.

A bequest to the children of persons named is to them per capita, and not per stirpes, where the mention of the names of the parents is only by way of designation of the persons who are to take.

Alabama.—*Taylor v. Cribbs* (1911) 174 Ala. 217, 56 So. 952.

Georgia. — *Huggins v. Huggins* (1884) 72 Ga. 825; *Rogers v. Smith* (1916) 145 Ga. 234, 88 S. E. 963.

Kentucky. — *Wells v. Newton* (1868) 4 Bush, 158; *Brown v. Brown* (1869) 6 Bush, 648; *Armstrong v. Crutchfield* (1912) 150 Ky. 647, 150 S. W. 835.

Massachusetts.—*Weston v. Foster* (1843) 7 Met. 297; *Hardy v. Roach* (1906) 190 Mass. 223, 76 N. E. 720; *Leslie v. Wilder* (1917) 228 Mass. 343, 117 N. E. 342; *Russell v. Welch* (1921) — Mass. —, 129 N. E. 422.

New York.—*Stevenson v. Lesley* (1877) 70 N. Y. 512.

North Carolina.—*Marsh v. Dellinger* (1900) 127 N. C. 360, 37 S. E. 494; *Ex parte Brogden* (1920) 180 N. C. 157, 104 S. E. 177.

Pennsylvania. — *Scott's Estate* (1894) 163 Pa. 165, 29 Atl. 877; *Priester's Estate* (1903) 23 Pa. Super. Ct. 386; *Roney's Estate* (1910) 19 Pa. Dist. R. 565; *Herneisen v. Blake* (1850) 1 Phila. 131.

Tennessee. — *Malone v. Majors* (1847) 8 Humph. 577.

Canada.—*Anderson v. Bell* (1882) 8 Ont. App. Rep. 531.

u. Effect of circumstance that person named as ancestor is living.

When a testator designates the objects of his bounty by their relationship to their living ancestor, such legatees or devisees have been held to take equal shares per capita, on the ground that the fact that the ancestor is living shows that they are

not to take in his place, but that he is referred to only to designate the beneficiaries. *Broermann v. Kessling* (1914) 6 Ohio App. 7; *Risk's Appeal* (1866) 52 Pa. 269, 91 Am. Dec. 156; *Scott's Estate* (1894) 163 Pa. 165, 29 Atl. 877; *Re Mitchener* (1873) 30 Phila. Leg. Int. (Pa.) 336, 1 Leg. Chron. 301; *Peale's Estate* (1876) 11 Phila. (Pa.) 147; *Hertz's Estate* (1912) 22 Pa. Dist. R. 250; *Ingram v. Smith* (1858) 1 Head (Tenn.) 411; *Blackler v. Webb* (1726) 2 P. Wms. 383, 24 Eng. Reprint, 777; *Williams v. Yates* (1837) Cooper, Pr. Cas. 177, 47 Eng. Reprint, 454, 1 Jur. 510.

So, the fact that a parent was living at the date of a will is sufficient to exclude a reference to the Statute of Distribution. *Bryant v. Scott* (1835) 21 N. C. (1 Dev. & B. Eq.) 155, 28 Am. Dec. 590; *McIntire v. McIntire* (1904) 192 U. S. 116, 48 L. ed. 369, 24 Sup. Ct. Rep. 196.

But the rule that entitles children of a living parent to take per capita must be controlled by the general intention of the testator. *Risk's Appeal* (1866) 52 Pa. 269, 91 Am. Dec. 156.

The fact that the testator enumerates children of his own children, whom he recognizes as living, as among his "heirs" to whom a bequest is made, shows that he meant them to take in substitution for their parents. *Roper v. Roper* (1859) 58 N. C. (5 Jones, Eq.) 16, 75 Am. Dec. 427. *Contra: Follansbee v. Follansbee* (1895) 7 App. D. C. 282.

v. Division of income as indicative of intention as to capital.

The proportion in which the income is given, pending final distribution, may be indicative of the mode of such distribution. See *Brett v. Horton* (1841) 4 Beav. 239, 49 Eng. Reprint, 331, 10 L. J. Ch. N. S. 371, 5 Jur. 696.

Thus, the fact that the income, until the distribution of the capital, is applicable per stirpes, is ground for assuming that a like principle is to govern the gift of the capital. See *Kidwell v. Ketler* (1905) 146 Cal. 12, 79 Pac. 514; *Barker v. Barker* (1916)

172 App. Div. 244, 158 N. Y. Supp. 413, affirmed on reargument in (1916) 175 App. Div. 940, 161 N. Y. Supp. 1117; *Re Campbell* (1886) L. R. 33 Ch. Div. (Eng.) 98, 55 L. J. Ch. N. S. 911, 55 L. T. N. S. 463, 34 Week. Rep. 629, affirming (1886) L. R. 31 Ch. Div. 685, *Re Janson* (1907) 14 Ont. L. Rep. 82.

That it is not conclusive, see *Nockolds v. Locke* (1856) 3 Kay & J. 6, 69 Eng. Reprint, 999, 2 Jur. N. S. 1064, 5 Week. Rep. 3; *Re Stone* [1895] 2 Ch. (Eng.) 196, 64 L. J. Ch. N. S. 637, 12 Reports, 415, 72 L. T. N. S. 815, 44 Week. Rep. 235, and *Re Ianson* (1907) 14 Ont. L. Rep. 82, in which it was held, upon the authority of *Re Stone* (Eng.) supra, that a prior stirpital disposition of the income will not warrant the construction as stirpital, of a gift to the corpus in itself clearly within the purview of the general rule that, under a gift to the children of A and B as a class, the children take per capita.

For an instance in which the division of the corpus was regarded as indicative of an intention similarly to divide the income, see *Whitehead v. Ginsburg* (1921) 197 App. Div. 266, 188 N. Y. Supp. 739.

v. Effect of treatment of legatees as a class elsewhere in will.

Where in one part of the will the testator treats the objects of his bounty as a class, and in another part refers to them by the same description, the presumption is that he uses the same words in the same sense and intends them to take as a class, and the division of a fund will be per stirpes as to them, treating them as a class. *Fields v. Fields* (1893) 93 Ky. 619, 20 S. W. 1042; *Bethel v. Major* (1902) 24 Ky. L. Rep. 398, 68 S. W. 631; *Ferrer v. Pyne* (1879) 18 Hun (N. Y.) 411, affirmed in (1880) 81 N. Y. 281; *Everitt v. Carman* (1880) 4 Redf. (N. Y.) 341; *Gilliam v. Underwood* (1856) 56 N. C. (3 Jones, Eq.) 100; *Lockhart v. Lockhart* (1857) 56 N. C. (3 Jones, Eq.) 205.

Thus, the fact that the testator has spoken of his grandchildren elsewhere as a class is an indication that, under a gift to his "heirs," they are to take per stirpes in the place of

their respective parents. *Baskin's Appeal* (1846) 3 Pa. St. 304, 45 Am. Dec. 641.

But the fact that persons entitled to participate in a gift are elsewhere given a legacy as a class is not conclusive that, in making the distribution, they are to be treated as a unit. See *Harris v. Philpot* (1848) 40 N. C. (5 Ired. Eq.) 324; *Hastings v. Earp* (1866) 62 N. C. (Phill. Eq.) 5.

Thus, the general rule that, when a testator gives equally to persons standing in the same relation to him, the distribution is per capita even though they are indicated to be the children of persons who stand in closer relation, is not affected by the fact that in other parts of the will he has made distribution of other shares of the estate to the same persons per stirpes, as remaindermen after their parents. *Hartley's Estate* (1912) 22 Pa. Dist. R. 417.

No inference of an intention that some of the beneficiaries of a gift shall take as a class can be drawn from the circumstance that, in some clauses of the will, they are treated as a class, where in other clauses they are treated as individuals. *White v. White* (1916) 168 Ky. 752, 182 S. W. 942.

α. Effect of direction that legatees shall take per stirpes.

The words "per stirpes" are not strictly applicable to named legatees, or legatees designated as a class, and are ordinarily, at least, appropriate and are used with respect to substitutional gifts to substituted legatees in the case of the death of a primary legatee. *Re Title Guarantee & T. Co.* (1913) 159 App. Div. 803, 144 N. Y. Supp. 889, affirmed in (1914) 212 N. Y. 551, 106 N. E. 1043.

A superadded direction that the children shall take per stirpes, and not per capita, shows that they do not take in competition with the original takers. *Pearson v. Stephen* (1831) 5 Bligh, N. R. 203, 5 Eng. Reprint, 286, 2 Dow & C. 328, 6 Eng. Reprint, 750.

Under a gift to several and their descendants per stirpes, the words "per stirpes" import not only distri-

bution, but also succession or some species of representation, and hence exclude children from taking concurrently with their parents. *Dick v. Lacy* (1845) 8 Beav. 214, 50 Eng. Reprint, 85, 14 L. J. Ch. N. S. 150, 9 Jur. 221.

As to the construction of a direction that the beneficiaries should take "per capita as well as per stirpes, equally and in all respects share and share alike," see *Re Curtis* (1909) 64 Misc. 425, 119 N. Y. Supp. 605, set forth under III. a, *infra*.

For an instance in which a direction that the beneficiaries should take per stirpes was rejected as at variance with the testator's clearly expressed intention, see *Van Cott v. Van Cott* (1915) 167 App. Div. 694, 152 N. Y. Supp. 840, affirmed without opinion in (1916) 219 N. Y. 673, 114 N. E. 1085.

It has been held that a direction for distribution per stirpes runs through the whole range of the descent. *Gibson v. Fisher* (1867) L. R. 5 Eq. (Eng.) 58, 37 L. J. Ch. N. S. 67, 16 Week. Rep. 115; *Re Wilson* (1883) L. A. 24 Ch. Div. (Eng.) 664, 53 L. J. Ch. N. 130; *Re Alchorne* (1911) 130 L. T. Jo. (Eng.) 528; *Powell v. Powell* (1873) 28 L. T. N. S. (Eng.) 730, 21 Week. Rep. 725.

But in some cases a mere direction that the share of any of the original takers dying is to go to his issue will not have the effect of preventing remoter issue from taking that share, with issue less remote, per capita between them. See *Southam v. Blake* (1854) 2 Week. Rep. (Eng.) 446.

III. Under various forms of bequest.

a. Under a bequest to the "heirs" of the testator or of some other person.

For instances in which the bequest was to the "heirs" of two or more persons, see III. n, *infra*.

For instances of bequests to one and the "heirs" of another, see III. p, *infra*.

For instances of bequests to persons living and the "heirs" of any deceased, see III. v, *infra*.

For instances of bequests to the "heirs" of the testator and of the

testator's wife or husband, see III. w, *infra*.

A rule of construction which is very generally, although, as will presently appear, not universally, recognized, is that a devise or bequest to "heirs," whether it be to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but also the manner and proportions in which they are to take; and when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the law of intestate succession.

Connecticut.—*Cook v. Cathin* (1856) 25 Conn. 387; *Conklin v. Davis* (1893) 63 Conn. 377, 28 Atl. 537; *Ruggles v. Randall* (1897) 70 Conn. 44, 38 Atl. 885; *Healy v. Healy* (1853) 70 Conn. 467, 39 Atl. 793.

Georgia.—*MacLean v. Williams* (1902) 116 Ga. 259, 59 L.R.A. 125, 42 S. E. 486.

Illinois.—*Richards v. Miller* (1872) 62 Ill. 417; *Kelley v. Vidas* (1884) 112 Ill. 242, 54 Am. Rep. 235; *Thomas v. Miller* (1896) 161 Ill. 60, 43 N. E. 848; *Kirkpatrick v. Kirkpatrick* (1902) 197 Ill. 144, 64 N. E. 267; *Mosier v. Bowser* (1907) 226 Ill. 46, 80 N. E. 730; *Jenne v. Jenne* (1916) 271 Ill. 526, 111 N. E. 540; *Best v. Farris* (1886) 21 Ill. App. 49.

Indiana.—*Laisure v. Richards* (1913) 56 Ind. App. 301, 103 N. E. 679.

Iowa.—*Johnson v. Bodine* (1899) 108 Iowa, 594, 79 N. W. 348.

Kentucky.—*Johnson v. Jacob* (1876) 11 Bush, 646; *Prather v. Watson* (1920) 187 Ky. 709, 220 S. W. 532.

Maine.—*Doherty v. Grady* (1908) 105 Me. 36, 72 Atl. 869; *Tucker v. Nugent* (1917) 117 Me. 10, 102 Atl. 307.

Massachusetts.—*Bowers v. Porter* (1827) 4 Pick. 198; *Daggett v. Slack* (1844) 8 Met. 450; *Tillinghast v. Cook* (1845) 9 Met. 143; *Holbrook v. Harrington* (1860) 16 Gray, 102; *Houghton v. Kendall* (1863) 7 Allen, 72; *Balcom v. Haynes* (1867) 14 Allen, 204; *Bassett v. Granger* (1868) 100 Mass. 348; *Rand v. Sanger* (1874) 115 Mass. 124; *King v. Savage* (1876)

121 Mass. 303; *Cummings v. Cummings* (1888) 146 Mass. 501, 16 N. E. 401; *Allen v. Boardman* (1906) 193 Mass. 284, 118 Am. St. Rep. 497, 79 N. E. 260; *McClench v. Waldron* (1910) 204 Mass. 554, 91 N. E. 126; *Ernst v. Rivers* (1919) 233 Mass. 9, 123 N. E. 93.

Missouri.—*WOOLEY v. HAYS* (reported herewith) ante, 1.

New Jersey.—*Hayes v. King* (1883) 37 N. J. Eq. 1; *Fisk v. Fisk* (1900) 60 N. J. Eq. 195, 46 Atl. 538; *Bartine v. Davis* (1900) 60 N. J. Eq. 202, 46 Atl. 577.

New York.—*Clark v. Lynch* (1866) 46 Barb. 68; *Cogan v. McCabe* (1898) 23 Misc. 739, 52 N. Y. Supp. 48; *Re Griswold* (1903) 42 Misc. 230, 86 N. Y. Supp. 250; *Re Curtis* (1909) 64 Misc. 425, 119 N. Y. Supp. 605.

North Carolina.—*Rogers v. Brickhouse* (1860) 58 N. C. (5 Jones, Eq.) 301; *Burgin v. Patton* (1860) 58 N. C. (5 Jones, Eq.) 425; *Grandy v. Sawyer* (1866) 62 N. C. (Phill. Eq.) 8; *Mitchell v. Parks* (1920) 180 N. C. 634, 105 S. E. 398.

Ohio.—*Mooney v. Purpus* (1904) 70 Ohio St. 57, 70 N. E. 894; *Wilberding v. Miller* (1913) 88 Ohio St. 609, L.R.A.1916A, 718, 106 N. E. 665.

Oregon.—*Ramsey v. Stephenson* (1899) 34 Or. 408, 56 Pac. 520, 57 Pac. 195.

Pennsylvania.—*Baskin's Appeal* (1846) 3 Pa. St. 304, 45 Am. Dec. 641; *Barnitz's Appeal* (1847) 5 Pa. 264; *Alston's Appeal* (1887) 8 Sadler, 451, 11 Atl. 366; *Hoch's Estate* (1893) 154 Pa. 417, 26 Atl. 610; *Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361; *Rood's Estate* (1898) 21 Pa. Co. Ct. 291.

Rhode Island.—*Swinburne's Petition* (1888) 16 R. I. 208, 14 Atl. 850.

South Carolina.—*Allen v. Allen* (1880) 13 S. C. 512, 36 Am. Rep. 716; *Dukes v. Faulk* (1892) 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122; *Brantley v. Bittle* (1905) 72 S. C. 179, 51 S. E. 561.

Tennessee.—*Forrest v. Porch* (1898) 100 Tenn. 391, 45 S. W. 676; *Farley v. Farley* (1908) 121 Tenn. 324, 115 S. W. 921; *Stewart v. Drake* (1910) 1 Tenn. C. C. A. 332.

Vermont.—*Hodges v. Phelps* (1898) 65 Vt. 303, 26 Atl. 625.

West Virginia.—*Ross v. Kiger* (1896) 42 W. Va. 402, 26 S. E. 193; *Collins v. Feather* (1902) 52 W. Va. 107, 61 L.R.A. 660, 94 Am. St. Rep. 912, 43 S. E. 323.

Canada.—*Coatsworth v. Carson* (1893) 24 Ont. Rep. 185; *Re Bint* (1909) 1 Ont. Week. N. 285.

In *Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361, it is said that the word "heirs," ex vi termini, implies representation, and in this respect its meaning is not changed by being coupled with the word "children."

The implication that a stirpital division is intended is apparently strengthened where the gift is not to "heirs" simply, but to "legal heirs." See *Woodward v. James* (1889) 115 N. Y. 346, 22 N. E. 150, set forth infra.

So, under a bequest to testator's "own right heirs," the Statute of Distributions governs the mode of division. *Boston Safe Deposit & T. Co. v. Blanchard* (1907) 196 Mass. 35, 81 N. E. 654.

It has likewise been held that under a gift to "heirs of the body," or "bodily heirs," the persons entitled take per stirpes. *Houghton v. Kendall* (1863) 7 Allen (Mass.) 72; *Re Wilson* (1907) 53 Misc. 238, 104 N. Y. Supp. 480; *Lowe v. Carter* (1856) 55 N. C. (2 Jones, Eq.) 377; *Templeton v. Walker* (1850) 24 S. C. Eq. (3 Rich.) 543, 55 Am. Dec. 646 (construing a deed of gift); *Kerngood v. Davis* (1884) 21 S. C. 183. In *Lemacks v. Glover* (1843) 18 S. C. Eq. (1 Rich.) 141, where the limitation was to the "heirs of the body" of a tenant for life, the question as to the proportions in which the designated persons should take the estate was referred to ten judges in the court of errors, but no authoritative decision was attained—five judges being of the opinion that the distribution should be regulated by the Law of Intestate Succession, and five being of the opinion that the estate should be equally divided amongst all the objects of the gift.

The presumption that, under a gift to "heirs," they take in the same proportions in which they would have

taken under the law of intestate succession, however, is not applicable in determining the distribution to be made among the "heirs" of the testator upon the default of the trustee of a power in trust to make such distribution of the residuary estate "among my heirs at law in such proportions as he in his discretion shall deem each of them worthy," but such distribution must be per capita. *Wetmore v. Henry* (1913) 259 Ill. 80, 102 N. E. 189, Ann. Cas. 1914C, 247.

The contrary view.

In a few instances the opinion has been expressed that the term "heirs" does not, of itself, imply representation and hence a stirpital division.

Thus, in *Records v. Fields* (1900) 155 Mo. 314, 55 S. W. 1021, it was held that, under a bequest to the "heirs" of testator's deceased brother, the children and grandchildren of such brother took as a class per capita, the court saying: "This is a bequest of personalty, and the word 'heirs' can have no effect as a word of limitation. Its sole purpose is to designate under a general term the persons whom the testator contemplated as his legatees. It points out, in this case, the children and grandchildren of William Fields, all of them together constituting one class. As none of them take in a representative character, but as purchasers directly from their uncle and granduncle, it must be ruled, in the absence of the slightest evidence showing a contrary intention, that they take per capita, or each one seventh of one half of said residue mentioned in the third clause of said will."

And in *Bisson v. West Shore R. Co.* (1894) 143 N. Y. 125, 38 N. E. 104, it is said that a construction of the word "heirs" merely as describing the persons who are to take, and not as fixing the interest which will vest in each person by virtue of his heirship, is preferable when the context will permit.

In *Ward v. Stow* (1834) 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 238, it was said that the term "heirs" does not indicate that the legatees take in a representative character, but that

its sole purpose is to point out the persons who are to take. See also *Campbell v. Wiggins* (1838) 14 S. C. Eq. (Rice) 10, in which it was held that, under a grant by act of assembly to the "heirs at law of John Taylor and Blake Wiggins," all who could bring themselves within the terms of the description were entitled to take per capita. But in *Templeton v. Walker* (1850) 24 S. C. Eq. (3 Rich.) 543, 55 Am. Dec. 646, it is said that the doctrine of *Campbell v. Wiggins* (S. C.) supra, was greatly shaken by the adverse opinions expressed in *Lemacks v. Glover* (1843) 18 S. C. Eq. (1 Rich.) 141, in which it was held by the circuit court, following *Campbell v. Wiggins* (S. C.) supra, that under a bequest to one for life, and after her death "to the heirs of her body, to them and their heirs and assigns forever," the distribution must be per capita and not per stirpes. The case was appealed to the court of appeals, a majority of which concurred in the decree of the circuit court, Harper, Ch. J., dissenting; and upon a further appeal to the court of errors, that court was equally divided, and the decree of the circuit court accordingly allowed to stand. The contrary view is adopted in the later South Carolina decisions, cited as supporting the general rule, supra.

Character of property as affecting result.

Whether the persons entitled to a bequest will take per capita or per stirpes may depend upon the character of the property.

Thus, in *Hayes v. King* (1883) 37 N. J. Eq. 1, it was held that, under a gift of real and personal property to the "heirs at law" of a certain person, those entitled took the personal estate per capita (under the rule that, where the persons entitled all stand in the same degree of relationship to the testator, they take per capita); but that they took the real estate per stirpes, according to the Statute of Descents.

It may be noted (without undertaking exhaustively to discuss the question as to who may take under a gift of personal property to "heirs")

that, when the word "heir" is used in a gift of personalty, it should primarily be held to refer to those who would be entitled to take under the Statute of Distributions, and to indicate that they should take in the same manner and in the same proportions as if it had come to them as intestate estate of the person whose "heirs" they are called. *Jacobs v. Prescott* (1906) 102 Me. 63, 65 Atl. 761; *Houghton v. Kendall* (1863) 7 Allen (Mass.) 72; *Scudder v. Vanarsdale* (1860) 13 N. J. Eq. 109; *Welsh v. Crater* (1880) 32 N. J. Eq. 177, affirmed on opinion below in (1880) 33 N. J. Eq. 362; *Armstrong v. Sheldon* (1899) 43 App. Div. 248, 60 N. Y. Supp. 1; *Freeman v. Knight* (1841) 37 N. C. (2 Ired. Eq.) 72; *Rood's Estate* (1898) 21 Pa. Co. Ct. 291.

But it is the province and duty of the court in each case to ascertain what the testator meant and intended when he used such words, and, when so ascertained, to give such meaning and intent full force and effect; and such meaning may be learned from the words themselves, the context, the instrument considered as a whole, and all the circumstances surrounding each particular case. Courts will not substitute "next of kin" for "heirs" in a testator's will, and thereby create an entirely different class of persons as legatees, unless it appear that such substitution is necessary in order to make operative and effectual his intent. *Armstrong v. Galusha* (1899) 43 App. Div. 248, 60 N. Y. Supp. 1.

—where realty and personalty are blended in one gift.

In *Burgin v. Patton* (1860) 58 N. C. (5 Jones, Eq.) 425, and *Hackney v. Griffin* (1863) 59 N. C. (6 Jones, Eq.) 381, it is held that where real and personal property are blended in a gift to testator's "heirs," the rule of division per stirpes applicable to the real estate must likewise apply to the personal estate, because it is manifest that the testator intended that both kinds of his property should go together.

But in *Hayes v. King* (1883) 37 N. J. Eq. 1, where testator gave his

residuary estate, both real and personal, to his mother, and in case of her death before his decease to her "heirs at law," it was held that the fact that the persons entitled took the personalty in equal shares was no evidence of an intention that they should take the real property in equal shares also.

Applicability of general rule as affected by context.

The presumption in favor of a per stirpes distribution arising from the use of the words "heirs," "heirs at law," etc., will yield to a contrary intention on the part of the testator, either expressed or implied. *Baker v. Baker* (1910) 152 Ill. App. 620.

So, also, in *Collins v. Feather* (1902) 52 W. Va. 107, 61 L.R.A. 660, 94 Am. St. Rep. 912, 43 S. E. 323, it is said that the rule is not inflexible, but often yields to the force of extrinsic circumstances casting light upon the question of the testator's intent, and expressions in the context tending to show an intent inconsistent with it.

It is easily controlled by words in the will indicating a different intention. *Daggett v. Slack* (1844) 8 Met. (Mass.) 450.

The rule that, where persons who are to take must be determined by the law of intestate succession, such law will determine the proportions in which they take, is necessarily inoperative where the will itself indicates such proportions. *Best v. Farris* (1886) 21 Ill. App. 49; *Freeman v. Knight* (1841) 37 N. C. (2 Ired. Eq.) 72; *Mooney v. Purpus* (1904) 70 Ohio St. 57, 70 N. E. 894; *Ramsey v. Stephens* (1899) 34 Or. 408, 56 Pac. 520, 57 Pac. 195; *M'Neilledge v. Galbraith* (1822) 8 Serg. & R. (Pa.) 43, 11 Am. Dec. 572; *Bender's Appeal* (1857) 3 Grant, Cas. (Pa.) 210; *Allen v. Allen* (1880) 13 S. C. 512, 36 Am. Rep. 716; *Walker v. Webster* (1897) 95 Va. 377, 28 S. E. 570.

So, where the will gives to "each" a specific sum, so that resort need not be had to the Law of Intestate Succession to determine the proportions in which persons entitled are to take, they take per capita. *Auger v. Tat-ham* (1901) 191 Ill. 296, 61 N. E. 77.

It has frequently been held that if, after a devise to "heirs," it be added, "in equal shares," or "share and share alike," or "to them and each of them," or "equally to be divided," or any equivalent words intimating an equal division, then they will take per capita, each in his own right.

Illinois.—Best v. Farris (1886) 21 Ill. App. 49; Copeland v. Copeland (1895) 64 Ill. App. 100.

Iowa.—Parker v. Foxworthy (1914) 167 Iowa, 649, 149 N. W. 879.

Maine.—Doherty v. Grady (1908) 105 Me. 36, 72 Atl. 869.

Massachusetts.—Daggett v. Slack (1844) 8 Met. Mass. 450; Allen v. Boardman (1906) 193 Mass. 284, 118 Am. St. Rep. 497, 79 N. E. 260.

Missouri.—Wooley v. Hays (1920) — Mo. —, 226 S. W. 842.

New Jersey.—Scudder v. Vanarsdale (1860) 13 N. J. Eq. 109; Welsh v. Crater (1880) 32 N. J. Eq. 177.

New York.—Bodine v. Brown (1896) 12 App. Div. 335, 42 N. Y. Supp. 202, affirmed on opinion below in (1898) 154 N. Y. 778, 49 N. E. 1093; Everitt v. Carman (1880) 4 Redf. 341; Re Griswold (1903) 42 Misc. 230, 86 N. Y. Supp. 250.

North Carolina.—Freeman v. Knight (1841) 37 N. C. (2 Ired. Eq.) 72; Hackney v. Griffin (1863) 59 N. C. (6 Jones, Eq.) 381; Tuttle v. Puitt (1873) 68 N. C. 543; Mills v. Thorne (1886) 95 N. C. 362.

Ohio.—Huston v. Crook (1882) 38 Ohio St. 328; McKelvey v. McKelvey (1885) 43 Ohio St. 213, 1 N. E. 594; Mooney v. Purpus (1904) 70 Ohio St. 57, 70 N. E. 894; Stearns v. Brandeberry (1920) 9 Ohio App. 300.

Oregon.—Ramsay v. Stephenson (1899) 34 Or. 408, 56 Pac. 520, 57 Pac. 195.

Pennsylvania.—Whitmer v. Ebersole (1846) 5 Pa. 458.

South Carolina.—Allen v. Allen (1880) 13 S. C. 512, 36 Am. Rep. 716; Kerngood v. Davis (1884) 21 S. C. 183; Dukes v. Faulk (1892) 37 S. C. 255, 34 Am. St. Rep. 745, 16 N. E. 122; Parrott v. Barrett (1904) 70 S. C. 195, 49 S. E. 563; Brantley v. Bittle (1905) 72 S. C. 179, 51 S. E. 561.

Tennessee.—Parrish v. Groomes (1874) 1 Tenn. Ch. 581.

Virginia.—Walker v. Webster (1897) 95 Va. 377, 28 S. E. 570.

Wisconsin.—McWilliams v. Gough (1903) 116 Wis. 576, 93 N. W. 550.

Canada.—Chadbourn v. Chadbourne (1882) 9 Ont. Pr. Rep. 317.

Expressions denoting equality are not, however, conclusive that the division should be per capita. See, for example:

Georgia.—Maclean v. Williams (1902) 116 Ga. 259, 59 L.R.A. 125, 42 S. E. 486.

Illinois.—Kelley v. Vigas (1884) 112 Ill. 242, 54 Am. Rep. 235.

Massachusetts.—Bowers v. Porter (1827) 4 Pick. 198; Allen v. Boardman (1906) 193 Mass. 284, 118 Am. St. Rep. 497, 79 N. E. 260; Thompson v. Thornton (1908) 197 Mass. 273, 83 N. E. 880; McClench v. Waldron (1910) 204 Mass. 554, 91 N. E. 126.

New York.—Re Wilson (1907) 53 Misc. 238, 104 N. Y. Supp. 480.

North Carolina.—Rogers v. Brickhouse (1860) 58 N. C. (5 Jones, Eq.) 301; Burgin v. Patton (1860) 58 N. C. (5 Jones, Eq.) 425.

Pennsylvania.—Baskin's Appeal (1846) 3 Pa. St. 304, 45 Am. Dec. 641; Hoch's Estate (1893) 154 Pa. 417, 26 Atl. 610; Rood's Estate (1898) 21 Pa. Co. Ct. 291; Alston's Appeal (1887) 8 Sadler, 366, 11 Atl. 451.

South Carolina.—Lott v. Thompson (1892) 36 S. C. 38, 15 S. E. 278.

Tennessee.—Stewart v. Drake (1910) 1 Tenn. C. C. A. 332.

Thus, in Allen v. Boardman (1906) 193 Mass. 284, 118 Am. St. Rep. 497, 79 N. E. 260, it is held that the words "to share the same equally" may be given effect by being applied to the division between the classes of testator's heirs.

And in Thompson v. Thornton (1908) 197 Mass. 273, 83 N. E. 880, it is said that the words "in equal shares" can be given effect by interpreting them as meaning with such equal regard to the rights of the testator's heirs at law as the law itself recognizes by the Statute of Distributions.

And in McClench v. Waldron (1910) 204 Mass. 554, 91 N. E. 126, it is said that the word "equally," when used in

a devise to heirs means that the property is to be divided per stirpes.

A direction for equal division may be satisfied by referring it to a division between two groups, as in the case of a bequest to be equally divided between the heirs of A and the heirs of B, in which case nothing remains to alter the rule under which the heirs, as among themselves, take per stirpes. See *Holbrook v. Harrington* (1860) 16 Gray (Mass.) 102; *Bassett v. Granger* (1868) 100 Mass. 348.

A direction that "heirs" shall take "pro rata" is not inconsistent with a stirpital distribution. *Conklin v. Davis* (1893) 63 Conn. 377, 28 Atl. 537.

Review of the decisions.

And in *DeLaurencel v. DeBoom* (1885) 67 Cal. 362, 7 Pac. 758, where testator, whose next of kin him surviving were three DeLaurencels, children of a deceased sister, and five DeBooms, children of a deceased brother, directed a division of his estate among "all my heirs, the DeBooms as well as the DeLaurencels," it was held that the words "all my heirs" were not to be taken solely as meaning those who would take in case of intestacy, but were to be considered in their relation to the words, "the DeBooms as well as DeLaurencels," testator meaning, not that all persons bearing such name should take, but that the persons of either name who stood in an inheritable relation to him should take, and that the case was one for the application of the principle that, where a class is named as devisees, all of that class shall share, and shall share equally.

In *Cook v. Catlin* (1856) 25 Conn. 387, it was held that under a bequest to testator's "heirs," who were his nephews and nieces and their representatives, a proper construction of the Statute of Distribution gave the nephews and nieces, although all in equal degree of relationship to the deceased, only such share as their respective parents would have taken.

In *Conklin v. Davis* (1893) 63 Conn. 377, 28 Atl. 537, where testator gave to each of his seven grandchildren, naming them, \$2,000 each, and, after

various pecuniary legacies, directed "the remnants of said estate to be divided pro rata among the heirs," and such heirs were his grandchildren, five of whom were the children of a deceased daughter, and the other two were sons, respectively, of deceased sons of the testator, it was held that, as the expressions used were not at variance with an intention to make a distribution according to the statute, the presumption that such a division was intended must prevail—especially as, if the testator had meant that his grandchildren should take equally, it would have been more natural to have given the residue to them by name, or "between my said grandchildren equally," or "among my grandchildren, all to share alike."

In *Jackson v. Alsop* (1896) 67 Conn. 249, 34 Atl. 1106, where testatrix bequeathed her residuary estate "to be divided to and among my lawful heirs according to the laws of the state of Connecticut," it was held that they took per stirpes, and not per capita.

In *Ruggles v. Randall* (1897) 70 Conn. 44, 38 Atl. 885, it was held that a legacy to the "heirs of my niece Minerva Ennis," who was deceased, was a class gift, which vested upon testator's decease in her descendants who were then living, per stirpes.

In *Healy v. Healy* (1898) 70 Conn. 467, 39 Atl. 793, it was held that, in a bequest to "legal heirs" of a person named, the persons entitled take, as among themselves, per stirpes.

In *Maclean v. Williams* (1902) 116 Ga. 259, 59 L.R.A. 125, 42 S. E. 486, where testatrix, whose husband's kindred at the time of her death were nephews and nieces and descendants of nephews and nieces, and whose own next of kin consisted of two half sisters, nephews and nieces who were children of deceased sisters, and grand nephews and nieces, disposed of her residuary estate as follows: "I direct that two thirds thereof be distributed in equal shares to such persons in life at the time of my decease who would then be the heirs at law of my deceased husband, had he survived me, and that the other one third be distributed in equal shares to my own

heirs at law then in life," it was held that the presumption arising from the use of the words "heirs at law" that the testatrix intended that the persons taking should take what they would take under the Statute of Distribution, was not overcome by the expression "equal shares," the court saying: "If all the heirs at law stand in the same relation to the decedent, they take equally per capita. If some stand in different degrees from others, they take per stirpes, but they take equally nevertheless. The estate in either event is divided into shares and equal shares, although, in the one case, each share goes to an individual, and in the other case the equal shares go to a class of individuals."

In *Kelley v. Vigas* (1884) 112 Ill. 242, 54 Am. Rep. 235, where testator, after giving his property to his wife for life, devised to the wife of a deceased son certain real estate, and to his only surviving child a sum of money, and directed the remainder of his estate "to be divided equal among my heirs at law," who were his daughter and four grandchildren, it was held that the implication of a per capita distribution arising from the use of the word "equal" was controlled by the context, the court saying: "The testator, by making a bequest of money to his own daughter and the devise of land to his daughter-in-law, evidently intended to make an equal division of his estate between his daughter and the family of his deceased son, and it is not unreasonable to believe that was all that he meant by the use of the words 'equal among.'"

In *Thomas v. Miller* (1896) 161 Ill. 60, 43 N. E. 848, the rule that a gift to "heirs" is presumably to them per stirpes was applied to a residuary gift to the testator's son, "and, in case of his death without living heirs of his own, the whole shall then revert to my heirs; but should he have heirs of his own body at his decease, they shall share equally with the rest of my heirs."

In *Auger v. Tatham* (1901) 191 Ill. 296, 61 N. E. 77, reversing (1900) 92 Ill. App. 194, testator bequeathed to certain persons named, and to "the

heirs at law of Lucy Auger, deceased," "each the sum of \$25,000, to be paid to them respectively by my executors after my decease." By a codicil he directed that the bequests made to some of the persons named, and to "the heirs at law of Lucy Auger, deceased," "be increased from \$25,000 . . . to the sum of \$50,000 each, said sum of \$50,000 to be paid to each of the persons named in this item 1 of this codicil in lieu of said sum of \$25,000 by my executors as therein provided." It was held that as at the time the will was made Lucy Auger was dead, so that a reference to her "heirs at law" was a reference to persons then definitely ascertained, and in view of the use of the word "each," the bequest was to such heirs at law as individuals, and not to them as a class; and therefore that each was entitled to the sum of \$50,000, rather than to a proportionate share of such sum, such construction being, in the opinion of the court, further fortified by the use of the word "persons" in the codicil. It was also held not to be a sufficient reason for departing from this construction that the testator had given to "the heirs of" other persons standing in the same relationship to him as did Lucy Auger, the sum of \$50,000, "to be divided between them;" but that, on the contrary, the difference in phraseology indicated that the gift to the heirs of Lucy Auger was not a class gift.

In *Kirkpatrick v. Kirkpatrick* (1902) 197 Ill. 144, 64 N. E. 267, where testator, who wrote his own will without legal advice or assistance, divided his personal property on the principle per stirpes, and directed that the real estate should "go to the heirs in equal portions as heretofore mentioned," it was held that an intention was manifest that his land should be divided per stirpes.

In *Welch v. Wheelock* (1909) 242 Ill. 380, 90 N. E. 295, testator, who had made a will by which he gave legacies of varying amounts to his nephews and nieces, who were his next of kin, and a legacy to a protégé, Thomas Carr, made a codicil, in which, after making various changes in his testa-

mentary dispositions he stated: "One half of my estate should, at its present valuation, more than cover all the bequests and legacies I have made in my said will and the two codicils thereto, and therefore it is my will that excess or surplus of my property that shall be left after the payment of all the bequests and legacies herein provided, shall go and descend to my legal heirs according to the laws of the state of Illinois. The said Thomas Carr, if living when the residuum of my estate is distributed, shall receive an equal share with my nephews and nieces, it being my intention, if said Thomas Carr is then living, that he shall be regarded the same as if he was my legal heir; and the children and descendants of children of my deceased nephew, Harrison W. Wood, shall receive the share that Harrison W. Wood would take if living, to be divided among said children, share and share alike." It was held that the direction that Thomas Carr should "receive an equal share with my nephews and nieces" was not sufficient to overcome the fact of the direction that such nephews and nieces should take "according to the laws of the state of Illinois," i. e., per stirpes.

In *Best v. Farris* (1886) 21 Ill. App. 49, a testator, whose heirs apparent when he made his will were two sons, two daughters, and the children of a deceased daughter, gave all his real estate to his wife for life, and directed that after her death it should be sold, and the proceeds "equally divided among my heirs," it was held that, there being nothing in the context to control the implication arising from the use of the word "equally," persons entitled took per capita.

In *Copeland v. Copeland* (1895) 64 Ill. App. 100, where testator, after equalizing the shares of his living children, directed "the residue of my estate to be equally divided among all of my lawful heirs,"—such heirs being his living children and the descendants of deceased children,—it was held that the direction that the residue should be "equally divided" indicated an intention that the persons entitled should take per capita.

In *Hayden v. Hargan* (1916) 202 Ill. App. 544, where the testator devised several parcels of real estate to his children, placing a valuation upon each parcel, and directed that the various devisees should pay and receive from the estate such sums as would make the share of each equal, and devised one parcel at a certain valuation to the "heirs" of a deceased daughter, naming her children, it was held that, for the purpose of such equalization, the children of the deceased daughter should be regarded as taking per stirpes, and not per capita.

In *Johnson v. Bodine* (1899) 108 Iowa, 594, 79 N. W. 348, where testator, who left surviving him two brothers and the issue of three deceased sisters, gave half of his estate to each of his brothers during his life, and directed that at their death it "be divided between my heirs at law," it was held that, there being no implication of a contrary intention, the heirs would take in the proportion fixed by the Statute of Distribution, i. e., per stirpes, and not per capita.

In *Parker v. Foxworthy* (1914) 167 Iowa, 649, 149 N. W. 879, where testator gave his wife his residuary estate for life, directing: "After her decease all of my said estate remaining unused shall be distributed to my heirs, share and share alike. I also direct that if any of my said heirs shall not survive my said wife, Mary M. Foxworthy, that portion of said estate which would have gone to said heir, had such a one been living, shall be divided share and share alike between the legal heirs of my said heir at that time deceased," it was held that as the gift was direct and immediate to his heirs, and as the testator specifically said that they should take share and share alike, the children of deceased children were entitled to take per capita; and that no sufficient evidence of a different intent could be derived from the clause last above quoted, the court saying: "His 'heirs' comprehend not only his living children, but also the heirs of any who were deceased at the time of his death, and he also specifically mentioned those who might survive him and yet die before the demise of his wife; but, as to the

latter, he does not differentiate between children and grandchildren."

In *Johnson v. Jacob* (1876) 11 Bush (Ky.) 646, testator gave a share of his estate to a son for life, and directed that after his death it should "be conveyed and paid to his descendants, if there be any such then living, in the same manner as it would pass by the law of descent if the same was to descend from him. If there be no such descendants, then the same shall be conveyed and paid to his heirs." It was held that the clear import of the language used was that the direction that it should pass "in the same manner as it would pass by the law of descent" was annexed to the alternative devise to the heirs, as well as to the primary devise to the descendants of the life tenant, and accordingly that they took per stirpes, and not per capita.

In *Doherty v. Grady* (1908) 105 Me. 36, 52 Atl. 869, where testator created a trust fund, giving his wife a portion of the income therefrom and the balance "to my legal heirs in equal shares," and directed that it be distributed, after the death of his wife, "in equal shares to my legal heirs," it was held that the implication arising from the use of the term "heirs" was controlled by the direction that they should take "in equal shares," and accordingly that they took per capita instead of per stirpes.

In *Bowers v. Porter* (1827) 4 Pick. (Mass.) 198, it was held that, under a devise to one for life and at her decease "to be equally divided between all her legal heirs," the division should be per stirpes, and not per capita.

In *Daggett v. Slack* (1844) 8 Met. (Mass.) 450, where testator devised certain property "unto the legal heirs of my late brother," it was held that there was nothing to take the case out of the rule that a devise to "heirs" is presumed to be to them per stirpes.

In *Holbrook v. Harrington* (1860) 16 Gray (Mass.) 102, it was held that there was nothing in a will by which testatrix gave her residuary estate "to be equally divided between the heirs of my late husband, Stephen Holbrook, and the heirs of my brothers and

sisters, viz., Joseph Barnes," etc., to take the case out of the rule that, under a devise to "heirs," the devisees take per stirpes.

In *Bassett v. Granger* (1868) 100 Mass. 348, the court applied the rule that under a devise to "heirs" the persons entitled take per stirpes, to a bequest "to the heirs of my late husband and to my heirs equally."

In *Rand v. Sanger* (1874) 115 Mass. 124, where testatrix gave her residuary estate "to be equally divided among those persons who shall be my legal heirs at the time of my decease, excepting my son John," adding, "and in the distribution of the said residue among my heirs I desire and direct that the children of my sisters, Mrs. Anne Smith and Mrs. Caroline Sanger, shall share the same equally; that is, that it be divided among them numerically or per capita, and not per stirpes, and that the offspring of any deceased child of theirs only take by right of representation, or the share that the parent of such offspring would take if living," it was held that the purpose of the latter paragraph was to regulate the proportions in which certain persons should take in the event of their becoming entitled to the estate under the first paragraph, and directed a departure from the proportions established by the statute if the contingency should arise; that it must yield to the leading provision, so far as it is repugnant to it; and that there was nothing to take the case out of the rule that, under a devise to "heirs," persons entitled take as heirs would, by the course of descent.

In *Allen v. Boardman* (1906) 193 Mass. 284, 118 Am. St. Rep. 497, 79 N. E. 260, where testator gave his residuary estate "to the persons who at my decease are my heirs at law, such heirs at law to share the same equally," it was held that the direction that they should share equally was not sufficient to overcome the presumption, arising from the use of the term "heirs," that the persons entitled should take according to the rules of descent.

In *WOOLEY v. HAYS* (reported herewith) ante, 1, testator, a bachelor,

by a will drawn during his last illness by a friend who was not familiar with the technical meaning of legal phrases, directed that, "after all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give and bequeath to my lawful heirs, share and share alike. Except John W. Barber and William F. Barber, heirs of my sister Clarissa, who I give the sum of one dollar each. They having been amply provided for." Testator's "lawful heirs" were his three brothers and the children of his deceased sister. The brothers were possessed of adequate means, while the nieces and nephews, except the Barber boys, were in comparatively poor circumstances. It was held that the implication arising from the use of the word "heirs," that the division was to be per stirpes, was overcome by the use of the words "share and share alike," and that this construction was strengthened by the testator's apparent intent to provide for those who had, rather than those who had not—a result which would be best attained by a per capita distribution.

In *Welsh v. Crater* (1880) 32 N. J. Eq. 177, where testatrix directed her residuary estate "to be equally divided among my heirs," it was held that, in view of the use of the word "equally," persons entitled to take by representation took per capita.

In *Woodward v. James* (1889) 115 N. Y. 346, 22 N. E. 150, affirming (1887) 44 Hun, 95, 7 N. Y. S. R. 411, which affirms (1885) 16 Abb. N. C. 246, where testator, after giving his wife half the income of his property during her life and the remainder of such income to his "legal heirs," bequeathed "to my legal heirs, except as herein provided otherwise, the reversion and ownership of all my estate and property after the death of my wife," and went on to provide that, in the event of any of his legal heirs making any attempt to interfere with his wife's management and enjoyment of the property, such one should be excluded from sharing therein, "and the share that would otherwise have gone to him or her shall be divided among the remaining heirs according to law."

At the date of his death the testator left his brother, his two half sisters, nine nephews and nieces who were the children of a brother, a half brother, and a half sister who were respectively deceased, and a grandchild of a deceased brother. It was held that in view of the qualification of the word "heirs" by the term "legal," and the phrase "according to law" in the limitation over the share of any heir transgressing the condition, it was probable, although not entirely clear and obvious, that the testator meant by the phrase "legal heirs" those who would take in case of intestacy and in the proportions prescribed by the statute.

In *Bodine v. Brown* (1896) 12 App. Div. 335, 42 N. Y. Supp. 202, affirmed on opinion below in (1898) 154 N. Y. 778, 49 N. E. 1093, where testator gave the residue of his real estate in trust to divide the income between his children in equal portions during their natural lives, and further provided: "Upon the death of either of my said children I do give and devise the fourth part of such real estate to the issue or heirs of such child in fee to be equally divided between them," it was held to be the intention of the testator that the heirs of any child should take, in event of its death without issue, and that, as the testator had directed an equal division between them, they took per capita.

In *Re Barker* (1921) 230 N. Y. 364, 130 N. E. 579, where testator provided that, in case any of the persons named as beneficiaries should die before the termination of the trust period, "the share or portion of such remainder which the one so dying would have received, if living, shall be paid to his or her lawful heirs," and further declared, "The term 'lawful heirs' as used in this will shall be deemed to be the persons to whom real estate would descend in cases of intestacy under the laws of the state of New York in force at the time" it was held that the statute was relied upon not only to fix the identity of the persons who were to take, but also the quantity of the shares which they were to take, the court saying: "The clauses which we have quoted seek to create the very

result which would have arisen if the property devised and bequeathed had vested in the deceased beneficiary, and he had then died intestate. His 'heirs' are to take in his place, and the feature of heirship is emphasized by reference to the statute governing the descent of real estate in case of intestacy. This, as it seems to us, means much more than a mere identification of people by their relation to a given person. It impresses upon the mind the ideas of representation and of descent which are included in the use of the word 'heirs' in its technical sense, and are not part of its significance when it is used as a mere word of purchase. Thus we reach the conclusion, so far as this question is concerned, that the relatives of the deceased legatee took per stirpes, and not per capita by purchase."

In *Everitt v. Carman* (1841) 4 Redf. (N. Y.) 341, where testator gave his residuary estate to his wife and the persons answering the description of his heirs at law, to be divided between them equally in such manner that his said wife and each of his said heirs at law should take equal shares, it was held that the language used clearly evinced an intention that the persons answering the description of heirs should take per capita.

In *Cogan v. McCabe* (1898) 23 Misc. 739, 52 N. Y. Supp. 48, where testator devised lands in trust for his wife during her life, directing that they be sold at her decease and one fourth of the proceeds paid "to my son, James Cogan, or, in the event of his death before my said wife, to his lawful heirs," it was held that the persons entitled to take under the description of "lawful heirs" took in proportions fixed by the Statute of Distribution.

In *Re Griswold* (1903) 42 Misc. 230, 86 N. Y. Supp. 250, where a testator whose heirs and next of kin were a brother, six sisters, two daughters of one deceased sister, and nine children of another, gave to his brother a fourth of his estate, and the rest "unto my lawful heirs, to be divided equally among them," it was held that the implication arising from the use of the term "lawful heirs" was controlled

by the circumstance that the testator had grouped the objects of his bounty in a single class, and directed that the residue should be "equally divided between them." It was further held that this construction was not affected by a codicil by which he excepted from the beneficiaries so described, his brother Joseph, "whose share of my estate is fully provided for in said fourth clause," since even under a per stirpes division each of the surviving sisters would take about one eleventh of the whole estate, while his brother Joseph took one fourth—a disparity so great as to make it evident that the testator cherished no intention of making the share of each of the sisters equal to Joseph's.

In *Re Wilson* (1907) 53 Misc. 233, 104 N. Y. Supp. 480, where testator directed that a trust fund, upon the termination of the trust, "be paid to the heirs of my body then surviving, they to share alike," such heirs being, at testator's decease, his two daughters, one of whom died before the termination of the trust, leaving children, it was held that the surviving daughter took one half, and the children of the deceased daughter the other.

In *Re Curtis* (1909) 64 Misc. 425, 119 N. Y. Supp. 605, where testator gave one third of his residuary estate "to the heirs of my sister Eliza," one third to the "heirs" of his sister Clara, one third to the "heirs" of his sister Florine, "to be divided among them per capita as well as per stirpes, equally and in all respects share and share alike," it was held that the application of the words last above quoted was limited to the subdivision in each third, and that they could be given effect only by first dividing the third per stirpes between the living child of a sister and the children of a deceased child, and then subdividing the portion taken by the children of the deceased child among them per capita; the court further adducing in support of this construction the consideration that, if the phrase should be disregarded entirely as contradictory and meaningless, the law would work the same result.

In *Freeman v. Knight* (1841) 37 N. C. (2 Ired. Eq.) 72, where testator directed certain property to be sold "and the proceeds equally divided between my legal heirs," it was held that, as the testator had declared that his heirs should take "equally," the division should be per capita.

In *Rogers v. Brickhouse* (1860) 58 N. C. (5 Jones, Eq.) 301, where testator directed the proceeds of certain lands "to be equally divided among my heirs at law," and made a similar disposition of his residuary estate, it was held that, as there was nothing in the will to show that the term "heirs at law" was not used in the technical sense, the distribution of the proceeds of the lands must be per stirpes, and that the personal property embraced by the residuary clause must be governed by the same rule, it being given in the same terms which were applied to the proceeds of the real estate.

In *Burgin v. Patton* (1860) 58 N. C. (5 Jones, Eq.) 425, where the testator, who, at the time of his death, left several children and two sets of grandchildren, the children respectively of a deceased son and daughter, directed his residuary estate "to be equally divided amongst my heirs," it was held that, as the rules of descent must be resorted to for the purpose of ascertaining the testator's heirs, the rule in right of representation must be observed as well.

In *Hackney v. Griffin* (1863) 59 N. C. (6 Jones, Eq.) 381, where testator directed all property, not otherwise disposed of, to be "equally divided among all my legal heirs," it was held that the effect of the word "equally" was to require the distribution to be made per capita.

In *Grandy v. Sawyer* (1866) 62 N. C. (Phill. Eq.) 8, where testator directed his property, upon his wife's decease, "to be equally divided between the heirs of my beloved wife, Mary G. Sawyer, and my heirs at law," it was held that the division between the heirs of the testator and those of his widow must be per stirpes; and that, there being nothing in the will to show that the words "heirs at law,"

as applied to the testator, were not used in their technical sense, such heirs took the part given to them per stirpes; and that, this rule being established for the division among the heirs at law of the testator, it must also be applied to the division between them as a class and the heirs of the widow.

In *Tuttle v. Puitt* (1873) 68 N. C. 543, where testator devised to a son certain lands, with a proviso that in case such son "and the balance of my heirs" should not agree on the price, the parties might choose a board of valuation, and that, if the son should not be willing to abide by such valuation, then the lands be sold and the proceeds "equally divided among my heirs, excepting" two grandchildren for whom he had otherwise provided, it was held that the intention of the testator was that his son should have the land, but that he should pay to the other heirs their proper shares of its reasonable value; that, as he had directed that the proceeds be "equally divided," the division must be per capita and not per stirpes; and that the exclusion of two grandchildren from the distribution of such land did not alter the application of the rule.

In *Mills v. Thorne* (1886) 95 N. C. 362, it was held that under a devise to testator's wife for life, "and after her death, for my sister Prissy Little, her or her heirs to share and share equally with my wife's heirs," it was held that the words "to share and share equally" indicated an intention on the part of the testator to give the property to his sister or her heirs, and the heirs of his wife, to be divided between them as tenants in common, the sister to take one moiety and the heirs of his wife the other moiety, to be distributed per capita between such persons as might bring themselves under that description.

In *Lee v. Baird* (1903) 132 N. C. 755, 44 S. E. 606, where testatrix directed certain property to be sold and the money divided "among all my heirs," and in a subsequent item provided for the equalization of her "heirs" with respect to advancements received, it was held that, reading

such two items together and taking into consideration the attendant circumstances, it was not to be supposed that she intended to give the children of a daughter who died subsequently to the execution of the will, leaving six children, nearly one half of the proceeds of the property, especially in view of the fact that their father was a man of large means; and therefore that the division should be per stirpes, and not per capita.

In *Huston v. Crook* (1882) 38 Ohio St. 328, where at the time of the making of the will, and at the testator's decease, he had children and three grandchildren, the children of a deceased daughter, to all of whom he gave specific legacies, and further directed that his personal property not otherwise disposed of should be sold "and the proceeds thereof divided equally, share and share alike, between all of my aforesaid heirs," it was held that the explicit direction that the division should be made "equally, share and share alike," entitled the grandchildren to take per capita, rather than per stirpes.

In *McKelvey v. McKelvey* (1885) 43 Ohio St. 213, 1 N. E. 594, where testator, who had made specific gifts to each of his living brothers and sisters, with the exception of one who was infirm, to whose children he gave legacies, and who had also given legacies to the children of his deceased brothers, so that, had the infirm sister been dead, all his relatives to whom he gave legacies would have been all his heirs apparent, further provided: "It is my will and desire that whatever money will be left after paying the different sums given to my different heirs in this, my last will and testament, shall be divided equally among them," it was held that the word "heirs" included the children of his deceased brothers and the children of the infirm sister, as well as his surviving brothers, and that division should be made per capita.

In *Mooney v. Purpus* (1904) 70 Ohio St. 57, 70 N. E. 894, where testator, who left surviving him, as his heirs at law, five children and two children of a deceased son, directed

that his residuary estate should "be equally divided amongst my lawful heirs, share and share alike," it was held that the use of the words "equally," and "share and share alike," evidenced an intention that the persons entitled should take per capita, and not per stirpes.

In *Wilberding v. Miller* (1913) 88 Ohio St. 609, L.R.A.1916A, 718, 116 N. E. 665, where testator devised one half of his estate to his lawful heirs and one half to the lawful heirs of his wife, it was held that the persons included in the designation took per stirpes, except in the instances in which the will itself provided that such shares should go, or not go, to certain specified persons.

In *Stearns v. Brandeberry* (1920) 9 Ohio App. 800 (as reported in vol. 10a. Key Number series, title Wills, § 531 (2)), which involved a will whereby testator, after bequests and a devise of a life estate to his wife in the remainder, provided the balance should be "equally divided between my living heirs and the living heirs of my wife S. A. S., share and share alike," it was held that the phrase "share and share alike" qualified the provision for each set of heirs, and that distribution among each set of heirs of the half so devised should be per capita, and not per stirpes.

In *Ramsey v. Stephenson* (1899) 34 Or. 408, 56 Pac. 520, 57 Pac. 195, where testator, who left surviving him a brother and sister and the children of a deceased brother and sisters, gave his residuary estate to be divided "equally among the heirs at law," it was held that, in view of the testator's expressed declaration that the distribution should be made "equally," it must be per capita.

In *Baskin's Appeal* (1846) 3 Pa. St. 304, 45 Am. Dec. 641, where testator, who had bequeathed part of his estate to be divided equally between his daughter Peggy "and my son Daniel's children and John Black's children," directed the residue to "be equally divided between all the heirs," it was held that, as reference must be had to the Statute of Distribution to show the persons who are to take under the

designation of "heirs," the same rule must be applied to the quantum of the estate; and that this construction was confirmed by the fact that in the preceding part of the will, where the testator had spoken of his children, he mentioned them by name, but in referring to his grandchildren spoke of them as a class.

In *Barnitz's Appeal* (1847) 5 Pa. 264, where testator, who had given his residuary estate to his living children and the children of his deceased children per stirpes, directed that, if his grandson Abraham should die without issue, "then the part as willed to him is to fall to my heirs back to be divided amongst my children as in my will mentioned, share and share alike," it was held that the word "heirs" was used as meaning issue or descendants, and that division should be per stirpes.

In *Witmer v. Ebersole* (1846) 5 Pa. 458, where testator directed that, in case there should be any surplus after the payment of the legacies, "all my heirs and my wife's heirs not herein aforesaid mentioned are to share equal, share alike," it was held that the next of kin of the husband and of the wife took each an equal share per capita.

In *Hoch's Estate* (1893) 154 Pa. 417, 26 Atl. 610, where testatrix directed her property not otherwise disposed of to be divided "in equal shares to my legal heirs," and such heirs were her two children and the children of a deceased son, it was held that the use of the words "in equal shares" was not sufficient to indicate a purpose to disregard the distribution provided for by the intestate laws, and therefore that such distribution should be per stirpes.

In *Rood's Estate* (1898) 21 Pa. Co. Ct. 291, where testator gave the use of a sum of money to a son for life, and at his death the principal "to the lawful heirs of my said son, share and share alike, their heirs and assigns forever," it was held that the words "share and share alike" did not compel a distribution per capita, the court saying: "The words 'share and share alike,' though often contained in

testamentary documents, frequently import a just and impartial distribution among the proper parties, rather than an actual per capita distribution."

In *Alston's Appeal* (1887) 8 Sadler (Pa.) 451, 11 Atl. 366, where testator gave to his brother Robert, who had been his partner in business, the use of all his estate during his life, directing at his death "the real estate to be divided among my legal heirs, share and share alike," it was held that the testator's heirs took per stirpes, and not per capita.

In *Nightingale v. Phillips* (1908) 29 R. I. 175, 72 Atl. 220, where testatrix, after creating a trust for the benefit of her brother Samuel, directed the trust property to be paid over and conveyed at the termination of the trust "to the heir or heirs at law of the said Samuel, to be held by them in absolute property and fee disencumbered of this trust, and in such parts and portions as such heir or heirs would be entitled had the estate been vested in him in absolute ownership and fee," and the heirs of Samuel were nephews and nieces and the issue of a deceased nephew, it was held that the fund should be distributed by the trustees per stirpes among them.

In *Allen v. Allen* (1879) 13 S. C. 512, 36 Am. Rep. 716, it was held that under a bequest of the residue to "be equally distributed among my heirs at law, share and share alike," the direction for an equal distribution, not being controlled by the context, must prevail, and accordingly that the persons entitled took per capita, and not per stirpes.

In *Kerngood v. Davis* (1883) 21 S. C. 183, it was held that under a devise to "the heirs of the body of my said daughter who may be living at the time of her death, share and share alike," the words "share and share alike" implied equality of division, and that grandchildren of the daughter would take an equal share with her living children.

In *Lott v. Thompson* (1891) 86 S. C. 38, 15 S. E. 278, where a testator who died leaving a wife and nine children

left a will which contained the following clause: "Such property as God has blessed me with I give and bequeath to my beloved wife Charlotte during her natural life at her decease the property to be divided in the following manner, my colt to James to my son William four head of cattle with their increase also my watch the balance of my property to be equally divided between my heirs only Betsy and Martha the heirs of their body to have an equal share with the rest of my heirs," the court construed the will as giving each set of his grandchildren, called "heirs of their body," the share of their excluded mothers, and therefore that they took per stirpes, and not per capita.

In *Dukes v. Faulk* (1892) 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122, where testatrix gave her son and his wife the use of a house during their lives, and declared it to be her will "that it shall descend to such heirs as my said [daughter-in-law and son] shall have living at the time of their death, begotten by them, share and share alike, to them, their heirs, executors, and administrators and assigns forever. And in the event of there being but one, then and in such case he or she shall be entitled to such share as his, her, or their ancestors would have been entitled to if then living," it was held that, in view of the phrase "share and share alike," the persons entitled, although in unequal degrees of relationship, took per capita rather than per stirpes, and that such construction was not affected by the provision that, in the event of there being but one, he or she should be entitled to such share as his or her ancestors would have been entitled to, if living, the court saying: "As remarked at the bar, no such contingency as contemplated by this language has occurred, whether you make it read child of Emelia [the daughter-in-law], or child of a child, or child of a child's child. The testatrix could not have meant Emelia's child, for in that event there could have been no ancestor who took a share, for certainly Stent [the son] and Emelia took nothing that passed

to the 'heirs of their bodies' through them. And if it meant grandchild it would be just as ineffective, for it was only in the event that there was only one such that anything like a per stirpes distribution was contemplated."

In *Parrott v. Barrett* (1904) 70 S. C. 195, 49 S. E. 563, where testator devised certain land to his daughter during her life, and upon her death "to the heirs of her body who may be living at the time of her death, share and share alike, to them and their heirs and assigns forever," it is said that, as the will expressly directed that the heirs of the body of the life tenant living at her death should take share and share alike, they took per capita, and not per stirpes.

In *Brantley v. Bittle* (1905) 72 S. C. 179, 51 S. E. 561, where testator, who left him surviving eight children and the children of a deceased son, gave his residuary estate to his daughters, Roxanna and Emily, during their lives, and directed that upon the death of the survivor "the whole of my estate, both real and personal, be equally divided among all my heirs, share and share alike, my grandson Franklin Bittle [an illegitimate] son of my daughter, Emily Vick, taking an equal share with the other of my heirs, the child or children of any deceased parent taking the shares to which his, her, or their parent would have been entitled if living," it was held that the words "equally divided" and "share and share alike" manifested the intention of the testator that those answering the description of "heirs" at his death should take per capita, and not per stirpes, and that such construction was not affected by the provision that the child or children of any deceased parent should take such parent's share, the court saying: "These words were not intended to show the proportions in which those answering the description of heirs at the death of the testator should take, for in that case they would be inconsistent with the provision that the estate should be 'equally divided' among such heirs, 'share and share alike,' and there is no necessity for

resorting to such construction. Full force and effect can be given to both provisions by construing the said words in the last sentence of the foregoing clause as intending that the child or children should take the share of the heir who died after the testator and before the falling in of the life estate."

In *Forrest v. Porch* (1897) 100 Tenn. 391, 45 S. W. 676, where testator devised certain lands to his wife for life, directing that at her death "the said land is to be divided between my heirs at law," it was held that the testator meant that persons falling within the designation of "heirs at law" would take per stirpes.

In *Alexander v. Wallace* (1881) 8 Lea (Tenn.) 569, where testator directed his residuary estate, both real and personal, to be "divided among my heirs according to the laws of the state of Tennessee now in force, none preferred, none discriminated against," it was held that the obvious intention of the testator was to refer to the laws of the state not only for the purpose of pointing out the persons who were to take, but also for the purpose of pointing out the manner in which they were to take, and that the words, "none preferred, none discriminated against," did not manifest an intention that the distribution should be per capita rather than per stirpes.

In *Parrish v. Groomes* (1874) 1 Tenn. Ch. 581, where testator, after providing for his wife, directed the residue of his property, at her decease, "to be distributed equally between my lawful heirs," it was held that the use of the word "equally" indicated a per capita distribution among the persons answering the description of the class.

In *Stewart v. Drake* (1910) 1 Tenn. C. C. A. 332, where testator devised to a daughter certain lands "to have and to hold during her natural life," adding, "and at her death I devise that such tract of land be equally divided among her legal heirs," it was held that it was the intention of the testator that those answering the description of "legal heirs" of the

daughter upon her death should take such lands per stirpes, and that the word "equally" should be interpreted to mean that the testator desired that equality should be observed in making the distribution according to the law of descent, and did not mean equality as to shares in the property to be distributed.

In *Hodges v. Phelps* (1893) 65 Vt. 303, 26 Atl. 625, where testator, after giving various annuities, gave at the death of the annuitants, or any of them, "to their and to the heirs of each the sum of \$1,600 each," it was held that, as there were no words in the will to show that the testator used the word "heirs" in a sense other than as meaning the persons entitled to take under the Statute of Distributions, such statute would indicate the proportions in which they were to take.

In *Walker v. Webster* (1897) 95 Va. 377, 28 S. E. 570, where testator gave the residue of his estate "to, and to be divided in equal parts among, those who would be my heirs at law under the Statute of Descent and Distribution in Virginia, in case I had died intestate," it was held that, as the testator directed that the subjects of the bequest should be "divided in equal parts," the persons entitled took per capita, and not per stirpes.

In *Ross v. Kiger* (1896) 42 W. Va. 402, 26 S. E. 193, a residuary bequest, "to be equally divided between my heirs and my husband's heirs," was held to be a gift to two classes rather than to a single class, the members of each class, as among themselves, taking per stirpes, and not per capita, unless they all stood in the same relation to the testatrix.

In *McWilliams v. Gough* (1903) 116 Wis. 576, 93 N. W. 550, where testator directed that in the case of the death of a child entitled to a principal fund upon the termination of the trust, before such termination, "then the share which said deceased child would be entitled to if living shall be paid to the heirs at law of such deceased child, in equal parts to each," it was held to be self-evident that such heirs at law should take share and share alike.

In *Chadbourne v. Chadbourne* (1882) 9 Ont. Pr. Rep. 317, where testator, who left three living children and the issue of two deceased children, gave the residue of his estate "to my legal heirs, including my daughter Jemima Woodside, to be divided equally amongst them," it was held that the division must be per capita.

In *Coatsworth v. Carson* (1893) 24 Ont. Rep. 185, it was held that under a bequest to "my own right heirs," the persons entitled took per stirpes.

In *Re Bint* (1909) 1 Ont. Week. N. 285, where testatrix directed that at the termination of certain life interests "the principal of the money shall be divided between the members of the Marr family who would have been natural heirs," it was held that division must be per stirpes.

b. Under a bequest to the "next of kin" of the testator or of some other person.

For instances of bequests to the "next of kin" of the testator and of the testator's wife or husband, see III. w, *infra*.

It has been held that when a legacy is given to the next of kin of a person, without mentioning the proportion in which the fund is to be divided, it is a reasonable inference that the legatees shall take as next of kin according to the Statute of Distributions. *Tillinghast v. Cook* (1845) 9 Met. (Mass.) 143; *Dunlap's Appeal* (1887) 116 Pa. 500, 9 Atl. 936.

But in *Conner v. Johnson* (1834) 11 S. C. Eq. (2 Hill) 41, it is said that if the devise be to next of kin, they will take per capita and not per stirpes.

Where, however, the will indicates the proportions in which the beneficiaries are to take, a resort to the statute for such purpose becomes unnecessary.

Such is the case where the will declares that they shall take "equally," or "share and share alike" (see *Phillips v. Garth* (1790) 3 Bro. Ch. 64, 29 Eng. Reprint, 410; *Everitt v. Carman* (1841) 4 Redf. (N. Y.) 341; *Davies v. Edwards* [1910] 2 Ch. (Eng.) 74, 79 L. J. Ch. N. S. 500, 103 16 A.L.R.—4.

L. T. N. S. 130; *Re Labatt* (1916) 11 Ont. Week. N. 250), unless the direction for equality of division may be satisfied by referring it to a division between groups, as where the gift is equally to be divided between the next of kin of A and B.

A bequest to testator's next of kin, both maternal and paternal, is not divisible in equal moieties, but per capita. *Dugdale v. Dugdale* (1849) 11 Beav. 404, 50 Eng. Reprint, 872.

Review of the decisions.

In *Erdman v. Meyer* (1906) 52 Misc. 256, 102 N. Y. Supp. 197, where testator directed his residuary estate to be divided into six shares, the principal, in the case of one brother and one sister, to be paid immediately to the designated brother and sister, and the principal of the other four shares to be held for the designated brother and three sisters, and the principal, upon the death of the life tenant, to be paid to the next of kin of said life tenant, it was held that such provision showed that the testator had it in mind to treat his brothers and sisters equally, and to make no provision for his nieces and nephews except as they might take as next of kin; and therefore that the grandchildren of one of his sisters should take per stirpes, and not per capita.

In *Dunlap's Appeal* (Pa.) *supra*, where testator, after making various devises and bequests, including one to a brother, further provided: "None of my money is to go back further than my brothers' and sisters' children. Except the \$200 I left to Sarah Cooper. My nephew William Smith is to have \$500 more than the rest of my nieces and nephews," it was held that there was an implied gift to next of kin, excluding grand-nephews and grandnieces, and that, his brother not being included, and he not having indicated in what proportions the next of kin should take, the distribution should be according to the Intestate Laws, per stirpes.

In *Phillips v. Garth* (1790) 3 Bro. Ch. 64, 29 Eng. Reprint, 410, it was held that under a bequest of residue to be equally divided to and among testator's "next of kin, share and share

alike," the direction for equal division required a per capita distribution.

In *Mattison v. Tanfield* (1840) 3 Beav. 131, 49 Eng. Reprint, 51, 4 Jur. 933, where testator devised property in trust for the persons who, at his decease, should be next of kin of a certain person deceased, "according to the statute made for the distribution of intestate's effects, and his, her, or their heirs and assigns forever; and if there shall be more than one such person, they shall take as tenants in common, and not as joint tenants," it was held that, there being nothing in the will to show a contrary intention, the persons who made out their right to be legatees as next of kin, by representation according to the statute, must, under the will, take by virtue of that representation, and only take the share of the person they represent.

Where a gift is to testator's own next of kin "under the Statute of Distribution," the statute governs the division as well as ascertains the objects who are to take, unless the testator expresses that the division is to be otherwise. *Lewis v. Morris* (1854) 19 Beav. 34, 52 Eng. Reprint, 261.

In *Davies v. Edwards* [1910] 2 Ch. (Eng.) 74, 79 L. J. Ch. N. S. 500, 103 L. T. N. S. 130, where testator gave a moiety of the residue of his estate "for and equally between the person or persons who at my death shall be my next of kin according to the statute for the distribution of the estates of intestates," it was held that as the testator had not in terms referred to the statutory mode of distribution, but on the contrary directed that the statutory next of kin should take equally, effect must be given to that direction by making an equal division per capita.

In *Re Labatt* (1916) 11 Ont. Week. N. 250, where testator gave the income of his residuary estate to his wife for life, and directed that on her death it be divided "unto and equally between and amongst the person or persons who at the decease of my said wife would be my next of kin and entitled to my personal estate under the

English statutes for the distribution of the personal estate of intestates," it was held that as the statute was referred to only for the purpose of defining the class, and there being nothing in the will to indicate in any way that the distribution was to be in such a way as would follow upon intestacy, the property must be divided "equally" among the persons entitled, and so per capita.

c. Under a bequest to "relations" or "relatives."

For instances of bequests to the "relatives" of the testator and of the testator's wife or husband, see III. w, *infra*.

In *Roach v. Hammond* (1715) Prec. in Ch. 401, 24 Eng. Reprint, 180, it was held that, where a man devises his property for the use of his "relations," those who by the Statute of Distribution would be entitled to the personal estate in case he died intestate should be let in to the same proportions only.

Under a gift to "relations according to their heirship," each will take the quantity provided by the statute in case of intestacy. *Mosier v. Bowser* (1907) 226 Ill. 46, 80 N. E. 730.

Under a bequest of a fund to be divided "equally between my blood relations of the degree which the law permits," the persons entitled take per stirpes, such words seeming to have been used to denote the mode of distribution provided by the statute. *Cummings v. Cummings* (1883) 146 Mass. 501, 16 N. E. 401.

In *Thompson v. Thornton* (1908) 197 Mass. 273, 83 N. E. 880, where testator gave his residuary estate "in equal shares to my relatives by right of representation under the statutes of this commonwealth," it was held that the intention of the testator was to have his estate distributed according to the law for the distribution of intestate estates.

In *Fielden v. Ashworth* (1875) L. R. 20 Eq. (Eng.) 410, 33 L. T. N. S. 197, where testator directed his executor to "distribute the residue to my relatives, share and share alike, as the law directs," it was held that, if the

interest had been merely to the relatives share and share alike, then the relatives would have included only those under the Statute of Distribution, and it would have made them take per capita and not per stirpes; but as the testator had added the phrase, "as the law directs," it was necessary, in order to give it effect, to disregard the words "share and share alike," and distribute the property among the relatives of different degrees as directed by the Statute of Distribution.

The language of the will may, however, be such as to exclude the implication of an intention that the "relations" shall take in the proportions fixed by the statute.

Thus, in *Thomas v. Hole* (1728) Cas. t. Talb. 251, 25 Eng. Reprint, 762, it was held that under a devise to the "relations" of a certain person, "to be divided equally between them," the persons entitled took per capita.

And in *Blossom v. Sidway* (1882) 5 Redf. (N. Y.) 389, where testator desired the distribution of his furniture, books, and household articles "among my relatives mentioned in my will," it was held that the allotment should be per capita, and not per stirpes.

Under a bequest to testator's "relations," to be divided between them according to the discretion of the executors, such relations take per capita, where, by reason of the death of the executors, the discretion cannot be exercised. *Tiffin v. Longman* (1852) 15 Beav. 275, 51 Eng. Reprint, 543.

So, also, in *Hoey v. Kenny* (1857) 25 Barb. (N. Y.) 396, where testator gave a share of his estate for the use of his wife during her natural life, "and by her to be divided and distributed by will among my relatives, in such shares as she may see fit and deem to be just," and the widow died without exercising the power of distribution, it was held that the law would make such distribution in equal shares among all testator's relatives living at the death of the widow, per capita and not per stirpes.

d. Under a bequest to the "family" of one individual or married couple.

For instances of bequests to the "families" of several individuals, see III. m, *infra*.

For instances of bequests to one and his "family," see III. s, *infra*.

For instances of bequests to the husband or wife of the testator and their children, see III. r, 2, *infra*.

Under a bequest to one for life, with remainder to his "family," his widow and children take in equal shares. *Bates v. Dewson* (1880) 128 Mass. 334.

Under a devise to the "family" of certain persons, the children of living parents are excluded, since, even if taken as meaning descendants or issue, such result would follow under the Massachusetts rule. *Townsend v. Townsend* (1892) 156 Mass. 454, 31 N. E. 632.

e. Under a bequest to testator's "grandchildren."

For instances of bequests to the "children," "issue," or descendants" of several persons, see III. l, *infra*.

Under a bequest to testator's grandchildren, they will ordinarily take per capita, the mere fact that some families will thus take more than others not being regarded as warranting the contrary construction. See *Walters v. Crutcher* (1854) 15 B. Mon. (Ky.) 2; *Bragg v. Carter* (1898) 171 Mass. 324, 50 N. E. 640; *Maguire v. Moore* (1891) 108 Mo. 267, 18 S. W. 897; *Stevenson v. Lesley* (1877) 70 N. Y. 512; *Herneisen v. Blake* (1850) 1 Phila. (Pa.) 131; *Anderson v. Bell* (1882) 8 Ont. App. Rep. 531.

The implication of a contrary intention may sometimes (see *Stoutenburgh v. Moore* (1883) 37 N. J. Eq. 63, affirmed without opinion in (1884) 38 N. J. Eq. 281; *Archer v. Legg* (1862) 31 Beav. 187, 54 Eng. Reprint, 1109), though not invariably (see *Potts v. Shirley* (1906) 28 Ky. L. Rep. 872, 90 S. W. 590; *Hill v. Spruill* (1846) 39 N. C. (4 Ired. Eq.) 244; *Remillard v. Chabot* (1903) 33 Can. S. C. 328), be found in the gift of a precedent interest to the respective parents. These cases are discussed in subd. I. u.

Where the gift is limited, by a subsequent enumeration, to a part only of testator's grandchildren, it may be inferred that they are not to take per stirpes. See *Huggins v. Huggins* (1884) 72 Ga. 825.

A direction that they are to take equally is indicative of a per capita division. See *Morrill v. Phillips* (1886) 142 Mass. 240, 7 N. E. 771; *Van Cott v. Van Cott* (1915) 167 App. Div. 694, 152 N. Y. Supp. 840, affirmed without opinion in (1916) 219 N. Y. 673, 114 N. E. 1085; *Wight v. Church* (1868) 15 Grant, Ch. (N. C.) 413.

A direction for distribution according to the laws of the state shows that they are to take per stirpes. See *Hopkins v. Keazer* (1896) 89 Me. 347, 36 Atl. 615.

Review of the decisions.

In *Hopkins v. Keazer* (Me.) supra, it was held that, under the terms of a will by which testatrix, upon the death of all her children, devised certain property "to my grandchildren then alive, said grandchildren receiving the share the parent would have received if distribution thereof had been made under the laws of Maine," and similarly giving the residue, upon the decease of all her children, "to my grandchildren, the same to be distributed in accordance with the laws of Maine," the grandchildren took per stirpes.

In *Morrill v. Phillips* (Mass.) supra, provisions in a will that the property should "go to all my grandchildren in equal shares," and that it was to go "then equally to all my grandchildren that may be living," were held to show clearly that the testator contemplated and intended that each grandchild should have the same share, and repelled the claim that the property should be divided among them per stirpes.

Under a devise "to my grandchildren who may then be living, to be equally divided between them," the grandchildren take per capita. *Bragg v. Carter* (1898) 171 Mass. 324, 50 N. E. 640.

In *Maguire v. Moore* (1891) 108 Mo. 267, 18 S. W. 897, where testator, who had given to his wife and children,

"or their heirs," one fifth each of the net income from the rental of his real estate, directing that the children of a deceased daughter should receive her fifth, further directed: "After the death of the last of my children, I desire that my real estate shall be sold to the best advantage, and the proceeds equally divided among my wife or her heirs and my grandchildren or their heirs living at the time," it was held that as there was no intimation contained in the will that the grandchildren were not to be equal participants in the fund to be distributed, but as, on the contrary, they were expressly mentioned as equal participants, they took per capita, and not per stirpes.

In *Stevenson v. Lesley* (1877) 70 N. Y. 512, affirming (1877) 9 Hun, 637, where testator gave his residuary estate "in trust for my grandchildren, namely, the children of my son, Alexander M. Lesley, and the survivors of them, share and share alike, and the children of my daughter Ellen J. Stevenson, deceased, and the survivors of them, share and share alike, to be paid and conveyed to each of said children respectively as they become of age, in equal shares, and in the meantime the income of my said estate shall be applied to the necessary support, maintenance, and education of each of said children," it was held that both the language of the will and the authorities pointed to a distribution per capita. The court of appeals in this case does not state its reason for this decision, but refers with approval to the opinion of Davis, P. J., in the court below, who said: "The residuum is given to the trustees named in solido, in trust for the testator's grandchildren; no part or interest is given to either of the parents, and such parents are named only for the purpose of designating more particularly the grandchildren who are the objects of his bounty. The description is preceded by the phrase 'namely,' which of itself indicates only particularity of description, when it follows such general language as the testator first uses. In that mode he proceeds to point out the

grandchildren intended, as, first, the children of his son, second, the children of his daughter; and, the words 'share and share alike, in respect of each, as used in connection with the words 'survivors,' indicate nothing further than an intention that the distribution shall be made amongst such of the grandchildren as survive the testator. . . . But the language which follows the particular designation of the persons meant as his grandchildren cannot be satisfied by any other interpretation than that which makes the legacies equal per capita. It is as follows: 'To be paid and conveyed to each of said children' (to wit, the children of his son and daughter), 'respectively, as each becomes of age, in equal shares, and, in the meantime, the income of my said estate shall be applied to the necessary support, maintenance, and education of each of said children, under the care of said executors.' In this clause the children of his son and daughter are grouped together as a class constituting the grandchildren of the testator; and his bounty is plainly given to them, share and share alike, as such grandchildren, and not because they represent their respective parents. To my mind this is altogether the more reasonable and just construction, for the larger gifts to the son, which the testator bestows in other parts of the will, afford good reasons for equality amongst the grandchildren, rather than a continuance of the same spirit of partiality; and the whole will, taken together, shows that he knew how, and was careful, to select his language when he meant to discriminate in favor of his son in bestowing his bounty; a selection of words which he has as carefully avoided in providing for his grandchildren."

In *Van Cott v. Van Cott* (1915) 167 App. Div. 694, 152 N. Y. Supp. 840, affirmed without opinion in (1916) 219 N. Y. 673, 114 N. E. 1085, where testator devised certain property in trust during the life of his wife, and directed his trustees, upon the death of his wife to sell the property, "and the proceeds of the said sale to

receive, and to divide into equal shares and pay over one of said shares to each of my grandchildren, Isabella Virginia Van Cott, Mortimer Van Cott, Jr., and Elbert Van Cott (children of my daughter Ida A. Van Cott), Mildred D. Cornwell (daughter of my son Millard Filmore Cornwell), Alma B. Lyons, Harold Lyons, and Cornwell Lyons (children of my deceased daughter, Clara Louise Lyons), and to their survivors at the time of the decease of my said wife, per stirpes and not per capita, and to the issue of such of my said grandchildren as shall have died before the of my said wife, per stirpes and not per capita, and so that the issue of each deceased grandchild of mine, living at the time of the death of my said wife, shall take the part or share which his, her, or their parent would have been entitled to, if then living," it was held that as the entire plan of testator's will, and his intention as disclosed thereby, were to put his grandchildren on a plane of perfect equality as participants in his bounty, and to treat them alike in the distribution of his estate, and as, in the clause in question, he explicitly required his executors to divide the proceeds of sale into equal shares and pay over one of such shares to each of his grandchildren, the words, "per stirpes and not per capita," used after the phrase "and to their survivors at the time of the decease of my said wife," must be treated as meaningless and nugatory, and as inserted by inadvertence.

In *Herneisen v. Blake* (1850) 1 Phila. (Pa.) 131, where testator devised all his real estate "to all my grandchildren, the children of my said daughter Ann Margaret, born and to be born, and the two children of my deceased son George, to be equally divided between my said grandchildren, their respective heirs and assigns," it was held that the clause of division of the grandchildren into two classes was an evident parenthesis, the object of which was not to classify, but to point out the objects of his bounty to be not merely testator's grandchildren who might be then

living, or who might be living at the period of his death, but such also as might be born at any time afterwards; and that the use of the preposition "between" was not of itself sufficient to indicate an intention that the division should be per stirpes.

In *Wight v. Church* (1868) 15 Grant, Ch. (U. C.) 413, testator devised all his real estate "for the use and benefit of my two daughters, Mary Wight, Isabella Wight, and my granddaughter Mary Jane, the daughter of the aforesaid Isabella, during their lives," and directed that, "after the death of the above-named persons to whom the same is left, then I desire that the same may be sold, and the proceeds of such sale be equally divided among all my grandchildren, share and share alike, without distinction of sex, or otherwise," it was held that the grandchildren took per capita, and not per stirpes.

In *Anderson v. Bell* (1882) 8 Ont. App. Rep. 531, affirming (1882) 29 Grant, Ch. (U. C.) 452, where testator bequeathed his residuary estate "to my grandchildren, the children of James Cathcart and of my daughter Ann Jane Bell, wife of Duncan Bell, share and share alike, on their coming of the age of twenty-five years each," and further provided that when the revenues of his estate should amount to a certain sum, then one half should be divided share and share alike "between the family of my son James Cathcart and the family of my daughter Ann Jane Bell," and that the other half be put into the general funds of his estate, and be divided with them, it was held that the grandchildren were to take as individuals, the additional words being merely intended to define with more particularity who such grandchildren were, and therefore that they took per capita; and that such construction was confirmed by the fact that the income given to the "families," i. e., the children, of his son and daughter, was to be divisible per capita.

f. Under a bequest to "descendants."

For instances of bequests to the "descendants" of several persons, see III. 1, *infra*.

For instances of bequests to certain persons "and their descendants," see III. q, 8, *infra*.

For instances of bequests to persons living and the "descendants" of any deceased, see III. v, *infra*.

In bequests to descendants equally, or to all the descendants of any person, or to the descendants simply, the rule is that all take per capita unless a contrary intention appears. *Levering v. Orrick* (1903) 97 Md. 139, 54 Atl. 620; *Barstow v. Goodwin* (1853) 2 Bradf. (N. Y.) 413; *Re Voight* (1917) 164 N. Y. Supp. 738, affirmed on opinion below in (1917) 178 App. Div. 751, 164 N. Y. Supp. 1117; *Crow v. Crow* (1829) 1 Leigh (Va.) 74 (obiter); *Crossly v. Clare* (1761) 1 Ambl. 397, 27 Eng. Reprint, 264; *Butler v. Stratton* (1791) 3 Bro. Ch. 367, 29 Eng. Reprint, 587.

Under a bequest to "descendants" of certain persons "in such proportions as each may be entitled to under" the Statute of Distribution, the children of living parents are excluded. *Smith v. Pepper* (1859) 27 Beav. 86, 54 Eng. Reprint, 34.

Review of the decisions.

In *Re Voight* (1917) 164 N. Y. Supp. 738, affirmed on opinion below in (1917) 178 App. Div. 751, 164 N. Y. Supp. 1117, where testator gave a sum of money in trust to pay the annual income to a daughter during her life, "and at her death to pay the principal thereof to her lawful descendants," it was held that the fact that elsewhere in the will there were many and repeated instances of the use of the word "issue," in such a relation only as to produce a direction for a stirpital distribution, did not afford a sufficient inference of an intention to use the word "descendants" in any other than its primary sense, as importing a per capita distribution.

In *United States Trust Co. v. Nathan* (1920) 112 Misc. 502, 183 N. Y. Supp. 66, affirmed without discussion of this point in (1921) 196 App. Div. 126, 187 N. Y. Supp. 649, where testator bequeathed property "to my descendants according to the law of the state of New York, now in force, regulating the distribution of person-

al property in case of intestacy," it was held to be evident that the distribution intended was the statutory distribution per stirpes, and not per capita.

In *Whitehead v. Ginsburg* (1921) 197 App. Div. 266, 188 N. Y. Supp. 739, where testatrix bequeathed certain stock in trust to pay an annuity from the dividends to the testatrix's sister-in-law Mary E. Yates during her lifetime, "and to divide the balance of said dividends equally between my said sons; and, in case of the decease of either of my sons during the life of said Mary E. Yates, to pay the share of dividends to which my said sons would have been entitled to the lineal descendants of such deceased son in equal shares. On the decease of said Mary E. Yates, then I direct my executors to divide said stock equally between my said sons, the lineal descendants of any deceased son to be entitled to the portion to which their parent would have been entitled if living,"—it was held that, as the principal was to be distributed per stirpes, the income which a son dying during the continuance of the trust estate would have received should be divided among his descendants per stirpes also. Smith, J., dissenting, drew a contrary inference from the fact that the corpus was to be distributed per stirpes, saying: "There appears to be no reason why the direction for the per stirpital division which governs the distribution of the corpus of the fund should not have been included in the provision for the distribution of the surplus income, if the testator had so desired. In fact, the contrary intention would seem to be indicated by the omission."

In *Crossly v. Claire* (1761) 1 Ambl. 397, 27 Eng. Reprint, 264, it was held that under a devise to the descendants of certain persons, of property to be sold and the money to be divided equally among them, they took, though in unequal degrees, per capita.

In *Butler v. Stratton* (1791) 3 Bro. Ch. 367, 29 Eng. Reprint, 587, it was held that, under a gift to divide the proceeds of certain property "equally between the descendants of" certain persons, the word "equally" would

have the effect to make the descendants take per capita.

g. Under a bequest to "issue."

The question as to whether, under a bequest to "issue," they take per stirpes or per capita, is covered by the annotation in 2 A.L.R., at page 963, which is supplemented by the annotation in 5 A.L.R. 195.

For instances of bequests to the "issue" of several persons, see III. l, *infra*.

For instances of bequests to persons living and the "issue" of any deceased, see III. v, *infra*.

h. Under a bequest to "nephews and nieces."

For instances of bequests to the children, issue, or descendants of several persons, see III. l, *infra*.

For instances of bequests to brothers and sisters and nephews and nieces, see III. q, *infra*.

The decisions warrant the generalization that under a bequest to "nephews and nieces," as such, no implication arises from the nature of the relationship that they are to take by families. See *McIntire v. McIntire* (1904) 192 U. S. 116, 48 L. ed. 369, 24 Sup. Ct. Rep. 196; *Post v. Jackson* (1898) 70 Conn. 283, 39 Atl. 151; *Nichols v. Denny* (1859) 37 Miss. 59; *Campbell v. Clark* (1887) 64 N. H. 328, 10 Atl. 702; *Re Verplanck* (1883) 91 N. Y. 439; *Scott's Estate* (1894) 163 Pa. 165, 29 Atl. 877; *Hartley's Estate* (1912) 22 Pa. Dist. R. 417; *Esbenshade's Estate* (1914) 23 Pa. Dist. R. 1069; *Mitchner's Estate* (1873) 30 Phila. Leg. Int. (Pa.) 336, 1 Leg. Chron. 301.

Review of the decisions.

In *McIntire v. McIntire* (1904) 192 U. S. 116, 48 L. ed. 369, 24 Sup. Ct. Rep. 196, affirming (1902) 20 App. D. C. 134, where a testator, who held promissory notes of his brother Charles for \$1,350.63, made an illiterate will by which he declared: "I . . . do will, bequeath or devise, to my nephews and nieces, that is to say, from July the 1st, 1854, to the opening of on reading of this paper, \$1,350.64 is to be calculated at 6 per cent interest, that amount whatever it may be

is to be given to each of my brother Edwin's children. The remainder if any, is to be equally divided between my brothers Edwin and Charles children." At the date of the will, the brother Charles was living and had two sons, and the brother Edwin had died, leaving six children. It was held that the general rule of construction must prevail, according to which, in the case of a gift to the children of several persons described as standing in a certain relation to the testator, the objects of the gift take per capita and not per stirpes, and that a contrary conclusion could not be based upon the use of the word "between," in view of the illiteracy of the will.

In *Post v. Jackson* (1898) 70 Conn. 283, 39 Atl. 151, where testator said: "I give, devise, and bequeath to my nephews and nieces, they being my lawful heirs, all the rest and residue and remainder of my property, real and personal," it was held that as a devise to the nephews and nieces in the character of "heirs" would be inoperative, since they would take as heirs and not under the will, it was not to be supposed that the testator meant, in using such words, to alter the effect of the phrase "my nephews and nieces," but that they were used as explanatory of the reason for the gift; and therefore that a per capita distribution should be made. The court also pointed out, as supporting this conclusion, the circumstances that testator was a widower and childless, and that his nephews and nieces were his only living kindred by blood, and would naturally present themselves to his mind as directly related to him, and each equally dear and an object of his bounty, rather than as representing to him his deceased brothers and sisters.

In *Nichols v. Denny* (1859) 37 Miss. 59, testator, who had two stepbrothers, Philip and Charles Nichols, and two living sisters, Mrs. Denny and Mrs. Surget, gave his personal property to his mother during her lifetime, "then one half the balance to be given to my dear stepbrothers Philip and Charles Nichols; the balance to be equally di-

vided between my nephews and nieces, Surgets and Dennys." It was held that there was nothing to prevent the application of the rule that, where a gift is to the children of several persons, they take per capita, and not per stirpes.

In *Campbell v. Clark* (1887) 64 N. H. 328, 10 Atl. 702, where testatrix devised the remainder of her estate "in equal shares to my nieces and nephews and to the nieces and nephews of my former husband, John Carr," it was held that, the gift being to the nieces and nephews as a class, they took per capita.

In *Re Verplanck* (1883) 91 N. Y. 439, testatrix, whose only next of kin and heirs at law were her brother John Henry and her sister Elizabeth, the brother being a widower having one son and one daughter, and her sister having nine children, gave the residue of her personal property "to my said nephews and nieces, the sons and daughters of my brother John Henry and my sister Elizabeth, to be divided equally between them. In case of the death of any such nephew or niece before me, what would have been his or her share, if living, I give to his or her issue, if any, equally. If there be none, then to the survivors of my last aforesaid nephews and nieces, and the issue of those deceased, per stirpes and not per capita." The context of the will showed that she did not intend to preserve an equality between the two families, that in another gift to the children of her brother and sister she clearly intended a per capita division, and that she knew the significance of the words 'per stirpes' and 'per capita,' and how to apply them where necessary. It was held that in view of such context, and of the fact that the legatees were all of equal degree of relationship to the testatrix, and apparently all had equal claims upon her bounty and liberality and of the fact that she spoke of them as "the sons and daughters" of her brother and sister, when the son had but one son and one daughter, and of the fact that they were first described as nephews and nieces, the further language describing them as

the sons and daughters of her brother and sister having been probably inserted for the purpose of distinguishing these nephews and nieces from her nephews and nieces who were of the blood of her husband, for some of whom she had made provision in her will, and as in the latter part of the residuary clause she showed, in providing for the event of the death of any nephew or niece before her, that she was thinking of her nephews and nieces as the original stock, it being their issue only that were to take by substitution in case of their death before her, and in view of the further provision therein that, if any of her nephews or nieces should die without issue before her, the share of the one so dying should go to the survivors of her "nephews and nieces, and the issue of those deceased, per stirpes and not per capita"—such nieces and nephews took per capita, and not per stirpes. It was further held that a codicil by which testatrix gave to the children of her brother and their issue, "as a part of their share of such residuary bequest," a bond and mortgage made by their father, was not significant of an intention that the two children, between them, should take but one share.

In *Scott's Estate* (1894) 163 Pa. 165, 29 Atl. 877, testatrix, who had given the residue of her estate to a niece, directed that, should the niece die without issue, such residue should "be divided among my nephews and nieces, to wit, the legal heirs of Mrs. Lilly A. Gwin [a sister], the heirs of my deceased brother, James A. Scott, and the lawful heirs of my beloved brother, John W. Scott, and Anna R. Stuckey [a niece], each to take share and share alike." Her sister, Mrs. Gwin, survived the testatrix; as did her brother, John W. Scott. Testatrix had nieces and nephews other than those mentioned or referred to. It was held that whether the technical rules of construction were applied to such residuary clause, or whether it was given the plain meaning which its words imported and its grammatical structure required, it must be construed as giving the residue to the

nieces and nephews referred to, per capita, the court saying: "The benefit here was evidently intended for the legatees individually, as nephews and nieces, and not as representing their parents, who in two instances are still living and were entirely passed over. The nephews and nieces are treated as if their parents were dead; and in that case, if there were no will, the estate would go per capita under the intestate laws to the beneficiaries and others occupying the same position. The intestate laws, which would have required a distribution per stirpes, are passed over in order to exclude brothers and sisters and give the estate directly to nephews and nieces. That having been done, distribution under the law would then be per capita; and the presumption is in favor of such an intention on the part of the testator, in the absence of evidence in the will of a purpose to further supersede the statute."

In *Hartley's Estate* (1912) 22 Pa. Dist. R. 417, construing a will by which testator gave a share of his residuary estate in trust to pay one half of the income to his sister Mary Anna Higgins and the other half to his brother William Henry Hartley and his wife, for and during the term of their natural lives, and from and after their decease in trust to divide the principal sum "between my nephews and nieces (the children of my said sister or brother) who shall be then living, and their lawful issue in equal parts, share and share alike, so nevertheless that such lawful issue shall take and receive such part and share only of the said one fifth part of my said estate as his, her, or their parents would have had and taken if then living," it was held to be apparent that the testator intended the nephews and nieces to take, not as children of their parents, but as a single class, and hence per capita, notwithstanding the fact that in other parts of the will he had given each set of children, as a class, the remainder expectant upon the death of their parents.

In *Esbenshade's Estate* (1914) 23 Pa. Dist. R. 1069, construing a will

by which testatrix gave all her estate "unto my nephews and nieces living at the time of my decease and the issue of any of them dead per stirpes," it was held that as manifestly the testatrix had nephews and nieces in her mind as the object of her benefaction and because they were her nephews and nieces, "not by reason of them being the children of brothers and sisters," and as they, and not their parents, were recognized as the stirps, the intention of the testatrix was manifest that they were to take per capita.

In *Re Mitchener* (1873) 30 Phila. Leg. Int. (Pa.) 336, 1 Leg. Chron. 301, where testatrix directed a division of the residue of her estate "equally among my nieces and nephews, children of Rynear, William, and Jesse Tyson (my brothers), share and share alike," it was held that the distribution should be per capita, and not per stirpes.

4. Under a bequest to "legal representatives."

For instances of bequests to persons named or to members of a class "and their representatives," see III. t, *infra*.

In *Thompson v. Young* (1866) 25 Md. 450, it was held that a bequest to "the legal representatives of" a certain person was equivalent to a bequest to the next of kin, and accordingly that the persons entitled took according to their respective relationships; if standing in equal degree, per capita; if in unequal degrees, per stirpes.

In *Holloway v. Radcliffe* (1857) 23 Beav. 163, 53 Eng. Reprint, 64, 26 L. J. Ch. N. S. 401, 3 Jur. N. S. 198, 5 Week. Rep. 271, where testator bequeathed a share of his estate "unto and equally among my legal personal representatives in such and the like manner as if the same had been then, or at that time, to be paid under the Statute of Distribution," it was held that as the testator had referred to the statute not only for the purpose of pointing out the persons to take, but also the manner in which they were to take, the division should be according to the statute.

5. Under a bequest to persons named.

For instances of bequests to persons named "and their representatives," see III. t, *infra*.

A legacy to persons named is *prima facie* a gift to them as individuals, although they may in fact constitute a class, and they will accordingly take per capita. *Re Fisk* (1920) 182 Cal. 238, 187 Pac. 958; *Marsh v. Dellinger* (1900) 127 N. C. 360, 37 S. E. 494; *Re Brogden* (1920) 180 N. C. 157, 104 S. E. 177; *Hicks's Estate* (1890) 134 Pa. 507, 19 Atl. 705; *Priester's Estate* (1903) 23 Pa. Super. Ct. 386; *Re Holder* (1898) 21 R. I. 48, 41 Atl. 576; *Rogers v. Morrell* (1909) 82 S. C. 403, 129 Am. St. Rep. 899, 64 S. E. 143; *Malone v. Majors* (1847) 8 Humph. (Tenn.) 577.

It is to be noted, however, that in cases not falling within the scope of this note, the context has been held to show that persons named were to take as a class, and not as individuals.

In *Re Fisk* (Cal.) *supra*, where testatrix directed her residuary estate to "be divided equally between my daughter-in-law Maude Bryant Fisk, and the four children of my late husband's sister, Mrs. W. Dunn, namely, William Dunn, Aida Furst, Charles Dunn, and Clarence Dunn," it was held that the strong inference to be derived from the use of the word "between" by the testatrix, who was a cultured woman and well acquainted with the use of language, was overcome by the use of the names of the residuary legatees, and that a consideration of the residuary clause showed that she had in mind five individuals to whom the residuary legacies were to go, and that in providing for distribution these individuals thus named were to share alike.

In *Hicks's Estate* (1890) 134 Pa. 507, 19 Atl. 705, where testator, who was his own draftsman and apparently a person of but ordinary education, directed his property to be "equally divided between my wife Martha R. Hicks, and my daughters Ida Bell and Bella Billmeyer if living at my death," it was held that the use of the word "between" was not sufficient to indicate an intention that the wife should

take one half and the daughters the other, but that the fact that the daughters were individually named showed an unmistakable purpose that each should share equally with the wife in the distribution.

In *Priester's Estate* (1903) 23 Pa. Super. Ct. 386, a will evidently drawn by an unlearned scrivener, and signed by the testatrix with her mark, provided as follows: "i give and bequeath to Ditty Hartman Lotta Hartman Charlie Hartman Heirs of caroline Priester intermarried to charlie hartman and Lewis Priester and charlie Priester and Mary Priester Jacob Priester and Katy Priester Hannah Priester Elizabeth Priester Henry Priester i bequeath all Personal Property and Moneys and Real estate to be equally divided share and share like except My grand child William Priester \$300. i give to him." It was held to be sufficiently apparent from the will that the testatrix intended the children of her daughter Caroline to take equal shares per capita with her son and daughters, and that the introduction of the words "Heirs of caroline Priester intermarried to charlie hartman" was for the purpose of identification, and did not evince an intention to create a class to include the first three named devisees.

In *Re Holder* (1898) 21 R. I. 48, 41 Atl. 576, where testatrix directed a share of her estate "to be divided equally among my cousin George Stone, and his wife Mary Stone, and my friend Fanny Northup," it was held that in view of the use of the word "among," and the fact that the three persons named all stood on the same footing in the will, they were to take in equal shares.

In *Rogers v. Morrell* (1909) 82 S. C. 402, 129 Am. St. Rep. 899, 64 S. E. 143, a will provided: "I further bequeath unto Henry W. Morrell and W. F., L. M., and Hazel S. Gilbert, all my notes, mortgages, and moneys to be equally divided between them," and directed other property to be sold and the proceeds "equally divided between the legatees above named." Henry W. Morrell was a son of the testator, and

the other persons named were children of a predeceased daughter. It was held that the word "between" was intended to mean "among," and that the word "and" after the name Henry W. Morrell was insufficient to show that testator intended that the other legatees named should not take per capita.

In *Malone v. Majors* (1847) 8 Humph. (Tenn.) 577, where testator, who had given his wife the use of a share of his property during her life, directed it "to be equally divided at her death between my brother Joshua Ward's three daughters, Rachael, Rhody, and Sealy, and Thompson Ward, son of my brother, James Ward, to them and their heirs forever," it was held to be clear that each of the individuals named took per capita, and not per stirpes.

k. Under a bequest to "legatees" elsewhere named in the will.

Where a legacy is given by the testator to his "legatees" as such, and some of such legatees have elsewhere in the will been designated as a class, the question may arise as to whether they are to participate in such legacy as individuals, per capita, or as a group, per stirpes.

In *Ruggles v. Randall* (1897) 70 Conn. 44, 38 Atl. 885, where testator gave the residue remaining after the payment of debts and legacies, "to all the legatees named in this will to be equally divided among them all, all to share and share alike and in equal amounts of the same," it was held that the class receiving any legacy, however numerous, should be treated as a unit as respects the division of the surplus, the court saying: "The right to share in it was an incident of each of these legacies, and it is more reasonable to suppose that the testator intended the number of shares to be that of the different legacies that took effect, than that of the individuals between whom these legacies might, by the accident of death and consequent substitution, happen to be divided. It was uncertain, in the testator's mind, whether there would be any residuary estate. There were, in all, twenty-seven legacies given to as

many individuals or classes, and of these eighteen were subject to lapse. The number of residuary shares, therefore, under the construction of the will which we adopt, could not exceed twenty-seven, and might be only nine, while if the division were to be made per capita, among all the individuals who shared in any legacy, the portion of each might be a mere trifle. It is to be presumed that the testator intended that his residuary legatees should receive, if anything, what would be of substantial benefit."

In *Baker v. Baker* (1910) 152 Ill. App. 620, where testator, after making various specific dispositions went on to state: "the balance of my estate, if any, I give, devise, and bequeath (to be divided equally) to the legatees herein except those that I have bequeathed \$1 each," and it appeared that the legatees who were to share in the residue were related to the testator in different degrees, being his wife, his three children, seven of his grandchildren, and three of his great grandchildren, it was held that as testator, wherever he desired to favor one child or grandchild more than another, had apparently done so in plain specific words, and as it appeared, from the language excepting the persons to whom he had given a nominal amount, that he was thinking of his legatees as a class, the residuary estate should be divided per stirpes.

In *Haskell v. Sargent* (1873) 113 Mass. 341, where testatrix in the first article of her will devised a house to her niece by name, in the second another house to two grandnieces by name, in a third, directed that any deficiency of her personal estate should be made up by money advanced by the legatees "in proportion to the value of each of said houses," and in a subsequent article bequeathed "to the legatees heretofore named in the first and second articles of this will, all of [certain described lands] to be equally divided between said legatees," it was held that the reference to the first and second articles of the will signified some other purpose than merely to point out the individuals to be benefited, but indicated that the

gift was something additional to the former one; and that the testatrix had in mind the relations and order of disposition which had been before set forth; and that this circumstance, taken in conjunction with the use of the word "between," strictly implying but two parties to the division, indicated an intention to treat the grandnieces collectively as representing their parent in equal degree of kindred with the niece.

In *Hastings v. Earp* (1866) 62 N. C. (Phill. Eq.) 5, where a testator, who had given legacies to the children of a deceased daughter by name and to the children of a deceased son as a class, directed the proceeds of his residuary estate to "be equally divided amongst all of the legatees named in the will," it was held that the children of the son were entitled to take per capita with the children of the daughter.

In *Corbley v. Patterson* (1893) 3 Ohio S. & C. P. Dec. 702, 3 Ohio N. P. 315, where testator, who in his will had referred to the children of deceased brothers and sisters as the "heirs" of the deceased brother or sister, making provision for them by families and not separately by name, with one exception, and remembering each family as a class in separate paragraphs, further directed any residue to be divided "in a pro rata rate between the heirs named in my will," it was held that, as the children of deceased brothers and sisters had been treated in the will as families, they took the residue per stirpes, and not per capita.

In *Uffner v. Lewis* (1903) 5 Ont. L. Rep. 684, testator gave the most valuable part of his estate to his adopted son John upon his attaining the age of twenty-five years, a legacy of \$500 to his sister Rachael, providing that in case of her death it should be paid to her daughter, or, in case of the daughter's death, to the daughter's children, \$500 to his niece Mary, daughter of his deceased brother David, \$500 "to the children of Sarah Uffner," another daughter of his brother David, "in even and equal shares," and \$500 to a charitable in-

stitution, directing that "should it be found that there will not be sufficient of my estate (other than John's) left to pay or satisfy all the said legatees their legacies aforesaid in full," each of the said legacies should be proportionately reduced. He then provided that should there be a residue it should be divided among the "legatees hereinbefore named and referred to, . . . in even and equal shares and proportions." It was held that, as by the actual division and distribution of what testator considered might possibly be a disposition of the whole of his estate, he had shown what he meant by a division of payment to and among his legatees named and referred to, in even and equal shares and proportions, the children of Sarah Uffner were entitled to participate in the residuary gift as a class rather than as individuals.

1. Under a bequest to the "children," "issue," or "descendants" of several persons.

For instances of bequests to the "descendants" of a single person, see III. f, *supra*.

For instances of bequests to the "issue" of a single person, see annotation in 2 A.L.R. 963, and supplemental annotation in 5 A.L.R. 195.

For instances of bequests to several persons for life, and at their decease to their children, see III. u, *infra*.

For instances of bequests to persons living and the "issue," "children," or "descendants," of any deceased, see III. v, *infra*.

Under a bequest to the children of several persons the children take per capita and not per stirpes, in the absence of words indicating a different intention.

United States.—McIntire v. McIntire (1904) 192 U. S. 116, 48 L. ed. 369, 24 Sup. Ct. Rep. 196; Moffit v. Varden (1840) 5 Cranch, C. C. 658, Fed. Cas. No. 9,689.

Alabama.—Smith v. Ashurst (1859) 34 Ala. 208 (obiter); Taylor v. Cribbs (1911) 174 Ala. 217, 56 So. 952.

Connecticut.—Hoadley v. Beardsley (1915) 89 Conn. 270, 93 Atl. 535.

Delaware.—Re Nelson (1909) 9 Del. Ch. 1, 74 Atl. 851.

Georgia.—Rogers v. Smith (1916) 145 Ga. 234, 88 S. E. 963.

Kentucky.—McFatridge v. Hotzclaw (1893) 94 Ky. 352, 22 S. W. 439.

Massachusetts.—Weston v. Foster (1843) 7 Met. 297; Balcom v. Haynes (1876) 14 Allen, 204; Hill v. Bowers (1876) 120 Mass. 135.

Mississippi.—Nichols v. Denny (1859) 37 Miss. 59.

Missouri.—Re Mays (1917) 197 Mo. App. 555, 196 N. W. 1039.

New Jersey.—Benedict v. Ball (1884) 38 N. J. Eq. 48; Budd v. Haines (1894) 52 N. J. Eq. 488, 29 Atl. 170.

New York.—Collins v. Hoxie (1841) 9 Paige, 81; Re Verplanck (1883) 91 N. Y. 439.

North Carolina.—Whitehurst v. Pritchard (1810) 5 N. C. (1 Murph.) 383; Stowe v. Ward (1825) 10 N. C. (3 Hawks.) 604; Ward v. Stow (1834) 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 238; Kirkpatrick v. Rogers (1848) 41 N. C. (6 Ired. Eq.) 130; Adams v. Adams (1855) 55 N. C. (2 Jones, Eq.) 215; Chambers v. Reid (1862) 59 N. C. (6 Jones, Eq.) 304; Britton v. Miller (1869) 63 N. C. 268; Howell v. Tyler (1884) 91 N. C. 207 (obiter); Leggett v. Simpson (1918) 176 N. C. 3, 96 S. E. 638; Mitchell v. Parks (1920) 180 N. C. 634, 105 S. E. 398.

Ohio.—Broermann v. Kessling (1914) 6 Ohio App. 7.

Rhode Island.—Guild v. Allen (1907) 28 R. I. 430, 67 Atl. 855 (obiter); Perry v. Brown (1912) 34 R. I. 203, 83 Atl. 8.

South Carolina.—Cole v. Creyon (1833) 10 S. C. Eq. (1 Hill) 311, 26 Am. Dec. 208; Ex parte Leith (1833) 10 S. C. Eq. (1 Hill) 152; Conner v. Johnson (1834) 11 S. C. Eq. (2 Hill) 41.

Virginia.—Hoxton v. Griffith (1868) 18 Gratt. 574; Whittle v. Whittle (1908) 108 Va. 22, 60 S. E. 748 (obiter).

England.—Barnes v. Patch (1803) 8 Ves. Jr. 604, 32 Eng. Reprint, 490, 7 Revised Rep. 127; Lincoln v. Pelham (1804) 10 Ves. Jr. 166, 32 Eng. Reprint, 808, 7 Revised Rep. 370; Stevenson v. Gullan (1854) 18 Beav. 590, 52 Eng. Reprint, 232; Pattison v. Pat-

tison (1855) 19 Beav. 638, 52 Eng. Reprint, 498; *Cooke v. Bowen* (1840) 4 Younge & C. Exch. 244, 160 Eng. Reprint, 996; *Lloyd's Estate* (1856) 2 Jur. N. S. 539; *Weld v. Bradbury* (1715) 2 Vern. 705, 23 Eng. Reprint, 1058; *Abrey v. Newman* (1853) 16 Beav. 431, 51 Eng. Reprint, 845, 22 L. J. Ch. N. S. 627, 17 Jur. 153, 1 Week. Rep. 156.

Canada.—*Re Ianson* (1907) 14 Ont. L. Rep. 82; *Sunter v. Johnson* (1875) 22 Grant, Ch. 249.

The rule will, of course, yield where the testator's intention was otherwise. *Howell v. Tyler* (1884) 91 N. C. 207; *Bethea v. Bethea* (1896) 116 Ala. 265, 22 So. 561.

For instances in which it was held that the children took per stirpes, and not per capita, see:

Connecticut.—*Lockwood's Appeal* (1887) 55 Conn. 157, 10 Atl. 517.

District of Columbia.—*Ferry v. Langley* (1881) 1 Mackey, 140.

Georgia.—*Mayer v. Hover* (1888) 81 Ga. 308, 7 S. E. 562.

Kentucky.—*Fields v. Fields* (1893) 93 Ky. 619, 20 S. W. 1042; *Butler v. Butler* (1895) 97 Ky. 136, 30 S. W. 4; *Murray v. Huffaker* (1886) 7 Ky. L. Rep. 766, 13 Ky. Ops. 1034.

Louisiana.—*Allen's Succession* (1896) 48 La. Ann. 1036, 55 Am. St. Rep. 295, 20 So. 193.

Maryland.—*Alder v. Beall* (1840) 11 Gill & J. 123.

Massachusetts.—*Re Paine* (1900) 176 Mass. 242, 57 N. E. 346.

New York.—*Re Walker* (1903) 39 Misc. 680, 80 N. Y. Supp. 653; *Re Keough* (1906) 112 App. Div. 414, 98 N. Y. Supp. 433, affirmed on opinion below in (1906) 186 N. Y. 544, 79 N. E. 1109; *Re Collins* (1909) 131 App. Div. 834, 116 N. Y. Supp. 243, affirmed on opinion below in (1909) 196 N. Y. 533, 89 N. E. 1098.

North Carolina.—*Chambers v. Reid* (1862) 59 N. C. (6 Jones, Eq.) 304; *Howell v. Tyler* (1884) 91 N. C. 207.

Pennsylvania.—*Fissel's Appeal* (1856) 27 Pa. 55; *Ihrie's Estate* (1894) 162 Pa. 369, 29 Atl. 750; *Stout's Estate* (1900) 16 Montg. Co. L. Rep. 193; *Fleck's Estate* (1905) 28

Pa. Super. Ct. 466; *Kline's Estate* (1909) 38 Pa. Super. Ct. 582.

South Carolina.—*Collier v. Collier* (1850) 24 S. C. Eq. (3 Rich.) 555, 55 Am. Dec. 653.

England.—*Nettleton v. Stephenson* (1849) 18 L. J. Ch. N. S. 191, 13 Jur. 618; *Ayscough v. Savage* (1865) 13 Week. Rep. 373.

It is not enough to take the case out of the general rule that, under a bequest to the children of A and to the children of B, the children take per capita and not per stirpes, that the persons named as parents stand in different degrees of relationship to the testator. *Hill v. Bowers* (1876) 120 Mass. 135.

In *Sunter v. Johnson* (1875) 22 Grant, Ch. (U. C.) 249, it was said that the exceptions to the general rule that where a gift is to the children of several persons the children take per capita, and not per stirpes, have been cases where the gift or the income of the gift has been given to the parents, and then over to the children, or where, from the terms of the will, it is apparent that the testator intended that the children should take by representation, and not in their own right.

It has been held that where such construction will produce an inequality of division between two branches of the testator's family, so gross that it is not reasonable to suppose that it was contemplated by him, it will not be adopted. See *Howell v. Tyler* (N. C.) supra.

Where the bequest is not to the several children of persons named, but to the children of persons named severally, and the classes are distinguished by the repetition of the word "and" between each of them, it amounts to a classification, and the division should be per stirpes. *Lockwood's Appeal* (Conn.) supra; *Fissel's Appeal* (1856) 27 Pa. 55; *Hiestand v. Meyer* (1892) 150 Pa. 501, 24 Atl. 749.

A direction that legatees referred to, not as the "heirs," but as the "children" of certain individuals, shall "share and share alike" or equally, is indicative of an intention that they shall take per capita.

United States.—Moffit v. Varden (1840) 5 Cranch, C. C. 658, Fed. Cas. No. 9,689.

Alabama.—Ballentine v. Foster (1900) 128 Ala. 638, 30 So. 481.

Connecticut.—Hoadley v. Beardsley (1915) 89 Conn. 270, 93 Atl. 535.

Delaware.—Re Nelson (1909) 9 Del. Ch. 1, 74 Atl. 851.

District of Columbia.—Follansbee v. Follansbee (1895) 7 App. D. C. 282.

Georgia.—Payne v. Rosser (1875) 53 Ga. 662; Huggins v. Huggins (1884) 72 Ga. 825; Almand v. Whitaker (1901) 113 Ga. 889, 39 S. E. 395.

Kentucky.—Hughes v. Hughes (1904) 118 Ky. 751, 82 S. W. 408.

Maryland.—Brown v. Ramsey (1848) 7 Gill, 347; Allender v. Kepingler (1884) 62 Md. 7.

Massachusetts.—Weston v. Foster (1843) 7 Met. 297; Leslie v. Wilder (1917) 228 Mass. 343, 117 N. E. 343.

Missouri.—Re Mays (1917) 197 Mo. App. 555, 196 S. W. 1039.

New Jersey.—Budd v. Haines (1894) 52 N. J. Eq. 488, 29 Atl. 170.

New York.—Collins v. Hoxie (1841) 9 Paige, 81.

North Carolina.—Bryant v. Scott (1835) 21 N. C. (1 Dev. & B. Eq.) 155, 28 Am. Dec. 590; Ex parte Brogden (1920) 180 N. C. 157, 104 S. E. 177.

Ohio.—Holmes v. Fackelman (1913) 20 Ohio C. C. N. S. 109.

Pennsylvania.—Brundage's Estate (1908) 36 Pa. Super. Ct. 211; Roney's Estate (1910) 19 Pa. Dist. R. 565.

Rhode Island.—Perry v. Brown (1912) 34 R. I. 203, 83 Atl. 8.

Tennessee.—Seay v. Winston (1846) 7 Humph. 472.

Virginia.—Brewer v. Opie (1798) 1 Call, 212.

England.—Boughen v. Farrer (1855) 3 Week. Rep. 495; Armitage v. Williams (1859) 27 Beav. 346, 54 Eng. Reprint, 185; Pattison v. Pattison (1865) 19 Beav. 638, 52 Eng. Reprint, 498.

It is not, however, conclusive. See Murray v. Huffaker (1886) 7 Ky. L. Rep. 766, 13 Ky. Ops. 1034; Kline's Estate (1909) 38 Pa. Super. Ct. 582; Collier v. Collier (1850) 24 S. C. Eq. (3 Rich.) 555, 55 Am. Dec. 653.

Where the testator goes on to enu-

merate the persons who are to take, and they are not all the children of the persons named as parents, it is clear that they are to take per capita. See Brown v. Ramsey (1898) 7 Gill (Md.) 347; Hardy v. Roach (1906) 190 Mass. 223, 76 N. E. 720.

Review of the decisions.

In Ballentine v. Foster (1900) 128 Ala. 638, 30 So. 481, where testator, who had made provision in his will for his son Paul and daughter Elmira as well as his son Edgar, provided that in the event of Edgar's dying without issue his portion should "be equally divided among the children of Paul J. Watkins and my daughter Elmira," it was held that the use of the words "equally among" rendered it wholly improbable that the testator could have intended other than a per capita distribution among his several grandchildren.

In Lockwood's Appeal (1887) 55 Conn. 157, 10 Atl. 517, testator, whose next of kin and sole heirs at law at the time the will was made were his nephew James and niece Mary, the children of a deceased brother, after making provision for his wife, disposed of his property as follows: "After the decease of my said wife, I give, devise, and bequeath all my estate, wherein the use is hereinabove given to my said wife as aforesaid, to the children of my nephew, James S. Andrews, who shall be living at the decease of my said wife if she survive me, and, if she do not survive me, then to such children of said James S. Andrews as shall be living at my own decease, and to the children of my niece, Mary E. Coley, who shall be living at the decease of my said wife, if my said wife shall survive me, and if my said wife do not survive me, then to such children of said Mary E. Coley as shall be living at my own decease, to be equally divided between said children, to wit, of said James S. and Mary E., and to belong to them and their heirs forever; and by the term 'children' I mean and intend all such children as said James S. Andrews or said Mary E. Coley now have or may hereafter have, either during

my own life or during the life of my said wife. And I further will and direct that if either of said children of said James S. or of said Mary E. shall die before my own decease, or before the decease of my said wife, and leave lawful issue, that such issue shall stand in place of their deceased parent, and take the same share of my estate which their deceased parent, if living as aforesaid, will be entitled to by virtue hereof." It was held that having regard to the use of the word "between," which is more applicable to two classes than to a greater number of individuals, and to the fact that the testator, instead of grouping his grandnephews and grandnieces in one class, divided them into classes by describing separately and fully the children of James F. Andrews, and then with equal distinctness and fullness the children of Mary E. Coley, to whom the property is given "to be equally divided between said children, to wit, of said James S. and Mary E.," it was reasonably clear that the testator intended that such children should take per stirpes.

In *Hoadley v. Beardsley* (1915) 89 Conn. 270, 93 Atl. 535, where testatrix directed that twenty-five years after her decease her residuary estate should be equally divided "between the legal issue of my said nephews and of my said niece [naming her], to be theirs to have and to hold forever," it was held that the words "legal issue" meant children, and that both the general rule of construction and the provision that the division should be made equally dictated that a division among the children of the nephews should be per capita.

In *Re Nelson* (1909) 9 Del. Ch. 1, 74 Atl. 851, where testator directed that after the decease of his wife his real estate should be sold, and the proceeds, together with the residue of his personal estate, "divided share and share alike between the children of my sisters Hannah Thorn, Eliza Strawley, and Ellen Crowell, and the heirs and representatives of any such children who shall have died between the time of my decease and the time of such division or distribution to be

entitled to such share or shares as their respective ancestors would have been entitled to have received if living," it was held that both the established rule of construction and the use of the words "share and share alike" pointed to a per capita division.

In *Ferry v. Langley* (1881) 1 Mackey (D. C.) 140, testator, who in the preceding clauses of his will had given property to his grandchildren by families, devised a certain house and land "to my daughters Eliza Ferry and Mary Langley in trust for the benefit of their children," and further provided that "in the above devise and bequests that I have made I wish it to be understood that my desire is that the property so named and designated be held in trust by the persons so named as trustees until the youngest child in each family shall become of age, when it shall be conveyed to them as tenants in common." The court, not being in possession of the circumstances which would enable it to ascertain what the effect would be as to equality of distribution, came to the conclusion upon the words of the will that the children of Eliza Ferry and Mary Langley were intended to take by families, the testator having manifested an intention throughout the will to provide for his grandchildren by families, and having, by the clause last above quoted, kept them out of possession as an entire family in each case.

In *Follansbee v. Follansbee* (1895) 7 App. D. C. 282, testator, whose nearest relatives were two living brothers, James and Joseph, and the children of a deceased brother George, devised real estate in trust to hold during the life of a person named and thereafter to convert into money, and out of the proceeds of the sale to pay certain charges, and "then of the remainder of the proceeds of said real estate to divide the same among my heirs at law as follows: To the children of my brothers James M. Follansbee and Joseph V. Follansbee and to the children of my late brother George Follansbee in equal proportions, share and share alike;" and directed the accumulation of income

"to be divided among the said children with the proceeds of the sale of said real estate." He also gave all his personal property "to my said nieces and nephews,—subject to this condition, viz., that Susan E. Tucker shall have the right to take such furniture or the personal property as she may elect,—and after such election then the balance to be distributed among the children of my said brothers as they may elect. All the rest and residue of my estate I give, devise, and bequeath to the children of my said brothers." It was held that taking the particular clause and considering it separately, and then in connection with the context, it was apparent that the testator intended the children of his brothers to take per capita, the court saying: "Granting the effect of the words of division,—‘among my heirs at law,’—as contended on behalf of the appellants, in cases of general doubt and uncertainty, we cannot give them controlling weight or even great importance in this instance. These words inaptly describe the children of the two living brothers, and are necessarily controlled by what follows them. The completed sentence is: ‘Among my heirs at law as follows—to the children of my brothers.’ These last are the effective words. That these children were in the mind of the testator, collectively, as individuals, and not as the representatives of their fathers merely, is made quite clear by the further words, ‘in equal proportions, share and share alike.’ The controlling effect of these words cannot be construed away. In the very same clause, also, the testator directs that the surplus revenues and profits that may accumulate during the life of Mrs. Tucker shall be ‘divided among the said children with the proceeds of the sale of said real estate.’ Again, the intention is shown in the second item, where the personal property is bequeathed ‘to my nephews and nieces,’ and in the general residuary devise and bequest ‘to the children of my said brothers.’"

In *Payne v. Rosser* (1875) 53 Ga. 662, where testator provided that upon a certain contingency his property

was to go to and be equally divided between the children of A, deceased, the children of B, deceased, and the children of C, who was living,—the persons named as parents being the niece and nephews of testator,—it was held that, the devisees being all equally of kin to the testator, and the gift being to them directly, provided the contingency happened upon which they took at all, and the testator having directed that the property be "equally divided," they took per capita.

In *Huggins v. Huggins* (1884) 72 Ga. 825, testator directed the residue of his estate to "be distributed equally among my following grandchildren, to wit, the children of my deceased daughter, Isabella Frances McClen-don, Mary, Joseph, Lula, Sabra, and Bettie; the child of my deceased son, John Huggins, Caledonia; the children of my deceased son, James Lewis Huggins, Wellborn, Joseph, and Susan," and so on, naming the grandchildren as children of others of his children, dead and living, and then added: "This item is to embrace all notes and accounts due me; all cash on hand at the time of my death, and all other property of which I may be possessed at the time of my death, to be equally divided among my grandchildren above mentioned, except that \$800 is to be deducted from the amount I have willed to the children of my deceased son, Hastings Young Huggins, the amount of \$800 having been advanced by me to my son Hastings Young Huggins during his lifetime." The grandchildren thus enumerated were not all his grandchildren, but only those who lived in Georgia; and by another item of his will, the testator gave to each of the children of a son and daughter who lived in Texas, naming such children, each \$10. It was held that the naming of his grandchildren as the children of each son or daughter was presumably because the testator wished the advancement made to his deceased son Hastings to be accounted for by the children of such son, and that, as he had twice expressed an intention that such property

should "be divided equally," the grandchildren took per capita, and not per stirpes. It was further held that this construction was not affected by a codicil by which testator directed that, in event that a son who had disappeared should return, "he shall receive an equal share with my above-named heirs, namely William Bluford and Asa Mitchell Huggins," taken in conjunction with the fact that in the will nothing had been left to either of those two sons, whose children were among the residuary legatees, the court saying: "Counsel insists that it shows the intention to be to make grandchildren take per stirpes, inasmuch as reference is made to two sons, one's children numbering eleven and the other's but one child, and the testator alluding to the shares as equal—inasmuch as he wished the absent son to have what either got. But neither got a dime as a legatee, while either would have got an equal share as heir; and he calls them heirs. The whole intent of the codicil was not to alter the will at all, except in so far as to provide for this absent son."

In *Mayer v. Hover* (1888) 81 Ga. 308, 7 S. E. 562, it was held that under a will, the provisions of which are not shown by the report, which directed upon a certain contingency certain property should be divided between the children of A and B, share and share alike, that it was not the testator's intention to give this property to such children per capita, but per stirpes.

In *Almand v. Whitaker* (1901) 113 Ga. 889, 39 S. E. 395, where testator, after devising certain lands to his two daughters, devised the balance of his lands "to the following named heirs of my estate: to Mrs. Nancy A. McDonald's children, names as follows [naming them], to the heirs of H. F. Smith [naming them], the above-named lands to be sold by my executor and equal division made between the above-named heirs as soon as practicable after my decease; also John H. Smith, who is now living in Texas, who is my eldest son," it was held that, in view of the rule that un-

der a gift to the children of A and the children of B all take per capita, together with the fact that the testator named the precise persons who were to receive the proceeds of the lands, and further declared that equal division should be made, the persons entitled took per capita; and that no different inference could be drawn from the use of the word "between," since, in view of the inclusion of John H. Smith as a beneficiary, it was manifest that the testator did not use it in its usual and proper grammatical sense, as having reference only to a division between two.

In *West v. Rassman* (1893) 135 Ind. 278, 54 N. E. 991, testator directed the residue of his estate "to be distributed in equal proportions amongst the children of the following named persons, namely,"—going on to name the persons, who were his sisters and brothers and the brothers of his wife, who had no sisters, adding: "Susanna Mosier's children are chargeable with or rather taken from their respective shares the following," etc.; "Robert Young's children are chargeable with \$1,200 which I paid for them at different times;" and so on, reciting various advancements made either to the children or their parents, and concluding with the statement: "I mean and intend that the children of these parties above named, without any regard to numbers, shall be regarded as one family." It was held that it was the intention of the testator that the distribution should be per capita, and not per stirpes, he having, for the purpose of defining his intention, made them all one class; and that the provision requiring advancements to be taken into account was not inconsistent with such construction.

In *Rohrer v. Burris* (1901) 27 Ind. App. 344, 61 N. E. 202, testatrix, all of whose brothers and sisters except her brother John were dead, after making a specific bequest to such brother and another bequest to various nephews and nieces, gave the residue of her estate "to the two daughters Hannah and Sarah, daughters of said David [a brother], and to the children of my brother John and

to the children of my said brother Jacob, to have and share the same in equal parts—the children of Ettie, daughter of Jacob, taking jointly their mother's own part;" further providing that, in case Sarah should die in the lifetime of the testatrix, her share should go to her sister Hannah. In addition to the daughters named in the above clause, her brother David had a son John, who was known to the testatrix, and her brother John had nine children, to only three of whom a specific legacy was given. It was held that in the residuary clause the testatrix had in view only one class of legatees, all bearing to her the same degree of relationship, the naming of her nieces Hannah and Sarah having been doubtless for the purpose of excluding their half brother, and as she had provided that the children of the deceased niece Ettie should take a niece's part, and that if the niece Sarah should die the niece Hannah should have two parts, it was clear that she intended that the division should be per capita.

In *Brown v. Brown* (1869) 6 Bush (Ky.) 648, testator, whose nearest kindred were the children of his uncles, gave his residuary estate "to the descendants of my three uncles, Benjamin Brown, William Brown, and Thomas Brown," adding: "My three uncles above named are all dead, and their children or descendants are unknown to me; at least, some of them. My desire is that this bequest shall go to such of their children as are living; and where a child of either has died leaving children, the children of said deceased child shall take such part as their parent would take if living." It was held that as the reference to the uncles was evidently for the purpose of identifying persons who were to be the objects of his bounty, and such objects being his nearest kindred and all related to him in the same degree, it was to be presumed that the same reason that influenced him to provide for them would induce him to make their provisions equal, and accordingly that they took per capita, and not per stirpes.

In *Fields v. Fields* (1893) 93 Ky. 619, 20 S. W. 1042, testator directed certain lands to be sold and the proceeds paid "equally to the children (that are alive at the time of distribution) of my brother, William Fields of Missouri, and the living children of my brother James Fields," adding: "In the event of the death of any of the parties to this bequest, then their portion is to go to any issue they may have left, and if none is left, then their portion is to be given to the heir or heirs indicated above." Both William and James were dead when the will was made. The residue of his estate he gave, one fourth to his brother Frederick, one fourth to a sister, one fourth to the children of his brother William, deceased, and one fourth to the children of his brother James, deceased, and provided that, if his brother Frederick should not be living at the time of distribution, "his share is to be equally paid to the other three branches of my kindred, named in this item." It was held that as the testator had in the residuary clause referred to the children of each of his deceased brothers collectively only, and as branches of his kindred, no good reason could be assigned for giving a different meaning to the same phraseology when used in the clause first above quoted, and that such construction was confirmed by the provision in such clause that in the event of the death of any of the parties in the bequest their portion must go to their issue, and if not, then to the heir or heirs, the court saying: "When we regard the distribution as being made to the two branches or classes we can see why the testator used the word 'heir' in providing that the surviving brother or sister of the children of James Fields should take the property and be properly designated as 'heir.' And then, too, under a distribution per capita, upon a child dying without issue its property would go not to its brother or sister wholly,—or members of the same class or branch,—but the distribution is made equally among the remaining brothers and sisters and the cousins

of the decedent. If one of James Fields's children died, the remaining one would take one seventh of the property, and the cousins take six sevenths, a distribution certainly not contemplated by the testator."

In *Butler v. Butler* (1895) 97 Ky. 136, 30 S. W. 4, it was held, construing a devise "to my said sons in trust (Richard and Joseph) for their children," that the two sons took the property equally, each holding one half of it for his children, who accordingly took per stirpes, and not per capita.

In *Hughes v. Hughes* (1904) 118 Ky. 751, 82 S. W. 408, testator gave a share of his residuary estate "to be equally divided between the children of Barney and James Hughes with the exception of Francis Bernard Hughes,—the share that may be due the heirs of Barney Hughes is to be given to the Fidelity Trust Company of Louisville, Kentucky,—and the widow of Barney Hughes is to have the net income of same as long as she remains his widow. Should she die or cease to be his widow, the trust is to be equally divided between the children of my brother Barney Hughes." James and Barney Hughes were both dead at the date of the execution of the will. It was held that as the testator had spoken of the children of Barney and James as constituting one class, and had directed an equal division, they took per capita, and not per stirpes.

In *Murray v. Huffaker* (1886) 7 Ky. L. Rep. 767, 13 Ky. Ops. 1034, construing a will by which testator directed that her personal estate "be divided equally between the children of my brother, James Rogers, and the children of my sister, Rebecca Murray. My nieces and my nephews are all I have, except two others, brother Hiram Rodgers's children, and I do not will them any part of said estate, and the children hereafter born to my brother, James Rogers, if any, shall be equal with those now living," it was held that while the words "equally divided" generally mean a per capita, and not a class, division, a contrary intention plainly appears

from the latter part of the clause quoted, which looks to two classes of persons; and accordingly that each set of children took one half of the estate.

In *Allen's Succession* (1896) 48 La. Ann. 1036, 55 Am. St. Rep. 295, 20 So. 193, where testator, whose will showed that he was ignorant of grammar and orthography and the most elementary rules of composition, gave certain property "to the families of my brother Thomas H. Allen's four children, R. H. Allen, Jr., for his family's use, Thomas H. Allen, Jr., for his wife and children, Harry Allen for his wife and children, Mrs. Mary Louis, wife of J. C. Leatham, of New York city. And to the five children of my sister Cynthia A. Smith, Gaston Smith, Fred W. Smith, Jr., Mrs. Nellie Houchens, Ogden Smith, & Thomas A. Smith," it was held that as the bequest was to the families of his brother's four children, who therefore took, not per capita, but per stirpes, and there being no language in the bequest to the sister's children which would justify the inference that the testator intended that they should receive differently from the family of his brother's children, they should likewise take per stirpes.

In *Alder v. Beall* (1840) 11 Gill & J. (Md.) 123, where testator directed the residue of his estate "to be equally divided between the children of my sister Ann Latimer and their heirs forever, and the children of my sister Penelope Beall and their heirs forever," the court, without stating the grounds of its decision, affirmed a decree of the orphans' court directing a division between the children of the two sisters per stirpes.

In *Brown v. Ramsey* (1848) 7 Gill (Md.) 347, testator directed his property to be sold after the decease of his wife, and after the payment of a certain legacy "the residue is to be equally divided and paid to the following named persons, namely: To the children of my sister Hannah Brown, deceased, Sarah, Levi, Deborah, Jeremiah, and Slater. To the children of my sister Rachael Reynolds, Elisha, Joel, Sarah, Susanna. To the children

of my brother Elisha England, deceased, George and John. To the children of my brother John England, deceased, Isaac, two shares; Samuel J. England, and the children of his daughter Sarah Kirk, deceased, namely, John and Hannah, share and share alike, with the exception of Isaac's two shares aforementioned." Of the persons named as parents, some were dead and some were living, and it appeared by the will that there was at least one sister who had a child still in being, and yet was not admitted to have a participation in this fund; and the brothers and sisters spoken of in this clause of the will had other children than those therein provided for. It was held that these circumstances showed that the testator had not a per stirpes distribution in mind; but that, on the contrary, the direction that the legatees should take "share and share alike" showed that the legatees were to take per capita.

In *Allender v. Keplinger* (1884) 62 Md. 7, where testator, after giving his two daughters, Mary and Elizabeth, life estates in all his property, directed that, upon the decease of both, such property should "be equally divided among the lawful issue of my son, John Etchberger, lately deceased, and the lawful issue of my two daughters, Mary and Elizabeth, aforesaid, or the survivors of their issue," adding: "But in case the property hereby bequeathed cannot be equally divided, then, and in that case, I hereby direct my executors, hereafter named, to sell the same, and distribute the proceeds thereof, share and share alike, among the lawful issue of my above-named son and daughters, or the survivors of them, the said issue," it was held that as the testator had plainly spoken of the issue of his son and daughters collectively, as composing one undivided body of persons, and directed that the property or its proceeds should be divided equally among them, they took per capita, and not per stirpes.

In *Weston v. Foster* (1843) 7 Met. (Mass.) 297, it was held that a devise, to be "equally divided between

the children of my sons Daniel R. Witt, Thomas Witt, and Henry Witt, was to such children per capita, and not per stirpes, the mention of the names of their fathers being regarded as only by way of designation of the persons who were to take.

In *Hill v. Bowers* (1876) 120 Mass. 135, where testator gave his residuary estate "to the children of my brother Joseph by his present wife and the survivors of them, and to the children of my said nephew Albert and the survivors of them," it was held that there was nothing to take the case out of the rule, that, by a bequest to the children of A and to the children of B, the children take per capita, and not per stirpes; the repetition of the words, "and the survivors of them," serving only to make clear the intention of the testator not to include any children if either person named should survive the testator.

In *Re Paine* (1900) 176 Mass. 242, 57 N. E. 346, where a testator directed the conversion of his estate, after the payment of certain specific bequests, into money, which he directed to be invested in the stock and securities of a certain company, which were to be distributed among various persons, in stated amounts, concluding with a gift "to the children of my deceased brothers and sisters, all the said stock and securities to be divided among them as provided in the statutes of the commonwealth in such cases made and provided," and in the next clause provided that if his nephew or his representatives should not be stockholders in such company at the time when such investment should be contemplated, then the executor should pay over to the several persons named in the preceding clause, the amount set against their respective names, "and paying to the children of my deceased brothers and sisters any balance of said money in proportions fixed by" the preceding paragraph, it was held, in view of the fact that the will did not state that the shares were to be divided equally among the children of the testator's deceased brothers and sisters, and the fact that the clause last above

quoted showed that the testator did not contemplate an equal division, and the use of the term "as provided in the statutes of commonwealth," that the testator contemplated a division among the children of the brothers and sisters in accordance with the Statute of Distributions.

In *Hardy v. Roach* (1906) 190 Mass. 223, 76 N. E. 720, where testator directed the balance of his estate to be divided in equal proportions to certain persons named, "daughters of my deceased brother Patrick Roach, my brother James Roach of Lyme, Conn., the children of my deceased sister Margaret" (naming them), and at the time of the testator's death there were other children of the testator's brother Patrick and of his deceased sister Margaret than those named, it was held to be plain that the legatees took per capita.

In *Wells v. Hutton* (1889) 77 Mich. 129, 43 N. W. 768, where testatrix devised all her estate "to my son James H. Voorhees, Homer F. Hutton, Charles W. Hutton, Emma Catharine Hutton, and Hattie E. Hutton, sons and daughters of my deceased daughter Emeline Hutton, and to Ransom Gibson, son of my deceased daughter Caroline Nash, to be divided as follows: One third thereof to my son James H. Voorhees, and two thirds to the said children of my said deceased daughters, Emeline Hutton and Caroline Nash," it was held that, as the children of her two deceased daughters were named, it was the intention of the testatrix that they should take per capita.

In *Re Mays* (1917) 197 Mo. App. 555, 196 S. W. 1039, testatrix gave the interest of her residuary estate to her three sisters during their lives, and directed that at her death the principal "shall be divided equally between the children of Martha B. Brown, John M. Benson, and the four children of William J. Mays, Homer, Virginia, John, Violet." Martha B. Brown was a stepdaughter, John M. Benson the son of another stepdaughter, and William J. Mays a stepson of the testatrix. It was held that, having regard to the rule of construc-

tion that, where a gift is to the children of several persons, they are presumed to take per capita, to the fact that the objects of the testatrix's bounty were children of her stepchildren, and not of her blood, and to the direction that the property should be divided "equally," the persons entitled took per capita, and not per stirpes.

In *Merrill v. Curtis* (1897) 69 N. H. 206, 39 Atl. 973, where the testator created a trust to divide the income equally between his children and the legal representatives of such of them as might have deceased, so long as any one of them should be living, and when all his children should be dead to divide the principal "between their children and the legal representatives of such of them as may have deceased, giving to the representatives of each of my children an equal share," it was held that it was testator's evident intention that the trust fund should be divided between the children's children and the legal representatives of such as might have died, giving to the representatives of each child of the testator an equal share.

In *Benedict v. Ball* (1884) 38 N. J. Eq. 48, where testator gave to his grandchildren, the children of his son Alexander and of his daughter Julia, the residue of his estate, to be equally divided between them, share and share alike, and further provided that if his executors should determine any of such grandchildren to be unworthy, the share and interest which would otherwise have come to such grandchild should go to and be vested in such person or persons as would have taken it if such grandchild had died, seised or possessed of it, intestate, it was held that the provision relative to the exclusion of any unworthy grandchild afforded no such evidence of an intention that the residue should be divided per stirpes as to take the case out of the rule that, where a gift is given to several persons, they take per capita, and not per stirpes. Further evidence of an intention that division should be per capita was found in another provi-

sion of the will that his son Alexander and the husband of his daughter Julia should receive during their lives the income of the residue in proportion to the number of their respective children.

In *Budd v. Haines* (1894) 52 N. J. Eq. 488, 29 Atl. 170, where testator gave a sum of money in trust to pay over the income to his two daughters, Abigail and Mary, "for the maintenance and education of their respective children" until such children shall arrive at the age of twenty-one years, giving the one who had four children two thirds of the income, and the one who had but one child one third, and further directed that, "after the said children shall arrive at the age of twenty-one years, then in that case the said interest to be paid equally between my two daughters, Abigail Taylor and Mary E. Haines, during their natural lives, and after their decease the principal to be paid to the children of my two daughters, Abigail Taylor and Mary E. Haines, share and share alike," it was held that the plain meaning of the language used was that the distribution should be per capita, and that the provision for the support and maintenance of the children during minority pointed in the same direction.

In *Collins v. Hoxie* (1841) 9 Paige (N. Y.) 81, construing a bequest of residue to be divided equally among the children of testator's sister Mary, his brother Solomon, and his brother John when they should severally become of age, it was held that, according to the settled rule of construction, all the legatees took per capita.

In *Re Walker* (1903) 39 Misc. 680, 80 N. Y. Supp. 653, testator, who had given his residuary estate to his wife for life and after her decease to his sister Mary and brother David, share and share alike, if they should be living at the time of his wife's decease, went on to provide: "It is my intention to leave my said property, except the two first legacies as above, after the decease of my said sister Mary and my wife Fanny, to Chestine

Stewart, Archibald Stewart, and Mary Stewart, or the survivors of them, children of my said sister, and to Robert Walker, David Walker, sons of my brother David Walker, and Isabella and Christina, and two other daughters of my said brother, whose names I cannot now recollect, jointly, share and share alike, or to the survivors of them." It was held that as the paragraph preceding the one above quoted clearly indicated that the testator intended to divide his property equally between his brother and sister, if they should be living at the time of the death of his wife, and as there was nothing in the paragraph quoted to indicate a change of his purpose to divide the property into two equal parts, but the contrary was indicated by his repetition of the phrase, "or to the survivors of them," after naming the members of each family, it was his intention to separate his nephews and nieces into two classes by designating the children of his sister as one class, and the children of his brother as another class, and to divide such residue equally between the two classes.

In *Re Keogh* (1906) 112 App. Div. 414, 98 N. Y. Supp. 438, affirmed on opinion below in (1906) 186 N. Y. 544, 79 N. E. 1109, where testator, who had given a fifth part of his estate in trust for his brother for life, with remainder to his children, further provided that, in case such brother should die leaving no children, the trust estate should go "to the children of my sisters hereinbefore mentioned, the child or children of each to take an equal portion thereof," it was held that, as testator clearly intended to divide his estate equally among his brothers and sisters, preserving it, so far as he could, by the creation of trust estates terminating upon the death of each respectively, and as there was nothing in the will to suggest that the testator had nephews and nieces in mind other than as representatives of their parents, or that he desired upon any contingency a distribution of his estate other than in accordance with his paramount intention of preserv-

ing equality among the brothers and sisters and their descendants as representatives, the phrase "the child or children of each to take an equal portion thereof," when construed in the light of the manifest testamentary scheme, evinced an intention to treat the child or children of each sister as one class, and to divide the remainder equally among the different classes.

In *Re Collins* (1909) 131 App. Div. 834, 116 N. Y. Supp. 243, affirmed on opinion below in (1909) 196 N. Y. 533, 89 N. E. 1098, testator, having three daughters, two by his first wife, and one by his second, directed that the residue of his estate should be divided into three equal parts, and that one part thereof should be held in trust for each daughter during her life, and on her death be paid to her issue in equal shares. The will further provided: "In case it shall so happen that either of my said daughters shall depart this life without leaving lawful issue, or descendants of issue, her surviving, then upon her decease the said one third shall be equally divided among her sisters, children of my first wife, or in case of the death of either leaving children or descendants of children surviving, then the said one third shall be divided in such way that the children or descendants of each of her said sisters shall take one share thereof." After the death of the two daughters by the first wife, each leaving children, the daughter by the second wife died without issue. It was held that the language of the clause under consideration, and the fact that in an earlier provision of his will, with respect to a division of his library, engravings, and paintings among his children, the testator had provided that, in case any child should die leaving lawful issue, such issue should take the share of the parent or parents, and the fact that, in directing how the share held in trust for each daughter should be distributed on her death, he had provided that it should be divided equally among her children, and, if any child should be dead leaving issue, such issue shall take the share which the

parent would have taken—indicated an intention that the share of such deceased daughter should pass to the children of her half sisters, per stirpes rather than per capita. It was further argued that the testator did not contemplate the death of both of his daughters by his first wife, because he provided that in case of the death of any daughter without issue the one third held in trust should be divided equally "among her sister's children of my first wife, or, in case of the death of either," to her children, and hence that, both having died prior to the death of the daughter by the second wife, who left no issue, all the grandchildren formed a class which should take equally. The court, however, considered this argument inconclusive, saying: "The event of the death of 'either' applies to the death of both the daughters by his first wife, and the will provides that the one third held in trust 'shall be divided in such way that the children or descendants of each of her said sisters shall take one share thereof.' While the language may not be entirely apt to the event of the death of both daughters leaving issue, still the intent of the testator is clear, that his two daughters by the first marriage should take equally, and, if either or both should die leaving issue, such issue should take the share which the parent would have taken."

In *Kirkpatrick v. Rogers* (1848) 41 N. C. (6 Ired. Eq.) 130, where testatrix directed a share of the proceeds of her residuary estate "to be equally divided between my brothers' and sisters' children," it was held that as the gift was to the children, and they all stood in the same degree of relationship to the testatrix, they took per capita.

In *Shull v. Johnson* (1855) 55 N. C. (2 Jones, Eq.) 202, where testator gave his residuary estate "to my brothers' and sisters' children, or all my nephews and nieces," it was held that, as the testator had made no distinction of families, the nephews and nieces all took equally, share and share alike.

In *Chambers v. Reid* (1862) 59 N. C. (6 Jones, Eq.) 304, where testator directed his residuary estate "to be equally divided between the children of my brother John Chambers, and the children of my deceased sister Nancy Woodward, each to share equally in all respects; i. e., on the supposition that my brother be dead, but if he is alive at the time of my death, then he is to receive one half of my estate himself," it was held that the latter clause was a sufficient indication of an intention that the division should be per stirpes.

In *Britton v. Miller* (1869) 63 N. C. 268, where a testatrix gave all her property "to the children of my brother Stephen and of my sister Mary," it was held that, there being nothing to take the case out of the general rule, the legatees took per capita.

In *Howell v. Tyler* (1884) 91 N. C. 207, where a testator, who had given his brother William one half of all his money on hand, gave the other half "to the children of my brother William and my sister Martha," it was held that, as a per capita division would result in giving William and his children twenty-seven twenty-eighths of such money,—a distribution not at all consonant to the disposition of his estate,—such clause would be construed as dividing the fund in equal parts between the children of William and the children of Martha.

In *Leggett v. Simpson* (1918) 176 N. C. 3, 96 S. E. 638, where testator, after giving his nieces Elizabeth and Charlotte the use of certain lands during their lives, proceeded to devise such lands, at the death of said nieces, "to the lawful children of my nieces, Elizabeth Bateman and Charlotte Baxter," it was held that there was nothing in the will which impaired the usual rule of construction that where a devise is to a class collectively, and not by name to various devisees in the class, all the members of the class take per capita, and not per stirpes.

In *Re Brogden* (1920) 180 N. C. 157, 104 S. E. 177, where testator directed

his residuary estate "to be equally divided between my two sisters' children," naming such children, it was held that the naming of the legatees, the using of the words "equally divided," and the circumstance that they were of equal degree of relationship to the testator, all indicated a per capita distribution.

In *Holmes v. Fackelman* (1913) 20 Ohio C. C. N. S. 109, where testator gave his residuary estate "to the children of my sisters, Margaret Fackelman and Marian Fackelman, to be equally divided between them, share and share alike,"—such sisters being dead at the time of the execution of the will,—it was held that the division should be per capita, and not per stirpes.

In *Broermann v. Kessling* (1914) 6 Ohio App. 7, where testator devised certain real estate "to the children of Elizabeth Boewer and the children of Marianna Broermann and Frederick Broermann, all said children being my grandchildren, to have and to hold the same for the said grandchildren, their heirs and assigns forever," it was held that, although the children were designated by their parentage, yet, as they were reduced by the language of the will to a single class,—that of grandchildren,—in the words "all said children being my grandchildren," and also by repetition in the use of the words "to have and to hold the same for the said grandchildren, their heirs and assigns forever," and as they were all of the same degree of relationship to the testator, there was nothing to take the case out of the rule that, where a devise is to the children of several persons, they take per capita, and not per stirpes. It was also said that the fact that two of the persons named as parents were living negatived any intention on the part of the testator to divide the estate equally among his children, or their representatives.

In *Fissel's Appeal* (1856) 27 Pa. 55, testatrix directed the proceeds of her estate to be divided as follows: "Between the children of my brother John, late of Hopewell township, York county, deceased, and the chil-

dren or heirs of my sister Rosanna Welshans, late of the state of Virginia, deceased, and the children or heirs of Catharine Pozer, late of New Salem, deceased, and the heirs of Juliann Miller, deceased, my sister, to wit, Michael, John, and Juliann, the said Michael, John, and Juliann being children of the said Juliann Miller, deceased, and also to Jacob Fissel, my brother, residing near York, or his heirs or legal representatives, it is my will, and I order and direct, that said proceeds be divided between said heirs, to wit, the children of my said brother John, and the children of said Rosanna Welshans, and the children of the said Catharine Pozer, and the children of the said Juliann, above enumerated, and to my brother Jacob or to his heirs, share and share alike." It was held that, as the bequest was not to the several children of the brothers and sisters of the testatrix, but to the children of her several brothers and sisters, and as she had herself, in form, classified them by naming them as several classes, and especially distinguishing the different classes by repeating the word "and" between each of them, an intention was apparent that the children of her brothers and sisters should take per stirpes, and not per capita.

In *Ihrie's Estate* (1894) 162 Pa. 369, 29 Atl. 750, where testatrix directed the residue of her estate "to be divided between my husband's grandchildren and the children of Ferdinand Poree," and neither group of beneficiaries could have inherited from the testatrix, so that no light could be obtained from the analogy of the intestate law, it was held, in view of the use of the word "between," and the fact that in a preceding clause the testatrix used the word "among" with entire accuracy, that it was her intention that the husband's grandchildren should take one half and the children of Ferdinand Poree the other.

Under a bequest, "in equal shares to my deceased brothers' and sisters' children, to take among them his or her of their parent's share," such

children take per stirpes. *Stout's Estate* (1900) 16 Montg. Co. L. Rep. (Pa.) 193.

In *Fleck's Estate* (1905) 28 Pa. Super. Ct. 466, the following residuary clause: "The remaining part of the estate shall be equally divided among the following named: To Cornelius Fleck son of Louis Fleck. To Alfred Fleck son of William Fleck. To Henry Fleck son of Charles Fleck. To the ten children of August Fleck, namely, Carl, Elizabeth, Lillie, August, Albert, Louis, Frank, Ernest, Fred, and Rose; should any of these ten children be dead before me, their share shall be divided among the remaining children of August Fleck," was held to exhibit evidence of an intention to give to the nephews and nieces as classes, such intention being found by the court in the designation of each class separately and the use of the proposition "to" in connection with each class, and in the provision that, if any one of the ten children of August should die before the testator, the share of such one should be divided among the remaining members of that group.

In *Brundage's Estate* (1908) 36 Pa. Super. Ct. 211, where testator gave his residuary estate to his son, with the provision that, in case of the son's death before becoming of age, "then the property to go to my brother's and sister's children in equal proportions, share and share alike," it was held, in view of the use of the words "in equal proportions, share and share alike," the fact that the bequest was to persons bearing the same relationship to the testator, and the further fact that they were not described by the names of the parents, but, by words equally definite, were grouped as a class in a single phrase, that they constituted a single class, and hence took per capita rather than per stirpes.

In *Kline's Estate* (1909) 38 Pa. Super. Ct. 582, where testator gave the residue of his estate to be "equally divided, share and share alike, among the children of my deceased brother John F. Kline, and the children of my deceased sisters, Jane

Mettler and Mary Bassett," it was held that the will divided the children of the brother and sisters of the deceased into classes, and accordingly that distribution should be made per stirpes among them; and that the fact that the testator's mode of expression apparently made two classes instead of three, one being the children of his deceased brother John, and the other the children of his deceased sisters, was not sufficient evidence of a contrary intention.

In *Wetherill's Estate* (1909) 21 Pa. Dist. R. 305, where testatrix directed a sum of money to "be equally divided between the children of my nieces, Blanche Wetherill Walton and Edith Wetherill Ives, share and share alike, the income derived from this money to be used by the parents of said children as their absolute property until such children successively arrive at the age of twenty years, at and after which time each child shall receive and have the interest of their share," it was held that the word "between" was used in the sense of "among," and that the words "share and share alike" indicated a division per capita, and that such construction was not altered by the provision that the parents should take the income from the children's shares.

In *Roney's Estate* (1910) 19 Pa. Dist. R. 565, where testator directed that his residuary estate should be divided "to and among the then-surviving children of my brother, John Roney, and of my sisters, Margaret Eckel, Mary R. Dougherty, Ann Jane Foust, and Elizabeth A. Smith, and the issue of any deceased child then living, their respective executors and administrators, share and share alike, such issue taking, however, only their parent's share," it was held that, as the gift was to a single class, the parents of the individuals composing the class being named only collectively, and at the end, so that there might not be included a nephew,—only child of a sister not mentioned, for whom the testator had made special provision elsewhere in the will,—and as the testator had in express terms declared that they were to take share

and share alike, and that the issue of any deceased child should take per stirpes, his intention was clear that the surviving children of the brothers and sisters named should take per capita.

In *Perry v. Brown* (1912) 84 R. I. 208, 88 Atl. 8, a bequest "to the children and grandchildren of Maria and William Whipple Brown of Providence, and Charlotte Perkins Gilman and daughter Catherine Stetson, to be equally divided, share and share alike," was held, both under the rule of construction applicable to such a bequest and in view of the phrase "to be equally divided, share and share alike," to be to the beneficiaries per capita.

In *Ex parte Leith* (1833) 10 S. C. Eq. (1 Hill) 152, where testator directed his residuary estate "to be equally divided in the following proportions, that is to say, two shares to my deceased sons, William's and James's, children, to be equally divided among them," it was held that as the children of William and James were described as one class, and not as several classes, they took, according to the natural import of the terms used, per capita and not per stirpes; and that this conclusion was strengthened by the disposition which the testator had made of the remaining third part, which he directed to be equally divided among the children of his son John, who was still living, thereby showing that the testator understood the necessity of separating his beneficiaries into classes where he intended they should take per capita, and by the first clause of the will, in which the testator gave to his grandchildren all his household furniture to be equally divided among them, "that is to say, one share to the children of my deceased son William, one share to the children of my deceased son James, and one share to my son John's children," giving rise to the inference that, if he had intended to make the same disposition of the residuum, he would have used the same phraseology.

In *Collier v. Collier* (1851) 24 S. C. Eq. (3 Rich.) 555, 55 Am. Dec. 653,

where testator, who died leaving a wife and children and the children of deceased sons, bequeathed a negro to his "deceased son" John's children, to his "deceased son" William's children, to his "daughter," naming her, and to each of his other four children, naming them, and gave a legacy to his grandson Oliver, who was one of John's children, and bequeathed his residuary estate "to be divided equally among the above-mentioned heirs," it was held that the preceding bequest evinced an intention to classify the children of his deceased son, and accordingly that the distribution should be per stirpes, and not per capita, notwithstanding the direction that the estate should "be equally divided," since the words of equality may be satisfied by equal distribution among those of the same degree according to the statute, and as otherwise Oliver would have taken a double share.

In *Seay v. Winston* (1846) 7 *Humph.* (Tenn.) 472, where testator, after several specific bequests to his wife, directed that at the death of his wife all the property previously specified should "be equally divided between the children of my brothers Jonathan D. Goodall, Isaac Goodall, William Goodall, and of my sister Betsy Winston," it was held that no argument could make it plainer than the words of the bequest that the devise was to the nephews and nieces individually, and not in classes, and that they therefore took per capita, and not per stirpes.

In *Brewer v. Opie* (1798) 1 *Call* (Va.) 212, where testator gave his estate upon a certain contingency to be equally divided "between the children of Joseph Langwell and Lindsay Opie and their heirs forever," the persons named being husbands of first cousins of the testator, it was held that such children took per capita, and not per stirpes, being all equally within the description.

In *Senger v. Senger* (1886) 81 *Va.* 687, testator directed that all his estate "be equally divided between the children of my deceased son Joseph Senger and the children of my daugh-

ter Elizabeth R. Showalter, taking into consideration what I have already given her," going on to direct that a stated sum given his daughter Elizabeth should be charged as an advancement to her children, that various sums advanced to the children of his deceased son Joseph should be taken as advancements, and concluding as follows: "It is my will and desire that, as fast as moneys come into the hands of my executor, that he pay out legacies to him or her, who are twenty-one years of age, who has received the least, until her or she are equal to the one who has already received, and they be carried along equally until the next highest advancements, until all are equal, then the balance of my estate be divided equal between the children of my daughter on the one hand, and the children of my deceased son, Joseph, on the other hand." It was held, by a divided court, that the language used unmistakably conveys the idea that the testator's grandchildren—not as classes, but as individuals—should equally share his bounty, all of them being of equal nearness and interest to him; that the word "between" was not sufficient to indicate an intention to separate the grandchildren into two classes; and that a contrary intention was evinced by the provision for the preference in payment of those who had not already received advances.

In *Wills v. Foltz* (1907) 61 *W. Va.* 262, 12 *L.R.A.* (N.S.) 283, 56 *S. E.* 473, it was held that, under a devise to three named daughters "and their children," the children living at the testator's death, daughters and children, took a joint estate and shared per capita, and that the children did not take per stirpes, though one of the daughters had more children than the others.

In *Moffitt v. Varden* (1840) 5 *Cranch, C. C.* 658, *Fed. Cas. No.* 9, 689, it was held that, under a bequest "to be equally divided among the children of my brother Richard Varden and my sister Henrietta," such children took per capita, and not per stirpes.

In *Wicker v. Mitford* (1782) 3 Bro. P. C. 442, 1 Eng. Reprint, 1422, where testator, in case of his own death without issue, gave the whole of his fortune equally to be divided between any second or younger sons of his brother John and his sister Sarah, and in case it should happen that his said sister and brother should not leave any such second or younger son, then to his said brother and his said sister equally to be divided between them, it was held that it was not testator's intention that the younger children of his brother and sister should take per stirpes, but that, the sister having a younger son and the brother none, the younger son of the sister would have title to the whole.

In *Lincoln v. Pelham* (1804) 10 Ves. Jr. 166, 32 Eng. Reprint, 808, 7 Revised Rep. 370, where testatrix bequeathed her property in trust to pay one fourth part to the younger children of her deceased daughter Catherine, one fourth part to the children or child of her other married daughter, one fourth part to her unmarried daughter Frances for life, and after her death to her children, one fourth part thereof to her unmarried daughter Mary for life and after her death to her children, and if either Frances or Mary should die without issue, then to the children or child of the other, and if both should die without leaving any children or child, then and in such case, the said two last-mentioned fourth parts should be equally divided amongst the younger children of her deceased daughter and the younger children of her other daughter, it was held by Lord Eldon that, though the particular circumstances were very strong to raise conjecture and doubt as to the intention, they were not sufficient to overpower the settled construction, according to which the children of the two daughters would take per capita rather than per stirpes.

In *Cooke v. Bowen* (1840) 4 Younge & C. Exch. 244, 160 Eng. Reprint, 996, where testator directed the residue of his personal estate, after the death of his wife, to be divided between five

nephews and nieces, two shares each, and to their children one share each, it was held that their children took per capita.

In *Nettleton v. Stephenson* (1849) 18 L. J. Ch. N. S. (Eng.) 191, 13 Jur. 618, where testator directed a fund to be divided among the children of his nephew Joseph, the children of his nephew Francis, the children of his niece Mary, and John Nettleton, the son of a deceased nephew, if living, adding, "If not, then I give his part or share and order and direct that it shall be divided into four equal parts to be paid unto and amongst the children of my said nephews and niece in manner aforesaid, or to such of them as shall be living at that time," the vice chancellor said that he inclined to the opinion that the fund would have to be divided per stirpes, and not per capita, and that the terms in which the testator had given the share of John Nettleton, his great-nephew, in case of his death, strengthened that opinion.

In *Stevenson v. Gullan* (1854) 18 Beav. 590, 52 Eng. Reprint, 232, where testatrix bequeathed the interest of a sum of money to her nephew Thomas Pullinger, and her niece Jane Stevenson, during the term of their natural lives, and from and after their decease to the surviving children of the said Jane Stevenson and Thomas Pullinger the principal sum, share and share alike, it was held that the surviving children of the two tenants for life took per capita.

In *Boughen v. Farrer* (1855) 3 Week. Rep. (Eng.) 495, testator gave property upon trust for his widow for life, and at her decease to sell and pay debts and various legacies, and gave the residue of the proceeds of his estate to his sister Elizabeth, his sister Hannah, and niece Hannah Dixon, who was the daughter of a deceased sister, "and to the children of my said two sisters, Elizabeth Smith and Hannah Wright, as shall be living at the time of the decease of her my said wife; to be equally divided between them my said niece Hannah Dickson, my sisters Elizabeth Smith and Han-

nah Wright, and the respective children of them my said sisters, share and share alike." It was held that the children of the sisters took per capita, the words "share and share alike" applying to all the parties; and that no contrary implication arose from the use of the word "respective," such word being necessary to make the description accurate, because strictly there could not be children of two sisters.

In *Lloyd's Estate* (1856) 2 Jur. N. S. (Eng.) 539, where testatrix gave the residue of her estate "to all the children of my said brother Richard Baker and my sister Mary Mason to be equally divided among them, share and share alike," it was held that as the testatrix had dealt with both her brother and sister in precisely the same way in previous parts of the will, and also almost in the same way with their respective children, it would appear unreasonable to hold that she intended to give the residue unequally among them, and therefore that all of them took equally as tenants in common.

In *Armitage v. Williams* (1859) 27 Beav. 346, 54 Eng. Reprint, 135, where testator directed that the income of certain property should be applied to the education of the children of a niece and nephew, in equal shares, "and on their attaining the age of twenty-one years the whole to be sold and divided equally among them," it was held that such children took per capita, and not per stirpes.

In *Pattison v. Pattison* (1855) 19 Beav. 638, 52 Eng. Reprint, 498, where testator gave a fund to his wife for life with power to appoint among three persons and their respective children, the property to go, in default of appointment, "among all the said children equally," it was held that the children who took in default of appointment did so per capita, and not per stirpes.

In *Ayscough v. Savage* (1865) 18 Week. Rep. (Eng.) 373, where testatrix gave her personal estate in trust "to divide all such principal trust moneys, together with the dividends, interest, and yearly proceeds thence-

forth to grow due for the same, unto such child or children of my son John Ayscough, and my daughter Harriet Booth, as shall be living at the time of the respective deceases of the said John Ayscough and Harriet Booth," at their respective ages of twenty-five, and in case any such child or children should die under such age without issue, then the share of the one so dying to go and be paid unto the survivors, it was held that the direction to divide between children living at the respective deceases of the son and daughter was equivalent to a direction to divide between the children of the son living at his decease, and the children of the daughter living at her decease—a division between two different classes, each of which would, of course, take a moiety.

m. Under a bequest to the "families" of several individuals.

For instances of bequests to the "family" of one individual or married couple, see III. d, *supra*.

For instances of bequests to the "children," "issue," or "descendants" of several persons, see III. l, *supra*.

For instances of bequests to one and his "family," see III. s, *infra*.

In *Walker v. Griffin* (1826) 11 Wheat. (U. S.) 375, 6 L. ed. 498, testator devised a fourth part of his estate "to the families of G. Holloway, William B. Blackburn, and A. Bartlett, to those of their children that my wife may think proper, but in a greater proportion to Francis T. Holloway than to any other of G. Holloway's children; to Elizabeth B. Bartlett in greater proportion than any of A. Bartlett's children. The balance to be given to the families of Cyrus and John T. Griffin's children, in equal proportion." It was held that as the testator, in disposing of the one-fourth part, intended that the families should take in equal proportions, the inequality being between children of the same family, not between the families, it was reasonable to suppose that Cyrus's and John T. Griffin's children were likewise to take by families, and that the additional words, "children in equal proportions," were inserted merely be-

cause the testator had, in the preceding clause, directed that the children of each family should take unequally.

In *Hoadly v. Wood* (1899) 71 Conn. 452, 42 Atl. 263, where a testatrix, who had given pecuniary legacies to divers of her relations by name, and who had directed that her furniture should be given to her sister, and her wearing apparel, books, and pictures "to the surviving members of the following families in equal portions: namely, my brother, Dr. William Wood's, my sister, Ursula Russell's, my brother, Dr. T. E. Wood's, my brother, Luke E. Wood's," went on to devise the residue of her estate "to the surviving members of my brothers' and sister's families which are above named in equal parts," it was held that those who were to share in the residuary bequest were not the four families, as such, but the surviving members of these families, as individuals.

In *Barnes v. Patch* (1803) 8 Ves. Jr. 603, 32 Eng. Reprint, 490, it was held that, under a bequest "to be equally divided between brother Lancelot's and sister Esther's families," the word "families" was to be construed as meaning children, the persons entitled taking per capita.

n. Under a bequest to the "heirs" of two or more persons.

For instances of bequests to the "heirs" of the testator or of some other individual, see III. a, supra.

For instances of bequests to the "children," "issue," or "descendants" of several persons, see III. l, supra.

For instances of bequests to one and the "heirs" of another, see III. p, infra.

For instances of bequests to persons living and the "heirs" of any deceased, see III. v, infra.

For instances of bequests to the "heirs" of the testator and the testator's wife or husband, see III. w, infra.

For instances in which a gift to the "heirs" of several persons was preceded by a life estate to such persons, see subd. III. u, infra.

For instances in which the gift was by a husband to his "heirs" and

those of his wife, or by a wife to her "heirs" and those of her husband, see subd. III. w, infra.

Inasmuch as the term "heirs," in a testamentary gift to the "heirs" of two or more persons, is usually used in the sense of "children" or "descendants," the same rule is applicable as in the case of a bequest to the children of several persons, namely, that in the absence of a qualifying context the beneficiaries take per capita; at least, where the testator has used some term implying equality of division. See *Taylor v. Cribbs* (1911) 174 Ala. 217, 56 So. 952; *Gold v. Judson* (1852) 21 Conn. 616; *Rogers v. Smith* (1916) 145 Ga. 234, 88 S. E. 963; *Kalbach v. Clark* (1907) 133 Iowa, 215, 12 L.R.A.(N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 647; *McFatrige v. Holtzclaw* (1893) 94 Ky. 352, 22 S. W. 439; *Stowe v. Ward* (1825) 10 N. C. (3 Hawks) 604, s. c. on subsequent appeal in (1826) 12 N. C. (1 Dev. L.) 67; *Ward v. Stow* (1834) 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 238; *Hobbs v. Craige* (1840) 23 N. C. (1 Ired. L.) 332; *Ingram v. Smith* (1858) 1 Head (Tenn.) 411; *Sunter v. Johnson* (1875) 22 Grant, Ch. (U. C.) 249.

The fact that the parent is living is a circumstance going to show that children are not intended to take as representing such parent. See *Ingram v. Smith* (1858) 1 Head (Tenn.) 411.

The use of the term "heirs" has, in one instance, however, been regarded as implying representation, and hence a taking per stirpes. See *Mitchell v. Parks* (1920) 180 N. C. 634, 105 S. E. 398.

For instances in which the context has been held to require a distribution per stirpes, see *Plummer v. Shepherd* (1902) 94 Md. 466, 51 Atl. 123; *Preston v. Brant* (1888) 96 Mo. 552, 10 S. W. 78; *Records v. Fields* (1900) 155 Mo. 314, 55 S. W. 1021; *Lowe v. Carter* (1856) 55 N. C. (2 Jones, Eq.) 377; *Harper v. Sudderth* (1867) 62 N. C. (Phill. Eq.) 279; *Mitchell v. Parks* (N. C.) supra.

Review of the decisions.

In *Taylor v. Cribbs* (1911) 174 Ala. 217, 56 So. 952, where testator de-

vised land in a certain contingency "to be equally divided between the bodily heirs of Rosanah Fry and Margaret Deck," it was held that the use of the names of the respective mothers was descriptive merely, and that their children took per capita, and not per stirpes.

In *Gold v. Judson* (1852) 21 Conn. 616, a bequest in the following language: "I give to the heirs of my brother A, deceased, the heirs of my sister B, the heirs of my brother C, the heirs of my sister E, and the heirs of my sister F, the residue of my estate, to be equally divided between said heirs, each individual alluded to having an equal portion of the same," was held to require a per capita distribution.

In *Rogers v. Smith* (1916) 145 Ga. 234, 88 S. E. 963, testator devised all his property to his wife during her life, and after her death certain property to named devisees, and all the remainder of his estate "to be divided equally between the heirs of my deceased brothers, Franklin Jackson Rogers and John Rogers, share and share alike." It appeared that at the date of the execution of the will, and at the death of the wife, there were five children of one of the deceased brothers living, and one child of the other deceased brother in life. It was held that in view of the direction that they should take "share and share alike," and notwithstanding the use of the word "between," the children of the deceased brothers took per capita, and not per stirpes.

In *Kalbach v. Clark* (1907) 133 Iowa, 215, 12 L.R.A.(N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 647, where testatrix gave her daughter the use of certain property for life, and directed: "At her death I wish the principal to be equally divided among the heirs of my four children," it was held that, the gift being direct and immediate to individuals, and the words used being descriptive of those who were to take, and the will providing for an equal division among them,—not for an equal division among the four children, and then a division of each fourth among the children of that

child,—the division must be per capita, and not per stirpes.

In *McFatrige v. Holtzclaw* (1893) 94 Ky. 352, 22 S. W. 439, where testator, who had no children, and whose two brothers and sisters survived him, gave his estate to his wife for life, and directed that after her death it should be "disposed of and equally divided between the heirs of my brothers and sisters, share and share alike, as though my brothers and sisters were living," it was held that the rule of construction that, where a gift is to the children of two or more persons, the division must be per capita, and not per stirpes, and the direction for equal division, indicated that the children of the brothers and sisters should take per capita, and not per stirpes; and that the addition of the words, "as though my brothers and sisters were living," did not operate to change the meaning of the preceding words so as to make them take per stirpes, and not per capita, the court saying: "They are named as children (heirs) of the testator's brothers and sisters as descriptive only of the class of persons that are to take, and the clause, 'as though my brothers and sisters were living,' if it has any significance whatever, it is certainly not that of limiting the right of the children to take per stirpes as the representatives of their parents. They were not only living at the date of the will, but at the date of its publication. And the reference to the devisees as the children (heirs) was descriptive only of the persons that were to take the estate. And if any meaning is to be given to the clause last quoted, it seems that it was intended to emphasize the fact that the children were to take per capita; for if the testator's brothers and sisters had been made the objects of his bounty, nothing in the will to the contrary, they would have taken per capita,—share and share alike,—and their children were to 'share and share alike' the same as their parents would, if living and taking equal portions. This construction gives effect to both clauses of the provision quoted; but the construction placed

upon the provision by the lower court destroys the first clause, giving the devisees equal portions of the estate, and makes them take per stirpes as the representatives of their parents."

In *Plummer v. Shepherd* (1902) 94 Md. 466, 51 Atl. 173, testatrix gave all her real estate "to my brother William and his heirs, to my deceased brother, Samuel Shepherd's heirs, and the heirs of my deceased brother Joseph Shepherd; also, all the heirs of my deceased sisters, Eliza Bevan and Mary Plummer, share and share alike." The testatrix had three brothers and two sisters, all of whom, except William, were deceased at the date of the will, and William predeceased the testatrix. It was held that it was the evident intention of the testatrix to treat the children of each of her brothers and sisters as a class, and accordingly that they took per stirpes.

In *Preston v. Brant* (1888) 96 Mo. 552, 10 S. W. 78, testator, who in the fourth clause of his will devised certain real estate to his son Henry for life, "and after his death unto his heirs, and the heirs and assigns forever of said heirs," and in the sixth clause other real estate to his daughter Elizabeth with a similar limitation, in the third clause of his will, devised to his wife certain real estate for life, "and after her death unto the heirs of my daughter Elizabeth Lovejoy McDowell, and the heirs of my son Henry Grant, and the heirs and assigns forever of said heirs, which said heirs shall take said last-mentioned real estate as purchasers from me, and not by inheritance of or descent from my said wife." It was held that as the testator, in the other clauses of his will, had referred to the heirs of Henry and the heirs of Elizabeth, respectively, as a class, it was reasonably to be presumed that he referred to them as classes in the third clause; that the connection of the two groups by the word "and" did not constitute them one class; and that no inference of an intention that they should take per capita could be drawn from the direction that they should take as purchasers, or from the omission of a

direction that they should take per stirpes.

In *Records v. Fields* (1900) 155 Mo. 314, 55 S. W. 1021, where testator, who had no children of his own, and whose two brothers, James and William, were dead, both leaving children surviving him, and one of them grandchildren, directed his residuary estate to be divided "between the heirs of William Fields and James Fields deceased," it was held that the use of the word "between," the consideration that the testator would naturally give each brother's heirs an equal share of his estate, and the fact that he named the two brothers, indicated that he meant them to take as two classes per stirpes, and not as a single class per capita.

The case of *Stowe v. Ward* (1825) 10 N. C. (3 Hawks) 604, s. c. on subsequent appeal (1826) 12 N. C. (1 Dev. L.) 67, and *Ward v. Stow* (1834) 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 238, involved the construction of a will by which testator directed his residuary estate to be "equally divided amongst the heirs of my brother John Ford, the heirs of my sister Nanny Stowe, the heirs of my sister Sally Ward deceased, and nephew Levi Ward." Levi Ward was a son of Sally Ward. At the time of making this will and at the time of his death the testator had living his brother John, who had four children, his sister Nanny, who had nine children, and the two children of his deceased daughter Sally. On appeal from a decree partitioning the real estate per stirpes, it was held in 10 N. C. (3 Hawks) 604, that, as the deviser had taken notice in his will that his brother John was alive by making a special devise to him, there was no doubt that he had used the word "heirs" in the sense of "children" and as a designation of persons, and as all these devisees were of equal kin to the deviser in their own persons, though making out their pedigree through different stocks, and would, were the parents of all dead, be entitled under the Statute of Distribution to a division per capita, the real estate should be divided among them per capita. Instead of remand-

ing the cause and awarding procedendo to the court below, a writ of partition was issued from the supreme court, and upon its return the order reversing the judgment below was set aside and another writ of partition issued, directing the division to be per stirpes (12 N. C. (2 Dev. Eq.) 67), on the ground that "where persons come to an estate as heirs, whether by descent as having been in by their ancestor, or by purchase as a new acquisition under the description of heirs, they take per stirpes and not per capita, . . . not individually, but collectively." The same question being subsequently raised in regard to the division of the personal property in *Ward v. Stowe* (1834) 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 238, the court, after an extensive discussion, repudiated the view expressed in (1826) 12 N. C. 67, and held that the word "heirs" was used as equivalent to "children" or "issue," and therefore that the persons entitled took as individuals, per capita.

In *Hobbs v. Craige* (1840) 23 N. C. (1 Ired. L.) 332, it was held that under a gift of residue, "to be equally divided among the heirs of my deceased brother Samuel Foster and the heirs of David Craige," the division, in view of the use of the term "equally among," must be per capita.

In *Lowe v. Carter* (1856) 55 N. C. (2 Jones, Eq.) 377, where testator directed his personal property to be sold and the proceeds "to be equally divided between the bodily heirs of my three daughters," it was held that the children of such daughters took per stirpes, and not per capita.

In *Harper v. Sudderth* (1867) 62 N. C. (Phill. Eq.) 279, where a will provided: "My will and desire is, that after the death of my beloved wife, my property shall be disposed of in the following manner, to wit, I give and bequeath to the heirs and legal representatives of my deceased sisters, Patty Sudderth, Betty Ramsey, and Polly Loving; (4) my will and desire is, that my brother Thomas Sumpter's children are to have an equal share of my estate, except," etc.; "(5) my will and desire is, Henry

Sumpter Taylor, son of Henry Taylor, shall have an equal share," it was held that in view of the fact that the legatees were designated as the "representatives" of their deceased parents, and the fact that the testator meant that the children of his brothers and sisters should take the share which their parent would have taken, the division should be per stirpes.

In *Mitchell v. Parks* (1920) 180 N. C. 634, 105 S. E. 398, where testator, after making provision for his wife, directed that at her death the property given her should "go to the heirs of" a deceased daughter, "and to the bodily heirs of" a surviving daughter, and bequeathed "to the heirs of" the deceased daughter, one half of the remainder of his estate, and the other half "to the heirs of" the surviving daughter, and further provided that, "if any of the above-named heirs should die within the said period of twenty years without issue of them of their own body, all the rights and heirships shall cease as to the real property," it was held that in view of the use of the word "heirs," and the testator's evident intention equally to divide his estate between the branches of his family, and of the provision last above quoted, by which he evidently intended, not a single class taking among themselves, but those who should take by classes or families in the character or equality of heirs, that the division of the property on the widow's death must be made per stirpes, and not per capita.

In *Harris's Estate* (1873) 74 Pa. 452, where testator bequeathed "unto my brother William Harris, and sister Anna Vance's heirs, the balance of my goods and chattels and credits and lands equally, except Rev. John A. Vance, he must have all that he owes me at this time over and above the said heirs of William Harris and Anna Vance's heirs," it was held that whatever might have been the case had this bequest been simply to his brother's and sister's heirs, the exception which followed indicated unmistakably that the testator had not in his mind two classes of legatees, since he gave to the Reverend John A.

Vance, who was one of the children of Anna Vance, a preference not merely over the other children of Anna, but over all of the legatees, and accordingly that distribution must be per capita.

In *Ingram v. Smith* (1858) 1 Head (Tenn.) 411, where testator bequeathed two negroes to a daughter during her life and after her death "to be equally divided between the heirs of my son Jesse and daughter Polly Ingram," and by his will recognized such son and daughter as living by giving specific bequests to each, it was held that the persons answering the description of heirs of the persons named when the bequest took effect took per capita, and not per stirpes.

In *Sunter v. Johnson* (1875) 22 Grant, Ch. (U. C.) 249, where testator devised certain lands "to the heirs of" A "and the heirs of" B, "to be equally divided between them," it was held to be clear that the children of the persons named were to take in their own right, and that their being described as the "heirs" of the persons named was merely the testator's mode of designating them, and accordingly that they took per capita.

c. Under a bequest to persons named and the children of others.

For bequests to persons standing in a certain relation and the children of others in the same relation, see III. q, 2, *infra*.

For instances of bequests to one and his or her children, see III. r, *infra*.

For instances of bequests to persons living and the "heirs," "issue," "children," or "descendants" of any deceased, see III. v, *infra*.

It is a generally recognized rule of construction that if a testamentary gift is made to one or more persons named and the children of another person, as for instance to A and the children of B, the persons entitled will, in the absence of anything to show a contrary intention, take per capita, and not per stirpes.

Alabama.—*Smith v. Ashurst* (1859) 34 Ala. 208.

Georgia.—*Almand v. Whitaker* (1901) 113 Ga. 889, 89 S. E. 395.

Illinois.—*Pitney v. Brown* (1867) 44 Ill. 363; *McCartney v. Osburn* (1886) 118 Ill. 403, 9 N. E. 210.

Kentucky.—*Armstrong v. Crutchfield* (1912) 150 Ky. 641, 150 S. W. 835; *Justice v. Stringer* (1914) 160 Ky. 354, 169 S. W. 836.

Massachusetts.—*Leslie v. Wilder* (1917) 228 Mass. 343, 117 N. E. 343.

New Hampshire.—*Farmer v. Kimball* (1866) 46 N. H. 435, 88 Am. Dec. 219.

New Jersey.—*Burnet v. Burnet* (1879) 30 N. J. Eq. 595; *Thornton v. Roberts* (1879) 30 N. J. Eq. 473; *Van Houten v. Hall* (1907) 73 N. J. Eq. 384, 67 Atl. 1052 (obiter); *Bailey v. Orange Memorial Hospital* (1917) — N. J. Eq. —, 102 Atl. 7.

New York.—*Re Kleeman* (1908) 61 Misc. 560, 115 N. Y. Supp. 982.

North Carolina.—*Whitehurst v. Pritchard* (1810) 5 N. C. (1 Murph.) 383; *Bryant v. Scott* (1835) 21 N. C. (1 Dev. & B. Eq.) 155, 28 Am. Dec. 590; *Cheeves v. Bell* (1854) 54 N. C. (1 Jones, Eq.) 234.

Pennsylvania.—*Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361 (in which it is said, however, that in Pennsylvania the existence of the rule has been seriously questioned, and that it has been more frequently disregarded than followed); *Garnier v. Garnier* (1919) 265 Pa. 175, 108 Atl. 595; *Peale's Estate* (1876) 11 Phila. 147.

Rhode Island.—*Guild v. Allen* (1907) 28 R. I. 430, 67 Atl. 855; *Perry v. Brown* (1912) 34 R. I. 203, 83 Atl. 8 (obiter).

South Carolina.—*Cole v. Creyon* (1833) 10 S. C. Eq. (1 Hill) 311, 26 Am. Dec. 208; *Conner v. Johnson* (1834) 11 S. C. Eq. (2 Hill) 41 (obiter); *Perdriau v. Wells* (1851) 26 S. C. Eq. (5 Rich.) 20; *Dupont v. Hutchinson* (1858) 31 S. C. Eq. (10 Rich.) 1.

Tennessee.—*Kimbro v. Johnston* (1885) 15 Lea, 78.

Virginia.—*Crow v. Crow* (1829) 1 Leigh, 74 (obiter); *Hoxton v. Griffith* (1868) 18 Gratt. 574; *Whittle v. Whittle* (1908) 108 Va. 22, 60 S. E. 748; *Perdue v. Starkey* (1915) 117 Va. 806, 86 S. E. 158, Ann. Cas. 1916C, 409.

West Virginia.—*Collins v. Feather* (1902) 52 W. Va. 107, 61 L.R.A. 660, 94 Am. St. Rep. 912, 43 S. E. 323.

England.—*Rickabe v. Garwood* (1845) 8 Beav. 579, 50 Eng. Reprint, 228; *Kekewich v. Barker* (1903) 88 L. T. N. S. 130; *Butler v. Stratton* (1791) 3 Bro. Ch. 367, 29 Eng. Reprint, 587; *Lugar v. Harman* (1786) 1 Cox, Ch. Cas. 250, 29 Eng. Reprint, 1151, *Dowding v. Smith* (1841) 3 Beav. 541, 49 Eng. Reprint, 213, 10 L. J. Ch. N. S. 235; *Brett v. Horton* (1841) 4 Beav. 239, 49 Eng. Reprint, 331, 10 L. J. Ch. N. S. 371, 5 Jur. 696; *Re Harper* [1914] 1 Ch. 70, 83 L. J. Ch. N. S. 157, 109 L. T. N. S. 925, 58 Sol. Jo. 120.

Canada.—*Re Elliott* (1920) 19 Ont. Week. N. 168.

Contra: *Fraser v. Dillon* (1887) 78 Ga. 474, 3 S. E. 695.

This construction is supported by language in the will importing equality of division. See the following cases:

Illinois.—*Pitney v. Brown* (1867) 44 Ill. 363.

Kansas.—*Neil v. Stuart* (1918) 102 Kan. 242, 169 Pac. 1138.

Kentucky.—*Armstrong v. Crutchfield* (1912) 150 Ky. 641, 150 S. W. 835.

Massachusetts.—*Leslie v. Wilder* (1917) 228 Mass. 343, 117 N. E. 343.

Michigan.—*Van Gallow v. Brandt* (1912) 168 Mich. 642, 134 N. W. 1018.

North Carolina.—*Bryant v. Scott* (1835) 21 N. C. (1 Dev. & B. Eq.) 155, 28 Am. Dec. 590; *Culp v. Lee* (1891) 109 N. C. 675, 14 S. E. 74; *Johnston v. Knight* (1895) 117 N. C. 122, 23 S. E. 92.

Pennsylvania.—*Garnier v. Garnier* (1919) 265 Pa. 175, 108 Atl. 595.

Texas.—*Ladd v. Whittedge* (1918) — Tex. Civ. App. —, 205 S. W. 463.

Virginia.—*McMaster v. McMaster* (1853) 10 Gratt. 275.

England.—*Dowding v. Smith* (1841) 3 Beav. 541, 49 Eng. Reprint, 213, 10 L. J. Ch. N. S. 235; *Rickabe v. Garwood* (1845) 8 Beav. 579, 50 Eng. Reprint, 228.

Canada.—*Re Harper* [1914] 1 Ch. 70, 83 L. J. Ch. N. S. 157, 109 L. T. N. S. 925, 50 Sol. Jo. 120; *Re Walmsley* (1916) 11 Ont. Week. N. 124.

Such language, however, does not necessarily require per capita division. See II. *supra*.

A difference in the degree of kinship will not prevent the application of the general rule that, under a gift to A and the children of B, the persons entitled are to take per capita. *Farmer v. Kimball* (1866) 46 N. H. 435, 88 Am. Dec. 219; *Wessenger v. Hunt* (1856) 30 S. C. Eq. (9 Rich.) 459.

But the rule is inapplicable where the title of the devisees is to accrue at different times. *Cole v. Creyon* (1833) 10 S. C. Eq. (1 Hill) 311, 26 Am. Dec. 208.

It has been held that it does not apply where the bequest is not to the "children," but to the "heirs" of B. *Roome v. Counter* (1821) 6 N. J. L. 111, 10 Am. Dec. 390.

This exception does not, of course, apply where the word "heirs" is used as meaning "children." See *McCartney v. Osburn* (1886) 118 Ill. 403, 9 N. E. 210; *Whitthurst v. Pritchard* (1810) 5 N. C. (1 Murph.) 383; *Burgin v. Patton* (1860) 58 N. C. (5 Jones, Eq.) 425; *Grandy v. Sawyer* (1866) 62 N. C. (Phill. Eq.) 8; *Farley v. Farley* (1908) 121 Tenn. 324, 115 S. W. 921.

This rule readily yields to the implication of a different intention from the context.

Georgia.—*Almand v. Whitaker* (1901) 113 Ga. 889, 39 S. E. 395.

Illinois.—*McCartney v. Osburn* (1886) 118 Ill. 403, 9 N. E. 210.

New Jersey.—*Burnet v. Burnet* (1879) 30 N. J. Eq. 595.

New York.—*Clark v. Lynch* (1866) 46 Barb. 68; *Re Kleeman* (1908) 61 Misc. 560, 115 N. Y. Supp. 982.

North Carolina.—*Roper v. Roper* (1859) 58 N. C. (5 Jones, Eq.) 16, 75 Am. Dec. 427.

Pennsylvania.—*Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361.

Virginia.—*Hoxton v. Griffith* (1868) 18 Gratt. 574.

England.—*Brett v. Horton* (1841) 4 Beav. 239, 49 Eng. Reprint, 331, 10 L. J. Ch. N. S. 371, 5 Jur. 696.

In *Re Kleeman* (N. Y.) *supra*, it was said by a surrogate that the doctrine that a faint glimpse of a different intention manifested in the will displaces the rule that a devise to one person named, and to others indicated

generally as children of another person, is a disposition per capita, does not mean that a stray glimmer of the contrary intention from one corner of the will shall supply the only light under which construction shall proceed; but that the will must be read in all the light which its contents may yield, and only when the reluctant ray, however faint, reveals any intention to provide for a per stirpes distribution, is the general rule displaced.

In *Raymond v. Hillhouse* (1878) 45 Conn. 467, 29 Am. Rep. 688, it is said that the English rule that referring to children is the same as if they were individually named in the will is, in view of the exceptions which so easily set it aside, of little practical importance.

For instances in which the rule was overcome by the context, see:

Massachusetts.—*Leland v. Adams* (1866) 12 Allen, 286.

Kentucky.—*Bethel v. Major* (1902) 24 Ky. L. Rep. 398, 69 S. W. 637.

Missouri.—*Rixey v. Stuckey* (1895) 129 Mo. 377, 31 S. W. 770.

New York.—*Rushmore v. Rushmore* (1891) 59 Hun, 615, 12 N. Y. Supp. 776 (mem.).

Pennsylvania.—*Kenworthy's Estate* (1898) 19 Pa. Dist. R. 986.

South Carolina.—*Cole v. Creyon* (1833) 10 S. C. Eq. (1 Hill) 311; *Conner v. Johnson* (1834) 11 S. C. Eq. (2 Hill) 41.

Virginia.—*Hoxton v. Griffith* (1868) 18 Gratt. 574.

England.—*Brett v. Horton* (1841) 4 Beav. 239, 49 Eng. Reprint, 331, 10 L. J. Ch. N. S. 371, 5 Jur. 696.

Review of the decisions.

In *Smith v. Ashurst* (1859) 34 Ala. 210, where testator directed his residuary estate to be converted into cash, and the whole amount "equally divided pro rata between my niece, Frances Ellen Johnson, and the children of my brother, Richard C. Coker," it was held that the legatees constituted a single class, and therefore that distribution must be per capita, and not per stirpes.

In *Pitney v. Brown* (1867) 44 Ill. 363, where testator directed the balance, after the payment of lega-

cies, of the fund arising out of the sale of his real and personal estate, to "be equally divided between the children of my late brother Mahlon Pitney and my brother-in-law William H. Brown . . . a large portion of my property having been received through his father and the father of my late wife," it was held that the reference to the fact that a large portion of the testator's property came from the father of William H. Brown was only for the purpose of giving a reason for making Brown a legatee, and not as indicating the extent of the legacy, and therefore that the three children of Mahlon Pitney took, per capita, each an equal share with William H. Brown.

In *Neil v. Stuart* (1918) 102 Kan. 242, 169 Pac. 1138, testatrix, who died leaving a husband but no children, and brothers and sisters who had children, and one sister who had none, devised all her property to her husband for life, and provided that at his death it should be sold "and divided as follows: Among my brothers' and sister's children and David R. Neil, and Andrew Neil, also Lulu Keith, equally." David R. Neil and Andrew Neil were nephews of her husband and had lived in her home in early life, her husband having been their guardian. Lulu Keith was a stepdaughter of the sister who had no children. It was held that the natural and only proper construction to be given to the language used was that the nephews and nieces of the testatrix were intended to share equally with the three other devisees, all taking per capita; and that such construction was confirmed by the circumstances, which failed to show that she wanted one of the nephews or nieces to have a greater or lesser share than any other.

In *Bethel v. Major* (1902) 24 Ky. L. Rep. 398, 68 S. W. 631, where testator provided that, in the event of the death of a devisee without heirs of his body, the property should "go and pass equally to John S. McAllister, son of brother William McAllister, and to Laura J. Barnett and the children of Maria H. Bethel," and

the children of Maria Bethel were mentioned elsewhere throughout the will as a class, it was held that they took as such under the provision above quoted.

In *Armstrong v. Crutchfield* (1912) 150 Ky. 641, 150 S. W. 835, which involved the following bequest: "I wish equally divided between my niece Jane Crutchfield, James Davenport (son of my nephew Jas. Davenport, Dec'd.) John Xavier and Bettie Xavier (son and daughter of my sister Agnes) Ben Crutchfield (son of my brother Richard) and the children of D. A. Russell by his wife Susan," it was held that in view of the direction for equal division, taken in connection with the circumstance that the persons named in the clause of the will were his nephews, nieces, grandnephews and grandnieces, and that some of the persons named as parents had other children to whom no property was devised by the will, it was not the testator's intention to devise the property to the children of D. A. Russell as a class, but that they took per capita, and not per stirpes.

In *Justice v. Stringer* (1914) 160 Ky. 354, 169 S. W. 836, testator devised to his sister all his property for life, and directed that after her death "an equal division be made of all the property . . . between Sarah Jane Stringer and Icy Ann Yates wife of Bud Yates (as is best known) and to George Graves's three daughters, my sister Leathy's children." Each of the five devisees were nieces of the testator, two being daughters of a deceased brother and the other three the daughters of a deceased sister. The court held the case to be one for the application of the rule that, under a gift to A and the children of B, the latter take per capita.

In *Leland v. Adams* (1866) 12 Allen (Mass.) 286, under a will by which testator directed certain property "to be divided between my grandchildren, viz.: Elizabeth C. Adams and the children of my sons John, George, and Joseph T., in equal proportions," adding, "Should either of said grandchildren have deceased at

that time the part that would have come to him or her, had they lived, to go to the others of the same family, if living; if not, to their parents," it was contended that the division should be per capita; but the court said that the answer to such contention was that "the division is to be 'in equal proportions,' and this is inconsistent with the scheme of division per capita in case some of the grandchildren should die. For example, if a part of John's six children should die, the surviving ones would take a larger proportion than the other grandchildren, and thus the proportions would be unequal. This inconsistency with the idea of a gift per capita indicates an intention to give per stirpes."

In *Leslie v. Wilder* (1917) 228 Mass. 343, 117 N. E. 343, where testatrix directed her residuary estate to be "divided in equal shares between Willie Wilder, the children of Ella Roper Philips and the children of the late George S. Roper, share and share alike," it was held that it was clearly the intention of the testatrix that the legatees should take per capita.

In *Van Gallow v. Brandt* (1912) 168 Mich. 642, 134 N. W. 1018, where testator, who had never married, devised certain real estate "to Charles Van Gallow, Joseph Van Gallow [who were the children of a deceased sister of testator], and the children of my sister Mary Peree Brandt," who was living, and also gave his residuary estate "in equal shares, share and share alike, to Charles Van Gallow, Joseph Van Gallow, and to the children of my sister, Mary Peree Brandt (being my nephews and nieces)," it was held that while the two sons of the deceased sister were named and the other beneficiaries were described as "children of" the other sister, yet as they were all collectively designated as "my nephews and nieces," and the property was bequeathed and devised to them "in equal shares, share and share alike," and as extraneous evidence showed that the deceased was on equally friendly terms with all his nieces and nephews when he made his will, the

children of Mrs. Brandt took per capita, and not per stirpes.

In *Rixey v. Stuckey* (1895) 129 Mo. 377, 31 S. W. 770, where testator, by a will written by himself, gave his residuary estate "to the persons and children of the persons herein named, to be divided between them share and share alike, to wit: The children of my wife's nephew, Edward T. Jones, of Virginia, one share; the children of my wife's brother, Thompson T. Jones, one share; the children of my sister, Margaret Fletcher, of Virginia, and the children of my sister, Achsah Settle, Joseph D. Settle, Jessie P. Settle, Charles Settle, Betty Styne, and Lucy Stuckey, children of my sister Achsah Settle, one share each," it was held that as testator by this clause evidently intended to divide the remainder of his estate equally between certain of his own relatives and those of his wife, who did not dwell in his mind particularly as individuals, but as classes, the children of Achsah Settle took one share as a class, and not one share each as individuals, notwithstanding implications to the contrary to be drawn from some of the expressions used by the testator.

In *Silsby v. Sawyer* (1888) 64 N. H. 580, 15 Atl. 601, where testatrix, who had given a legacy to a brother "for the use of his family," one to the widow of a brother, and one "to the family" of another deceased brother, directed the residue to be sold and the proceeds "divided between my brother John D. Sawyer's family and Mary J. Miller," it was held that, although the testatrix's meaning was in doubt, the whole will, taken together, showed a balance of probability in favor of her intention to give one half of the residue to Mary J. Miller and the other half to the children of John D. Sawyer, instead of dividing it per capita.

In *Burnet v. Burnet* (1879) 30 N. J. Eq. 595, it was held that there was nothing in a will by which the testator provided that, if anything should remain after paying legacies and expenses, her executor should "divide it between the children of Joseph H.

Burnet and Benjamin F. Howell," to take the case out of the rule that, under a bequest to A and the children of B, the donees take per capita, and not per stirpes.

In *Bailey v. Orange Memorial Hospital* (1917) — N. J. Eq. —, 102 Atl. 7, the rule that, under a gift to one and the children of another, the persons entitled take per capita, was applied to a residuary gift in equal shares to certain named persons, "and the four children of" another.

In *Re Turner* (1913) 208 N. Y. 261, 101 N. E. 905, Ann. Cas. 1914D, 245, affirming on this point (1912) 152 App. Div. 231, 136 N. Y. Supp. 512, construing the following testamentary provision: "All the rest, residue, and reversion of my estate, both real and personal, I give, devise and bequeath as follows: To my nephew, Byron J. Tillman of Buffalo, N. Y., one share; to my niece, Grace Joy of Boise, Idaho, one share; and to each of the children of my brother, George Turner, one share, to be divided equally among my said nieces and nephews share and share alike. I direct that the share of any dying with issue surviving shall be paid to such issue, and that the share of any dying without issue surviving shall be equally divided among the survivors," it was held that notwithstanding extrinsic evidence in reference to the knowledge of the testator concerning his several relatives, and notably his lack of knowledge concerning the children of his brother George, created a doubt, the presence of the word "each," in the bequest to "each of the children of my brother," operated to individualize the children of the brother, and accordingly that they took per capita, and not as a class.

In *Rushmore v. Rushmore* (1891) 59 Hun, 615, 35 N. Y. S. R. 845, 12 N. Y. Supp. 776, where testator who, by his will, had given his residuary estate "to my nephew John Rushmore" and other persons named, to be divided equally between them, share and share alike, by codicil directed "that the children of my niece, Helen Adams, have an equal share with my nephew John W. Rushmore and others

therein mentioned, to have and to hold the same, their heirs and assigns, forever, to be divided equally between them, share and share alike," it was held that such children took as a class, and not as individuals.

In *Bryant v. Scott* (1835) 21 N. C. (1 Dev. & B. Eq.) 155, 28 Am. Dec. 590, where testator directed his property to be sold and the proceeds "equally divided among the persons hereafter named [naming certain persons], and the children of my deceased son James and the children of my son William," it was held that, having regard both to the rule that, under a gift to A and the children of B, the legatees take per capita, and the direction in the will for an equal division among all the donees, the children of the persons named took per capita with the other legatees.

In *Cheeves v. Bell* (1854) 54 N. C. (1 Jones, Eq.) 234, which involved the following testamentary division; "I bequeath that after my death, that my negroes, land, and every species of my property be sold, and after my honest debts have been paid, the balance be divided among my heirs as my will directs. First, I give to my daughter Sarah Bell, Nancy Hightower and heirs, Simon Williams, four children (Wilson, Anne, Craven, and Mary) Marmaduke Williams. I give unto my beloved grandson Henry Carter, his mother's part of my estate. Margaret Cheeves. Rebecca Hopkins part I give unto her four children, and lastly, I give unto Obedience Dolvin one hundred dollars," it was held that the expression in the first clause that "the balance be divided among my heirs" was not sufficient to exclude the application of the general rule that, under a gift to A and the children of B, the children of B take per capita; and therefore that the children of Simon Williams took per capita; and that such construction was supported by the circumstance that the testator showed that he knew how to give the share of a child to his or her children, as in the case of his grandson, Henry Carter, and the children of Rebecca Hopkins.

In *Culp v. Lee* (1891) 109 N. C. 675,

14 S. E. 74, it was held that a direction in a residuary clause that the "surplus shall be equally divided and paid over to Philip J. Russell, Miss Mary Russell, and the children of my niece Martha, wife of Charles Stanford, in equal portions share and share alike," was, in view of the direction that they should take in equal portions, properly construed as a devise per capita, and not one to the children of Martha Stanford per stirpes as a class.

In *Johnston v. Knight* (1895) 117 N. C. 122, 23 S. E. 92, a direction "that the balance of my estate be equally divided between [certain persons named] and the children of [certain other persons] was held, in view of the use of the words "equally divided," to require a division per capita.

In *Marsh v. Dellinger* (1900) 127 N. C. 360, 37 S. E. 494, where testatrix directed that certain property be sold and the proceeds "be equally divided between my children Mary C. Bynum, James C. Marsh, Henry F. Marsh, Sarah Rachel Dellinger's two children, Marsh and Chester, and Annie M. Kritz," it was held that as the will not only put the children of Sarah Dellinger into one class with the others, but named them by name, they were entitled to take per capita.

In *Garnier v. Garnier* (1919) 265 Pa. 175, 108 Atl. 595, a will provided: "I will, bequeath, and devise, divided into equal parts, . . . the rest, residue, and remainder of my estate . . . to and unto my father's great-grandson, Lafayette Adrian Garnier if living at the time of my death, and to and unto the children of Janetta Laing Macafee, to him and to them, and to his and their heirs and assigns forever." It was held that the persons entitled took per capita, the court saying: "When we look at this will we must bear in mind that Lafayette Adrian Garnier was really referred to as if he were a stranger to the testatrix. In the third clause of her will she said: 'I have but one heir, my only brother Lafayette of eastern Pennsylvania.' Adrian, as a matter of fact, was only her grandnephew. As admitted in the case stated, the children of Janetta Laing Macafee

are not related in any way to the testatrix. In our judgment, when, the testatrix said, 'I will, bequeath and devise, divided into equal parts,' there is no room for any doubt as to what she meant. She knew that Adrian was alive, and she knew that the children of Janetta Laing Macafee were alive, and she wanted them to have each an equal part."

In *Peale's Estate* (1876) 11 Phila. (Pa.) 147, where testator gave the principal of a fund to and among a great-niece, naming her, and the children of a person named, his great nieces and nephews, share and share alike, it was held that, considering the fact that the person named and the children of the other person were all in the same degree of relationship to the testator, and there being nothing in the will to indicate that he meant to be more bountiful to one than to the others, it was presumably his intention that they should share equally.

In *Kenworthy's Estate* (1898) 19 Pa. Dist. R. 986, where testator gave his residuary estate in trust to divide the income equally between his two brothers, Charles and Joseph, and directed that, at the death of his said brothers, the principal should be divided between a son of his brother James, naming him, and the "children" of his brother Joseph, share and share alike, it was held that, although the case was a close one, yet there was nothing to indicate that the testator did not use the word "between" except for its proper purpose,—that is, to indicate a division in classes, to which the words "share and share alike," might be referred, as well as to a division among all the beneficiaries,—the children of Joseph took as a class, and not per capita.

In *Cutler v. Ritchie* (1904) 21 Lanc. L. Rev. (Pa.) 331, where testator gave a share of his estate "to the children of my deceased sister (Mrs. Rineer) and Erastus Ritchie, share and share alike,"—Erastus Ritchie being a son of a deceased sister of the testator,—it was held that, as all the beneficiaries stood in the same relation to the testator, they should take per capita.

In *Cole v. Creyon* (1833) 10 S. C. Eq. (1 Hill) 311, testator, after giving all his property to his wife for life, and giving two small legacies, directed his residuary estate to be "equally divided between Henry and Elizabeth Cole's children, and Alexander Creyon . . . to be retained in the hands of my executors and executrix until the age of twenty-one years, or days of marriage, which shall first happen; then to be made over to them lawfully, each legatee receiving their just quota of the same." Elizabeth Cole was a niece and Alexander Creyon the son of a niece of the testator. It was held that as Alexander Creyon was a person ascertained and in being, while who the children of Elizabeth Cole should be at the death of the testator's widow was uncertain and unascertained, the bequest should be considered as being one half to Alexander Creyon, and the other half to the children of Elizabeth Cole.

In *Conner v. Johnson* (1834) 11 S. C. Eq. (2 Hill) 41, where testator directed that, after the death of his wife, certain property should "be equally divided between David Rees, and Daniel and Jacob Utesy, son of Jacob Utesy and David, and Isaac, and Ann Utesy, children of George Utesy, and Jacob Carn and the children of Elizabeth Carn (afterwards Elizabeth Rhode and now Elizabeth Conner), children and grandchildren of Frederick Carn;" adding: "And whereas, I have made four different parts of families my heirs, my will and desire is that if any of them should die without issue, then, and in that case, his or her share shall be equally divided between my adopted heirs of the same family," it was held that as the persons described as the "children of Elizabeth Carn" could not be ascertained till the death of the tenant for life, they took as a class a share equal to that of each of the ascertained individuals, and no more.

In *Perdriau v. Wells* (1851) 26 S. C. Eq. (5 Rich.) 20, where testator gave certain property to his wife during her life, and at her death directed one half to be sold and "the proceeds . . . divided between Ann M. China, wife of John China, Jr., the children of my

deceased brother, Peter Perdriau, and also the children of my sister, Hester Wells, alive at the death of my wife, share and share alike for and during the term of their natural lives, and after their death to their respective children," it was held that as at the death of the testator the two parents referred to were both dead, and their children were then so ascertained that no additions could be made to their number, and as all the parties were put on the same footing, and to share and share alike, the legatees must take each an equal share.

In *Dupont v. Hutchinson* (1858) 31 S. C. Eq. (10 Rich.) 1, where testator gave to each of his daughters certain property for life with remainder to the children of each, and further provided "that, should either of my daughters die leaving neither child nor children, then the estate bequeathed to her for life shall descend to the child or children of my other daughter, and my son Edward Louis Hutchinson, their heirs and assigns forever," it was held that the testator could not have intended the equivocal word "descend" to have the technical meaning of "proceed to the heir," and that the case was within the rule that, under a gift to A and the children of B, the beneficiaries take per capita.

In *Ladd v. Whitledge* (1918) — Tex. Civ. App. —, 205 S. W. 463, where testatrix devised certain lands "to Fanny G. Whitledge and to the living children of Daniel Avery, deceased, or their heirs, said Fanny G. Whitledge and said children to share alike in equal proportional parts," the latter direction was construed as meaning that Fanny G. Whitledge and the living children of Daniel Avery should each take one fifth, and that the heirs of Daniel Avery's deceased children should inherit per stirpes.

In *McMaster v. McMaster* (1853) 10 Gratt. (Va.) 275, where testator gave "to the children of Arthur McMaster and David McMaster, and to Robert B. McKee McMaster, all the funds remaining after every just claim against my estate has been satisfied, to be equally divided between

them," it was held to be perfectly obvious that the testator was dividing the residuum between individual legatees, and not between classes, and that their respective interests were determined by the direction that the bounty should be "equally divided between them."

In *Hoxton v. Griffith* (1868) 18 Gratt. (Va.) 574, testatrix devised certain realty "to be equally divided between my nephew D. Colville Griffith and the children of" a niece, naming them. It appeared that the nephew and niece had been brought up by the testatrix, who regarded them with equal affection, and that the niece was dead at the time the will was made. The will also provided that, if any of the children of the niece should "die without heirs, the property left them shall be divided among the survivors." It also provided that, if the testatrix should survive the nephew, "the property left him shall be equally divided between his three children;" and also that, if a claim of the testatrix on the government for certain property destroyed should be recovered, it should be equally divided between the nephew and the "surviving children" of the niece. It was held that the provision giving the share of the nephew in event of his death to his children, treating them as a class representing their father, and the provision that, should any of the children of the niece die without heirs, the property left them should be divided among the survivors,—which would be unreasonable and unjust if individual equality between the nephew and the several children of the niece was the object,—afforded satisfactory evidence that, in the clause under construction, the children of the niece, though enumerated as individuals, were designed to take as a class representing their mother.

In *Dowding v. Smith* (1841) 3 Beav. 541, 49 Eng. Reprint, 213, 10 L. J. Ch. N. S. 235, construing a bequest "to my niece Miss Mary Stockdale, . . . and to the children of Mr. John Stockdale, to be equally

divided," it was held that the division must be per capita.

In *Brett v. Horton* (1841) 4 Beav. 239, 49 Eng. Reprint, 331, 10 L. J. Ch. N. S. 371, 5 Jur. 696, testatrix directed her trustees to divide the rents of her real estate equally between A, B, C, and D (the widow of E) until E's children should attain twenty-one, upon which event she directed her trustees to sell the property and pay and apply the proceeds unto and equally between A, B, C, and the children of E, "in equal shares and proportions as tenants in common," and further provided that if E's widow should marry, her part of the income should be applied to the maintenance of E's children. She also gave the residue of her estate "equally between A, B, C, and the children of E who should live to attain twenty-one. It was held that as it could not have been the intention of the testatrix that the other legatees were to take one fourth each until the children attained twenty-one, and a lesser share after that time, the children took as a class, and not per capita with the other legatees.

In *Rickabe v. Garwood* (1845) 8 Beav. 579, 50 Eng. Reprint, 228, where testatrix gave a legacy in trust for a certain person for life, with remainder to another for life, and after the death of the survivor upon trust to pay the same "to, between, or amongst Esther Pye the wife of Richard if she should be then living, but if she should be then dead, to, between, and amongst the children of the said Esther Pye and the children of the said Thomas Rickabe lawfully to be begotten who should be then living, equally to be divided between or among them share and share alike, if there should be more than one; and if there should be but one such child, the whole to be paid or transferred to such one child," it was held that as the words "to, between, and amongst," which were repeated the second time in this bequest, implied a distribution, and as such distribution was to be made between Esther Pye, if living, and the children of Thomas Rickabe, equally, they took per capita.

In *Kekewich v. Barker* (1903) 88 L. T. N. S. (Eng.) 130, reversing (1902) 86 L. T. N. S. 129, it was held that a bequest of residuary estate in trust for two certain persons "and the children now living" of a third, who should attain the age of twenty-one, or, if females, marry, was a gift to persons exactly as if they were named, and accordingly that the children of the third person took per capita.

In *Re Harper* [1914] 1 Ch. (Eng.) 70, 83 L. J. Ch. N. S. 157, 109 L. T. N. S. 925, 58 Sol. Jo. 120, where testatrix gave her residuary estate in trust to pay the income to a sister for life and after her death gave a moiety thereof "to be divided equally between the unmarried daughters of my brother-in-law Dr. J. Harper and Dr. Alexander Smeaton Grant equally,"—Dr. Grant being a medical man to whom the testatrix was indebted for kindnesses,—it was held that notwithstanding the use of the word "between," and of the word "equally" following the name of the last legatee, the probabilities were in favor of a construction which would give the unmarried daughters of the brother-in-law and Dr. Grant equal shares.

In *Re Puley* (1915) 8 Ont. Week. N. 306, affirming (1915) 8 Ont. Week. N. 42, where testator directed that at the death of his widow the whole of his real estate should be converted into money, and placed with the money previously invested, "and the sum total shall be equally divided between my adopted daughter, Mary Ann, and the children of my whole sisters, Mary Williams and Betsey James," it was held, having regard to the circumstances appearing from the will, that when the testator directed that the fund should be equally divided between the adopted daughter whom he loved, and a class numbering not less than twelve or thirteen individuals, he intended precisely what his words in strictness expressed, an equal division between the daughter and the class.

In *Re Walmsley* (1916) 11 Ont. Week. N. 124, where a testator gave a sum of money in trust for his half

brother during his life, and upon his decease "to divide and distribute the said principal sum equally between and among the children of my said half brother, namely, Joseph, Donald, and Annie, and the daughters of Mrs. Nellie Peterman, one equal share to each child. Should any of the said daughters die before attaining the age of twenty-one years, without leaving issue her surviving, her share is to go to her surviving sisters equally. The child or children of any deceased child are to receive the share which the deceased parent would have received if living," it was held that as the testator himself had said "one equal share to each child," and as the provision for a substituted gift in the event of a child dying and leaving issue was intended to apply to all, the beneficiaries took per capita; and that the provision that, in event any of the daughters of Mrs. Peterman should die under age without issue, her share should go to her surviving sisters, was not in conflict with this construction.

In *Re Elliott* (1920) 19 Ont. Week. N. 168, where testator directed that the residue of his estate should be "divided" equally among the following respective persons, Dr. H. P. Elliott, the surviving children of the late Mrs. L. Kirby, of Swansea, Wales, each child to receive his or her share on attaining the age of twenty-one years, the surviving children of the late Robert J. Elliott, Helen Shearing, Ruth Shearing, John Shearing, Jr., the last three persons being the children of the said John Shearing, Edith Crasknell, and John Shearing, Sr., it was held that division was to be made per capita.

p. Under a bequest to one and the "heirs" of another.

For instances of bequests to the "heirs" of the testator or of some other person, see III. a, *supra*.

For instances of bequests to the "heirs" of two or more persons, see III. n, *supra*.

For instances of bequests to persons living and the "heirs" of any deceased, see III. v, *infra*.

It has been held that where a bequest is made to A and the "heirs of"

B, and the word "heirs" is not to be construed as meaning simply "children," the persons described by the term "heirs" will take per stirpes, and not individually per capita. See *Billinslea v. Abercrombie* (1832) 2 Stew. & P. (Ala.) 24; *Balcom v. Haynes* (1867) 14 Allen (Mass.) 204; *Perkins v. Stearns* (1895) 163 Mass. 247, 39 N. E. 1016; *Clark v. Lynch* (1866) 46 Barb. (N. Y.) 68; *Stowe v. Ward* (1826) 12 N. C. (1 Dev. L.) 67; *Ricks v. Williams* (1826) 16 N. C. (1 Dev. Eq.) 8; *Jourdan v. Green* (1828) 16 N. C. (1 Dev. Eq.) 270; *Spivey v. Spivey* (1841) 37 N. C. (2 Ired. Eq.) 100; *Bivens v. Phifer* (1855) 47 N. C. (2 Jones, L.) 436; *Grandy v. Sawyer* (1866) 62 N. C. (Phill. Eq.) 8; *Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361; *Farley v. Farley* (1908) 121 Tenn. 324, 115 S. W. 921.

In *Re Griswold* (1903) 42 Misc. 230, 86 N. Y. Supp. 260, it is said that a gift to a person described as standing in a certain relation to the testator, and to the heirs of another person standing in the same relation to him, imports an intention upon the part of the testator that the persons named and described shall take per stirpes.

In a number of instances, in most of which the term "heirs" was probably used as meaning "children," although it is not always so stated, the persons thus designated were held to take per capita. See *McCartney v. Osburn* (1886) 118 Ill. 403, 9 N. E. 210; *Bunner v. Storm* (1844) 1 Sandf. Ch. (N. Y.) 357; *Myres v. Myres* (1862) 23 How. Pr. (N. Y.) 410; *Whitehurst v. Pritchard* (1810) 5 N. C. (1 Murph.) 383; *Wood v. Armour* (1866) 12 Ont. Rep. 146.

Review of the decisions.

In *Billinslea v. Abercrombie* (1832) 2 Stew. & P. (Ala.) 24, where testator gave the residue of his estate "to my children, to wit [naming his living children], and also to the heirs and legal representatives of my daughter Elizabeth Billinslea, deceased, to be equally divided among each," it was held that the children of his daughter Elizabeth took, not per capita, but per stirpes, the words "to be equally divided among each," having reference

only to the distribution of the share of the daughter Elizabeth.

In *McCartney v. Osburn* (1886) 118 Ill. 403, 9 N. E. 210, where testator, whose heirs were a daughter, Henrietta, and a grandson, Harry G. McCartney, son of a deceased daughter, gave certain real estate to the daughter and a sum of money to the grandson equal to the value of the real estate devised to the daughter, and directed the remainder of his estate "to be equally divided between the heirs of the said Henrietta that may be living at the time of said division, and the said Harry G. McCartney, each to share and share alike," it was held that the fact that the testator in his will had characterized his grandson Harry as the "heir" of his deceased mother, and the fact that he gave him a legacy equal in value to the property devised to the daughter, were not sufficient to justify a departure from the general rule that, where a gift is made to A and the children of B, the parties entitled will take per capita.

But in *Osburn's Appeal* (1884) 104 Pa. 637, construing the same will, it was held that a careful consideration of the words used, and of the manifest spirit of the whole will, showed that the testator intended a per stirpes distribution between the children of Henrietta and the son of his deceased daughter.

In *Prather v. Watson* (1920) 187 Ky. 709, 220 S. W. 532, testator directed his land to be sold and the proceeds "to be divided equally between E. C. Watson and Sheffie Bridges and my two grandchildren, Sheffie Watson and Shafter Watson, Walter's heirs,"—E. C. Watson and Sheffie Bridges being testator's only surviving children, and Walter being a deceased son,—and also directed the personal property to be sold "and the proceeds divided equally between E. C. Watson and Sheffie Bridges and my two grandchildren, Sheffie Watson and Shafter Watson." It was held to be clearly the testator's intention that his two grandchildren should receive the portion of the property devised by those two clauses which their father, Wal-

ter Watson, would have taken as an heir of the testator, the court saying: "The will first names E. C. Watson as the taker of one division of the property, 'and Sheffie Bridges' as the taker of another division, and in naming those who should constitute the third group in the division he says, 'and my two grandchildren,' naming them, and then adds, 'Walter's heirs.' Evidently he intended to include in the last group or class among which his property should be divided his grandchildren collectively, which is evidenced by the words 'my two grandchildren,' as composing that group or class. This construction is fortified by the additional words 'Walter's heirs,' indicating that the testator intended his two grandchildren to represent, in sharing the devise, their father, Walter. This view is further strengthened by the rule, *supra*, that in using the word 'heir' in his will the testator intended it to have its ordinary and usual meaning. There is nothing in the will to indicate a contrary intention. Viewed in this light, it is evident that the testator intended for his two grandchildren to take under the will what they would have inherited from their father, had he been the devisee and died intestate."

In *Balcom v. Haynes* (1867) 14 Allen (Mass.) 204, where the testator, who had given a pecuniary legacy "to the heirs of my sister Lydia," gave his residuary estate to his brothers, naming them, and his sisters, naming them, "and the heirs of Lydia," to be divided in equal shares between them, it was held that the residuary bequest to the heirs of Lydia was to them as a class, and not as individuals, and accordingly that the division must be per stirpes rather than per capita.

In *Perkins v. Stearns* (1895) 163 Mass. 247, 39 N. E. 1016, it was held, construing a bequest of income to be "equally divided between the heirs of my mother . . . and my said wife," that the heirs of the mother took per stirpes as a class, and not per capita.

In *Roome v. Counter* (1821) 6 N. J. L. 111, 10 Am. Dec. 390, where a testator, having at the date of his will four daughters living, a living son,

and children of a deceased son, Peter, after making provision for all these surviving children, and having also given the plantation on which the deceased son had lived in his lifetime to two of the sons of Peter, directed the remainder of his personal property to be equally divided among his living children, naming them, "and the heirs of my son Peter," it was held, distinguishing the English case of *Blackler v. Webb* (1726) 2 P. Wms. 383, 24 Eng. Reprint, 777, that as Peter was dead before the making of the will, and as the bequest was not to the "children of Peter," but to his "heirs," "a term which always carries with it the idea of representation," the children of Peter took per stirpes as the representatives of their father.

In *Bunner v. Storm* (1844) 1 Sandf. Ch. (N. Y.) 357, where testator, after reciting the death of his daughter Ann, and the fact that had she survived him she would have been "entitled to one seventh part of my estate equal with my other children and heirs," went on to provide that "said seventh part, last named after the deductions agreeable to this my will shall have been made, . . . shall be equally divided among my three daughters Elizabeth, Mary, and Catherine, and the heirs of my deceased daughter Hester, viz., Thomas S. Bunner and Charles F. Bunner," it was held that there was nothing to show that the children of the daughter were to take otherwise than as individuals, and hence per capita, the court remarking that "the argument upon the language of the bequest (leaving out of view what we may conjecture as to motives and intention) is as strong in favor of restricting the three daughters to one half, as a class, as it is for restricting the two grandsons in the same manner to one fourth."

In *Myres v. Myres* (1862) 23 How. Pr. (N. Y.) 410, construing the following testamentary provisions: "I give, devise, and bequeath unto my son Thomas M. Myres, and the heirs of my son Melancthon W. Myres, and their heirs forever, all the rest and residue of my real and personal prop-

erty of whatever name, to be equally divided between my son Thomas M. Myres and the heirs of my son Melancthon W. Myres," it was held, there being nothing in any other portions of the will indicative of the testator's intention, that the words of the clause quoted, notwithstanding the use of the word "between," admitted the heirs of his son Melancthon to participate per capita, rather than per stirpes.

In *Clark v. Lynch* (1866) 46 Barb. (N. Y.) 68, construing a will by which testator gave his residuary estate "to my brother James Lynch, and to the male heirs of my brother John Lynch, deceased, except that Dennis Lynch, one of said heirs, is to receive no part whatever, but the same is to be divided among the other male heirs of said John Lynch, deceased," it was held that the inference of intention, arising from the absence of qualifying words indicating a mode of distribution, that the heirs of John were intended to take as a class, and by representation, one half of the residue, and James, the surviving brother, the other half, was rendered unmistakable by the superadded direction that Dennis should receive no part whatever, "but the same is to be divided among the other male heirs of said John Lynch."

In *Re Jewett* (1893) 5 Misc. 557, 25 N. Y. Supp. 1109, where testatrix gave her residuary estate "to my three remaining heirs, namely, my sister, Elizabeth J. Mack, my deceased brother, Allen Jewett, his heirs being Allen Stanley Jewett and Elizabeth E. Jewett, and to my deceased brother, Rodney Jewett, his heirs being Mary Electra Jewett," etc., it was held to be her evident intention to give the shares which such deceased persons would have taken, if living, to the persons named as their heirs, such construction being confirmed by a subsequent provision in which she treated the bequest to one of her deceased brothers as a bequest to the persons named as his heirs.

In *Whitehurst v. Pritchard* (1810) 5 N. C. (Murph.) 383, where testator devised his residuary estate "to be

equally divided between Hugh Pritchard, Benjamin Pritchard, Lydia Taylor, Elizabeth Whitehurst's heirs, and Jeremiah Bright," the court construed the word "heirs" as equivalent to "children," and accordingly held that the distribution was to be per capita, thereby giving each of the children of Elizabeth Whitehurst an equal share with the other legatees. The court also relied on the use of the word "equally" as excluding a contrary construction. This decision, in construing the word "heirs" as equivalent to "children," is said in *Croom v. Herring* (1826) 11 N. C. (4 Hawks) 393, and *Ricks v. Williams* (1826) 16 N. C. (1 Dev. Eq.) 3, to have been wrongly decided.

In *Jourdan v. Green* (1828) 16 N. C. (1 Dev. Eq.) 270, where testator gave certain property "to be equally divided between my son John and my daughter Sally Jourdan's heirs," and the testator in his will took notice that Sally Jourdan was alive by declaring that he had given her a certain negro, it was held that, in determining the shares of the legatees, the heirs apparent of Sally Jourdan took as one person.

In *Ricks v. Williams* (N. C.) *supra*, where testator directed his residuary estate to be converted into money, "and the money to be divided equally between my son P, and my daughters D, C, and E, and the lawful begotten heirs of my daughter Priscilla,"—Priscilla being then deceased,—it was held, upon the authority of *Stowe v. Ward* (1826) 12 N. C. (1 Dev. L.) 67, that testator intended a division by stocks or families, the court saying: "He could not have used a more appropriate word than 'heirs of my daughter Priscilla,' to call them in as a stock or share." This case must be regarded as having been overruled by *Ward v. Stow* (1834) 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 238.

In *Spivey v. Spivey* (1841) 37 N. C. (2 Ired. Eq.) 100, where testator, after reciting and confirming gifts which he had made to various children, including one (Hetty Taylor) who was deceased, went on to say: "My will and desire is, those who have

received a part of my estate will account to the balance of my children for what they have received; then it is my will and desire that all the balance of my property not given away shall be equally divided between the heirs of Hetty Taylor," and his surviving children, naming them, it was held that, although the phrase "equally divided" imported an equality of division per capita, yet, in view of the fact that the heirs of Hetty Taylor were required to account as a class for advancements made to their mother, such words must be understood as directing an equality of division in which the heirs of Hetty Taylor were to be regarded as a unit.

In *Bivens v. Phifer* (1855) 47 N. C. (2 Jones, L.) 436, where testator, after making certain provisions for his wife, directed property not otherwise disposed of to be sold and the proceeds divided as follows: "Item, my will and desire is that my son Matthew Phifer's heirs, my son David Phifer's heirs, my son Ezra Phifer's heirs, my son McCallum Phifer, my daughter Rachel Bivens's heirs, my daughter Martha Craig's heirs, each receive as much of my estate as the value of my land given to my wife; then beloved wife, Elizabeth Phifer, and the above-named heirs, with the exception hereinafter named, to share and share alike," it was held that although, if the clause above quoted had stood alone, the legatees would take per capita and not per stirpes, the fact that the manifest purpose of the testator of providing liberally for his wife would be defeated by a per capita division, and that such a division would operate to the prejudice of his son McCallum, who was a man with a family of children, warranted a contrary construction.

In *Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361, affirming (1893) 14 Pa. Co. Ct. R. 59, 2 Pa. Dist. Rep. 828, where testatrix, who died leaving two daughters and the children of two deceased sons, gave certain property "to my daughters, Harriet E. Tucker and Maria B. Osborne, and the children and heirs of my sons, Benjamin and Charles B. Ashburner, to be di-

vided equally between them," it was held that the word "heirs" implied representation, that its meaning was not changed by being coupled with the word "children," and that its effect was not altered by the direction to divide "equally between them," since such words are no less appropriate to a division among classes than a division among individuals; and accordingly that the children of the deceased son took per stirpes.

In *Wootten's Estate* (1916) 253 Pa. 136, 97 Atl. 1066, where testatrix, who by her will had given her estate to her five brothers, by codicil declared that the shares of two of them, who had deceased, "shall divert to Howard L. Hoff [one of her brothers], their heirs or assigns, share and share alike," it was held that the children of the two deceased brothers were referred to by the words "their heirs or assigns," and that, as they and the brother named stood in different degrees of relationship to the testatrix, the distribution must be per stirpes.

In *Swinburne's Petition* (1888) 16 R. L. 208, 14 Atl. 830, where testator, having seven living children and one who had died leaving two children, gave his residuary estate "to [naming one of his children], the legal heirs of [the deceased son], and" the other children named, "share and share alike, to them their heirs and assigns forever," adding: "Should either of my above-named children die leaving any legal heirs born of their own body, then I give their shares after their death, to my then-living heirs," it was held that the intention of the testator to have the children of his deceased son take representatively as a unit, rather than individually, was too clearly manifested by the significant choice of the words "legal heirs" to designate them, and by the entire structure of the bequest, to allow the words "share and share alike" to control, inasmuch as the latter expression may be satisfied by an equality in division among classes, and as it is usually intended not so much to direct equality between the legatees, as to denote an intent to have the legatees

take as tenants in common instead of as joint tenants.

In *Farley v. Farley* (1908) 121 Tenn. 324, 115 S. W. 921, where testatrix devised the remainder of her real estate "to James Osburn and heirs of Lucy Farley equally,"—James Osburn being a nephew, and Lucy Farley a niece who was deceased,—it was held that as it was impossible for the testatrix to foresee who would, at the time of her death, answer the description of heirs at law of Lucy Farley, the word "heirs" must be taken in its ordinary technical signification, and accordingly that the division must be per stirpes.

In *Wood v. Armour* (1866) 12 Ont. Rep. 146, where testator directed all his property to be "equally divided between my children or their heirs, that is, the heirs of my son Gilbert and daughter Sarah, now deceased, and my son John, Mary Jane, and Hannah, or their heirs. Should any of my said heirs not be of age at my death, my executors are to place their legacies in some of the banks of Ontario, until the said heirs are of age," it was held that, as the testator had shown that he used the term "heirs" as meaning "children," no implication as to a devise per stirpes could be drawn from such use; and that, as the children of the deceased son and daughter took in their own right, and as an equal division was directed, they took per capita.

q. Under a bequest to persons standing in unequal degrees of relationship.

1. In general.

Although the fact that all the beneficiaries stand in the same degree of relationship is a circumstance tending to support a per capita division (see *Payne v. Rosser* (1875) 53 Ga. 662; *Brown v. Brown* (1869) 6 Bush (Ky.) 648; *Van Gallow v. Brandt* (1912) 168 Mich. 642, 134 N. W. 1018; *Re Verplanck* (1888) 91 N. Y. 439; *Kirkpatrick v. Rogers* (1848) 41 N. C. (6 Ired. Eq.) 130; *Ex parte Brogden* (1920) 180 N. C. 157, 104 S. E. 177; *Broermann v. Kessling* (1914) 6 Ohio App. 7; *Brundage's Estate* (1908) 36 Pa. Super. Ct. 211; *Senger v. Senger*

(1886) 81 Va. 637), there being a presumption that, when the beneficiaries are in equal degrees of relationship to the testator, his affection for each is equal, and therefore he will desire to benefit each equally (Osburn's Appeal (1884) 104 Pa. 637), and the fact of equal relationship is to be taken into consideration in cases where the intent of the testator is at all doubtful (Ex parte Brogden (1920) 180 N. C. 157, 104 S. E. 177); and although it has been said that, if beneficiaries under a will are of different degrees of relationship, the presumption ordinarily is that the two classes should not be benefited equally, unless the intention that they should be may be clearly and unequivocally gathered from the instrument itself (Bayley v. Beekman (1909) 133 App. Div. 888, 118 N. Y. Supp. 286, affirmed without opinion in (1910) 197 N. Y. 593, 91 N. E. 1110), and that, in such a case, when the language of the will leaves the clause of distribution in doubt, or the language does not exclude a distribution per stirpes, then the will must be construed as intending a distribution per stirpes, and not per capita (Laisure v. Richards (1913) 56 Ind. App. 301, 103 N. E. 679), the majority of cases regard the fact that they stand in unequal degrees of relationship as insufficient to affect the construction imported by the language used. (White v. White (1916) 168 Ky. 752, 182 S. W. 942; Courtenay v. Courtenay (1921) — Md. —, 113 Atl. 717; Russell v. Welch (1921) 237 Mass. 261, 129 N. E. 422; Farmer v. Kimball (1866) 46 N. H. 435, 88 Am. Dec. 219; Dible's Estate (1875) 81 Pa. 279; Penney's Estate (1893) 159 Pa. 346, 28 Atl. 255; Jose v. Uson (1914) 27 Philippine, 73; Wessinger v. Hunt (1857) 30 S. C. Eq. (9 Rich.) 459; Perdue v. Starkey (1915) 117 Va. 806, 86 S. E. 158, Ann. Cas. 1916C, 409; Baker v. Baker (1847) 6 Hare, 269, 67 Eng. Reprint, 1168, 11 Jur. 585; Turner v. Hudson (1847) 10 Beav. 222, 50 Eng. Reprint, 568, 16 L. J. Ch. N. S. 180). "Where a legacy is to several, whatever may be their relation to each other, or however the Statute of Distribution might operate

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upon such relation, equality is the rule, unless the testator has established a different one." Crow v. Crow (1829) 1 Leigh (Va.) 74.

As is said in Johnston v. Knight (1895) 117 N. C. 122, 23 S. E. 92, it is not enough to warrant a division per stirpes that the contrary construction will give persons standing in a more remote relation a larger share than those standing in a nearer relation to the testator. "Testators usually divert the line of distribution from that marked out by the law for descent and distribution, and no doubt do so 'in the light of surrounding circumstances.'"

Thus, a tenancy in common between "children" and "grandchildren" who are to take "equally" is necessarily a gift to each individual, as such, and the distribution must be per capita. Bryant v. Scott (1835) 21 N. C. (1 Dev. & B. Eq.) 155, 28 Am. Dec. 590.

Whenever property is devised to children and grandchildren, or to brothers and sisters and nephews and nieces, to be equally divided between them, and the devisees are individually named, they take per capita, and not per stirpes. When the devise is to them by name, they take in their own right, and not as the representatives of another; the devise is made to them nominatim; they are personæ designatæ, and they claim, not as representing their ancestor, although in the will as a descriptio personæ they may have been distinguished as his children, but in their own right, inasmuch as the testator has named them specially and personally, as those who have the legal, personal, and individual right to the benefit conferred by the will. Doe ex dem. Kean v. Roe (1836) 2 Harr. (Del.) 103, 29 Am. Dec. 336.

Review of the decisions.

In Farmer v. Kimball (1866) 46 N. H. 435, 88 Am. Dec. 219, where testatrix, who died unmarried, leaving no brother or sister, or any descendants of the brother or sister, surviving, and who left real property, about \$18,000 of which was derived from her mother's side, \$14,000 from her father's side, and a personal estate of

about \$6,000 which she had herself accumulated, gave her residuary estate "unto my cousins and the children of my mother's cousins . . . to be equally divided between them." She had, at the time of her decease, 20 cousins, and about 129 children of her mother's cousins. Some of her cousins and most of the children of her mother's cousins were personally unknown to her. It was held that the use of the word "between," and the repetition of the preposition "to," the difference in the degree of kinship of the legatees, and the facts as to the sources of the property, afforded no certain inference of an intention to divide the residue by classes; sufficient to prevent the application of the well-settled general rule that, under a gift to one and the children of another, the persons entitled take per capita.

In *Penney's Estate* (1893) 159 Pa. 346, 28 Atl. 255, where testator directed his residuary estate to be "distributed, share and share alike, to the following persons if they are living at the time of my death, namely: To my sister Martha J. Houghton one share, and to my stepdaughter Olive J. Smith one share, and to each of my nephews and nieces then living one share," it was held that the word "each" separated the class into individuals, and therefore that the nephews and nieces took per capita.

In *Perdue v. Starkey* (1915) 117 Va. 806, 86 S. E. 158, Ann. Cas. 1916C, 409, where testator gave his residuary estate unto certain persons named, "and S. L. Holland's daughters" by his first wife, "to be equally divided between them," it was held that, in the absence of anything else in the will indicating a different intention, the legatees described as "S. L. Holland's daughters" took per capita, and not as a class, notwithstanding they stood in a different degree of relationship to the testator than did the other persons named as residuary legatees.

In *Wessenger v. Hunt* (1856) 30 S. C. Eq. (9 Rich) 459, where testator gave the residue of his estate to his wife for life, and directed that at her death it should be "equally divided

amongst my children and grandchildren, except Howell Jeffries, son of my daughter Sarah (as his uncle, Howell L. Jeffries, has promised to provide for him), and my daughter Maria (having given her as much as I intend her to have out of my estate)," it was held that the exclusion of Maria, as having had her share, was not sufficient to show that the testator meant that division should be per stirpes rather than per capita, according to the ordinary meaning of the words used.

In *Baker v. Baker* (1847) 6 Hare, 269, 67 Eng. Reprint, 1168, 11 Jur. 585, where testator gave a sum of money "unto, between, and among, my said brother and my sisters and my nephews and nieces living at the time of the decease of my said wife, in equal shares and proportions," it was held that the legatees took per capita.

In *Turner v. Hudson* (1847) 10 Beay. 222, 50 Eng. Reprint, 568, 16 L. J. Ch. N. S. 180, where testator bequeathed the residue of his estate upon trust to convert into money and distribute the same in equal shares and proportions between and among each and every of his brothers and sisters, and such of their children as should be then living, the parents and children to be classed together and to share in equal proportions, it was held that the testator intended a division among a class composed of the brothers and sisters and their children then living, to be divided per capita.

2. To persons standing in a certain relation and children (or grandchildren) of others in the same relation.

For instances of bequests to persons named and the children of others, in which the relationship of the beneficiaries does not appear, see III. o, *supra*.

For instances of bequests to persons living and the children of any deceased, see III. v, *infra*.

Another rule, which is in effect but a particular aspect of the rule stated in the preceding subdivision, is that, by a gift to a person described as standing in a certain relation to the

testator and the children of another person standing in the same relation, the objects of the gift take per capita, and not per stirpes; and therefore each child of the latter person takes a share equal to the share of the first person.

Alabama. — *Howard v. Howard* (1857) 30 Ala. 391; *Smith v. Ashurst* (1859) 34 Ala. 208 (obiter).

Delaware.—*Doe ex dem. Kean v. Roe* (1836) 2 Harr. 103, 29 Am. Dec. 336.

Kentucky.—*Wells v. Newton* (1868) 4 Bush, 158.

Maryland.—*Maddox v. State* (1815) 4 Harr. & J. 539; *Brittain v. Carson* (1877) 46 Md. 186.

Massachusetts.—*Balcom v. Haynes* (1876) 14 Allen, 204.

Mississippi. — *Crawford v. Redus* (1877) 54 Miss. 700.

New Jersey. — *Smith v. Curtis* (1862) 29 N. J. L. 345; *Fisher v. Skillman* (1867) 18 N. J. Eq. 229; *Macknet v. Macknet* (1873) 24 N. J. Eq. 277; *Thornton v. Roberts* (1879) 30 N. J. Eq. 473.

New York.—*Ferrer v. Pyne* (1880) 81 N. Y. 281, affirming (1879) 18 Hun, 411; *Vincent v. Newhouse* (1881) 83 N. Y. 505; *Re Farmers' Loan & T. Co.* (1914) 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340; *Lee v. Lee* (1863) 16 Abb. Pr. 127, 39 Barb 172; *Myres v. Myres* (1862) 23 How. Pr. 410; *Bunner v. Storm* (1844) 1 Sandf. Ch. 357; *Re Walker* (1903) 39 Misc. 680, 80 N. Y. Supp. 653; *Re Griswold* (1903) 42 Misc. 230, 86 N. Y. Supp. 250; *Re Title Guarantee & T. Co.* (1913) 81 Misc. 106, 142 N. Y. Supp. 1070, modified in (1913) 159 App. Div. 803, 144 N. Y. Supp. 889, which is affirmed in (1914) 212 N. Y. 551, 106 N. E. 1043.

North Carolina.—*Harris v. Philpot* (1848) 40 N. C. (5 Ired. Eq.) 324; *Cheeves v. Bell* (1854) 54 N. C. (1 Jones, Eq.) 234; *Gilliam v. Underwood* (1856) 56 N. C. (3 Jones Eq.) 100; *Roper v. Roper* (1859) 58 N. C. (5 Jones, Eq.) 16, 75 Am. Dec. 427; *Waller v. Forsythe* (1868) 62 N. C. (Phill. Eq.) 353.

Pennsylvania. — *Osburn's Appeal* (1884) 104 Pa. 637; *Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361;

Scott's Estate (1894) 163 Pa. 165, 29 Atl. 877; *Cutler v. Ritchie* (1904) 21 Lanc. L. Rev. 331; *Kenworthy's Estate* (1898) 19 Pa. Dist. R. 986.

South Carolina.—*Barksdale v. Macbeth* (1855) 28 S. C. Eq. (7 Rich.) 125; *Dupont v. Hutchinson* (1858) 31 S. C. Eq. (10 Rich.) 1.

Virginia.—*Hoxton v. Griffith* (1868) 18 Gratt. 574; *Perdue v. Starkey* (1915) 117 Va. 806, 86 S. E. 158, Ann. Cas. 1916C, 409.

England. — *Northey v. Strange* (1716) 1 P. Wms. 340, 24 Eng. Reprint, 416; *Blackler v. Webb* (1726) 2 P. Wms. 383, 24 Eng. Reprint, 777; *Williams v. Yates* (1837) Cooper, Pr. Cas. 177, 47 Eng. Reprint, 454, 1 Jur. 510; *Tyndale v. Wilkinson* (1856) 23 Beav. 74, 53 Reprint, 29, 2 Jur. N. S. 963, 4 Week. Rep. 695; *Payne v. Webb* (1874) 31 L. T. N. S. 637, 22 Week. Rep. 43.

Canada.—*Wood v. Armour* (1886) 12 Ont. Rep. 146.

In *Hoxton v. Griffith* (Va.) *supra*, it is said that the substance of this rule of construction is that, in the absence of explanation, the children in such a case are presumed to be referred to as individuals, and not as a class, and that the relationship existing between the parties, and the operation which the statute would have upon those relations in case of intestacy, are not sufficient to control this presumption.

In *Ashburner's Estate* (1894) 159 Pa. 545, 28 Atl. 361, it is said: "A bequest to a designated person and the children of another is a gift to ascertained individuals, which, in the absence of evidence of a contrary intent, is said to confer an equal share upon all alike; and the mere fact that the parent of the children is dead, and that he bore the same relation to the testator that the designated donee does, or that, had there been no will, the parties would have taken per stirpes under the intestate laws, does not change the result."

And in *Perdue v. Starkey* (Va.) *supra*, it is said that the operation which the statute would have in case of intestacy is not sufficient to overcome

the presumption that a per capita distribution was intended.

In *Wells v. Newton* (1868) 4 Bush (Ky.) 158, the court, in holding that the assumed unreasonableness of giving to a grandchild as much as to a child could not control or neutralize the construction of the testamentary language, said: "In many cases it might be unreasonable not to do so. Jacob thought so as to Ephraim and Manasseh, and there may have been as satisfactory reasons in the case now litigated as there were. In the more illustrious precedent crystallized in the Bible. We can suppose cases in which equal distribution among children and some grandchildren would be natural and just."

In *Collins v. Feather* (1903) 52 W. Va. 107, 61 L.R.A. 660, 94 Am. St. Rep. 912, 43 S. E. 323, it was said, with reference to a contention that a per capita division giving each of the children of a deceased daughter of the testator a larger amount than his living daughters would receive would be inequitable and unjust: "But how are we to determine what were the views of the testator concerning the equity of the distribution of his property? May he not have said: 'These grandchildren are motherless. Some of them are infants and helpless. Their necessities and their helplessness demand more ample provision for them than for the married daughters.'"

The rule, however, has been regarded with disfavor by some courts.

In *Haas v. Atkinson* (1892) 9 Mackey (D. C.) 537, the court refused to follow the rule, saying: "If the question whether the old rule is of binding authority were to be decided by weight of authority, we should not feel bound to conform to it; but, apart from the weight of authority, we conceive that the intent of such a provision as this is not the proper subject of a rule of interpretation. We feel at liberty, therefore, to consider the circumstances of this bequest, as well as its language. It is manifest that family affection was the controlling impulse of this bequest, and this element is to be considered in determin-

ing what the testatrix intended to do in accordance with that motive. It is, on the one hand, consistent with that motive that the children of a niece whom the testatrix remembered with affection should be placed in their mother's stead, and, on the other, improbable that the shares of the beneficiaries should increase as their consanguinity became more remote. At the same time equal division was just as applicable to the objects of her care, if we suppose three of those objects to have been individuals and the fourth a group, as it would be if we suppose all the parties to have been intended individually. It may be said further that, while it is not probable that the testatrix would enlarge her gift as the kinship of the recipients receded, it is not natural, and therefore not probable, that those who remained nearest should suffer diminution of her regard by the appearance of more remote kindred. In the absence of distinct expressions to the contrary, we think that these considerations are a safer guide in determining what the testatrix meant by an equal division between her nearest kindred and the children of one who had stood in the same degree, than the English rule would be."

And see also, in this connection, the reported case (*DOLLANDER v. DHAEMERS*, ante, 8), and *Lachland v. Downing* (1850) 11 B. Mon. (Ky.) 32.

In *Henry v. Thomas* (1888) 118 Ind. 23, 20 N. E. 519, it is said that the rule that when a devise or bequest is made to "my son A and the children of my son B," the children of B take per capita, has been so far abrogated by the courts of the different states that it no longer has any practical force in the construction of wills, and that the weight of authority is to the effect that the beneficiaries take per stirpes, unless the language used in the devise or bequest is such as to exclude that intention.

In *Ferrer v. Pyne* (1880) 81 N. Y. 281, it is said that the rule that where a gift is made to a person described as standing in a certain relation to the testator, and to the children of another person standing in the same

relation, they take per capita, has in modern times been applied with reluctance, by some courts because it had become a rule of property, and by others out of deference to its supposed authority; but that, in many if not in all cases, with open protest, while by others it has been wholly rejected. The court, however, found it unnecessary to go to the extent of rejecting it, finding in the context indications of a contrary intention.

In *Graves v. Graves* (1889) 55 Hun, 58, 8 N. Y. Supp. 284, affirmed on opinion below in (1891) 126 N. Y. 636, 27 N. E. 411, it is said that, in the case of a bequest to certain persons and the children of others standing in the same relation to the testator, the court will favor, in case of doubt, a construction which will specifically give as nearly as possible in accordance with the Statute of Distribution.

The case of *Blackler v. Webb* (1726) 2 P. Wms. 383, 24 Eng. Reprint, 777, upon which the general rule of construction is based, is impliedly criticized in *Roome v. Counter* (1822) 6 N. J. L. 111, 10 Am. Dec. 390, where the chief justice spoke of it as "a very extraordinary decision, and such a one as I think would hardly be made by any court at this day," and as one to be followed only in cases exactly like itself. In *Bisson v. West Shore R. Co.* (1894) 143 N. Y. 125, 38 N. E. 104, the court, speaking with reference to *Blackler v. Webb* (Eng.) supra, said: "That case, though the subject of much criticism, has never been rejected as an authority in this state. Its existence as a rule of construction has been recognized; but its application has been closely confined to cases where nothing in the context of the will can be referred to, to control the language of a devise or bequest which places all the persons who are to benefit by it upon an equality, irrespective of their different degrees of relationship to the testator. Undoubtedly, and very justly, that rule has yielded, and should yield, as it has been said, 'to a very faint glimpse of a different intention in the context.'"

All courts concede that the rule will

yield to a very faint glimpse of a contrary intention in the context.

See *Balcom v. Haynes* (1867) 14 Allen (Mass.) 204 (in which it is said that the rule that by a gift, either to the children of several persons, or to a person described as standing in a certain relation to the testator and the children of another person standing in the same relation, the objects of the gift take per capita, and not per stirpes, has perhaps been adopted and adhered to by the courts, rather from the importance of having some rule of interpreting phrases so frequently used by testators, than from any strong or preponderating reason in its favor); *Burnet v. Burnet* (1879) 30 N. J. Eq. 595; *Van Houten v. Hall* (1907) 73 N. J. Eq. 384, 67 Atl. 1052; *Re Walker* (1903) 39 Misc. 680, 80 N. Y. Supp. 653; *Re Title Guaranty & T. Co.* (1913) 81 Misc. 106, 142 N. Y. Supp. 1070, modified in (1913) 159 App. Div. 803, 144 N. Y. Supp. 889, which is affirmed in (1914) 212 N. Y. 551, 106 N. E. 1043; *Osburn's Appeal* (1884) 104 Pa. 637; *Kenworthy's Estate* (1898) 19 Pa. Dist. R. 986; *Barksdale v. Macbeth* (1855) 28 S. C. Eq. (7 Rich.) 125.

In *Scott's Estate* (1894) 163 Pa. 165, 29 Atl. 877, it is said that in Pennsylvania a contrary intent which will overcome the rule that, where there is a testamentary gift to one person and to the children of another person who stand in the same relation to the testator, the donee takes per capita, is inferred where, under the intestate laws which are always resorted to in cases of doubtful interpretation, the distribution would be made per stirpes, as in the case of a gift to a son or brother of the testator, and to the children or heirs of a deceased son or brother; but that where the gift is to persons, or classes of persons, who stand in the same relation to the testator, the analogy furnished by the intestate laws indicates a division per capita.

See also, to the same effect, *Sipe's Estate* (1906) 30 Pa. Super. Ct. 145.

In *Raymond v. Hillhouse* (1878) 45 Conn. 467, 29 Am. Rep. 688, the court said of the rule that, when a devise

or bequest is made "to my son A and the children of my son B," the children of B take per capita: "If the above rule is so easily set aside, it would seem equally reasonable that it should also yield to the presumption in favor of the natural heirs or next of kin, for a distribution according to the statute, in all cases where the language of the will is consistent with such a distribution, and the real intention of the testator is in doubt."

And in *White v. Holland* (1893) 92 Ga. 216, 44 Am. St. Rep. 87, 18 S. E. 17, it is said that if the rule that, where there is a devise or bequest to a given person and the children of another person standing in the same relation to the testator, they take per capita, yields to a very faint glimpse of a different intention in the context, it would seem that it ought also to yield where there is evidence outside of the will going to show a different intention on the part of the testator.

A direction that the children shall take their parent's share clearly requires a per stirpes division. See *Shinn v. Motley* (1857) 56 N. C. (3 Jones, Eq.) 490.

Where the context shows that the testator meant to deal equally between a son and the children of a deceased son, and make such children stand in their father's stead, the force of the word "equally," in a residuary gift to the son and grandsons, is overcome. *Martin v. Gould* (1832) 17 N. C. (2 Dev. Eq.) 305.

For instances in which the context was held to show that the children were to take as a unit, see the following cases:

Connecticut.—*Lyon v. Acker* (1866) 33 Conn. 222; *Raymond v. Hillhouse* (1878) 45 Conn. 467, 29 Am. Rep. 688; *Geery v. Skelding* (1893) 62 Conn. 499, 27 Atl. 77.

Georgia.—*Randolph v. Bond* (1852) 12 Ga. 362; *Fraser v. Dillon* (1887) 78 Ga. 474, 3 S. E. 695; *White v. Holland* (1893) 92 Ga. 216, 44 Am. St. Rep. 87, 18 S. E. 17.

Kentucky.—*Luke v. Marshall* (1831) 5 J. J. Marsh. 353; *Gulley v. Lillard* (1911) 145 Ky. 746, 141 S. W. 58.

Michigan.—*Eyer v. Beck* (1888) 70 Mich. 179, 38 N. W. 20.

Mississippi.—*Nichols v. Denny* (1859) 37 Miss. 59.

New York.—*Ferrer v. Pyne* (1880) 81 N. Y. 281; *Vincent v. Newhouse* (1881) 83 N. Y. 505; *Re Farmers' Loan & T. Co.* (1914) 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340; *Re Stocum* (1905) 94 N. Y. Supp. 588.

North Carolina.—*Martin v. Gould* (1832) 17 N. C. (2 Dev. Eq.) 305; *Henderson v. Womack* (1849) 41 N. C. (6 Ired. Eq.) 437; *Pardu v. Givens* (1844) 54 N. C. (1 Jones, Eq.) 306; *Gilliam v. Underwood* (1856) 56 N. C. (3 Jones, Eq.) 100; *Lockhart v. Lockhart* (1857) 56 N. C. (3 Jones, Eq.) 205; *Roper v. Roper* (1859) 58 N. C. (5 Jones, Eq.) 16, 75 Am. Dec. 427.

Oregon.—*Gerrish v. Hinman* (1880) 8 Or. 348.

Pennsylvania.—*Minter's Appeal* (1861) 40 Pa. 111; *Risk's Appeal* (1866) 52 Pa. 269, 91 Am. Dec. 156; *Green's Estate* (1891) 140 Pa. 253, 21 Atl. 317; *Thompson's Estate* (1901) 10 Pa. Dist. R. 276; *Miller's Estate* (1904) 26 Pa. Super. Ct. 453; *Sipe's Estate* (1906) 30 Pa. Super. Ct. 145.

South Carolina.—*Archer v. Munday* (1881) 17 S. C. 84.

Virginia.—*Hamlett v. Hamlett* (1841) 12 Leigh, 350.

England.—*Davis v. Bennett* (1862) 4 De G. F. & J. 327, 45 Eng. Reprint, 1209, 31 L. J. Ch. N. S. 337, 8 Jur. N. S. 269, 5 L. T. N. S. 815, 10 Week. Rep. 275; *Re Walbran* [1906] 1 Ch. 64, 93 L. T. N. S. 745, 75 L. J. Ch. N. S. 105, 54 Week. Rep. 167.

Review of the decisions.

In *Howard v. Howard* (1857) 30 Ala. 391, where testator directed a share of his property to "be equally divided between my half brother, Samuel J., and half sisters, Mary E., Anna, Caroline F., and Gabriella Howard, and the children of my full sisters Nancy Malinda Rutherford, deceased, and Sarah Mead; my said half brother and half sisters and the children of my two said whole sisters, to take equally, share and share alike. Should either of my said whole sisters' children be dead at the death or marriage of my dear wife leaving

children, they shall take the place of their deceased parent," it was held that the children of the two sisters of the whole blood took, per capita, equally with the brother and sisters of the half blood.

In *Lyon v. Acker* (1866) 33 Conn. 222, where testator devised certain property "to my three daughters and the children of my son, Samuel A. Lyon, viz. [naming the daughters], and the children of my son Samuel A. Lyon . . . to them and their assigns forever, share and share alike," it was held that as the names and number of the children of Samuel did not appear in the will, but they were referred to only as a class, they took per stirpes, and not per capita.

In *Raymond v. Hillhouse* (1878) 45 Conn. 467, 29 Am. Rep. 688, where testator gave his residuary estate "to the following named persons, to be divided equally among them: my sisters Rachel and Sarah, the grandchildren of my deceased brother William, and the grandchildren of my deceased sisters Delia and Mary, meaning by this to include all said grandchildren living at the time of my decease," it was held that as the will was silent as to the names and number of the grandchildren, they being an uncertain body to be ascertained at the time of testator's death, and as other parts of the will showed that, where the testator had in mind a per capita distribution among his nephews and nieces, it was very clearly expressed, the gift was to them as a class, notwithstanding the employment of the phrase "the following named persons;" and therefore that they took per stirpes, and not per capita.

In *Geery v. Skelding* (1893) 62 Conn. 499, 27 Atl. 77, where testatrix divided the residue of her estate into three equal parts, one of which she gave to an individual who was the representative of a deceased brother, another part to an individual who was a representative of another deceased brother, and one part "to [five persons named, the children of a deceased sister], Franklin M. Skelding and Addie Skelding, children of William F. Skelding, deceased, and Carrie

H. Skelding, child of Francis E. Skelding, deceased,"—William F. and Francis E. Skelding being deceased sons of her sister,—and went on to state: "If any of my aforesaid nephews or nieces shall die leaving lawful issue him or her surviving, such issue shall take the share which the parent, if living, would take," it was held that in view of the fact that the testatrix, in disposing of her residue, took as a basis of distribution, not her nephews, but her two brothers and one sister, all of whom were dead, and of the fact that she had provided that in case of the death of any of her nephews and nieces named, leaving lawful issue, such issue should take the parent's share, and the repetition of the conjunction "and," connecting the nephews and nieces named with the persons named as children of the deceased nephews and nieces, and the inclination of the court towards a construction conformable to the Statute of Distributions, the children of William F. Skelding took per stirpes, and not per capita.

In *Doe ex dem. Kean v. Roe* (1836) 2 Harr. (Del.) 103, 29 Am. Dec. 336, where testator devised all his real estate to his sister Elizabeth, his brother James, and his nephews and nieces Joshua Clayton, Elizabeth Clayton, Jennet Clayton, and Henry Clayton, and proceeded to dispose by way of executory devise of the third devised to his brother in the event of his dying without issue, by devising it to be "equally divided between my sister Elizabeth and my said nephews and nieces, their heirs and assigns forever, as tenants in common," it was held that, by this specific reference to his nephews and nieces whom he had previously named, they were as fully, individually, and personally designated with reference to this third part as if their names had been repeated, and therefore that they took as individuals, and not a moiety per stirpes.

In *Haas v. Atkinson* (1892) 9 Mackey (D. C.) 537, where testatrix directed her money in bank "to be equally divided between [certain named nephews and nieces] and the children of my late niece, Ella," it was

held that as it was manifest that family affection was the controlling influence of this bequest, and that it is, on the one hand, consistent with that motive that the children of the deceased niece should be placed in their mother's stead, and, on the other, improbable that the shares of the beneficiaries should increase as their consanguinity becomes more remote, the children of the deceased niece should be considered as taking as a class, and not as individuals, and hence *per stirpes* rather than *per capita*.

In *Randolph v. Bond* (1852) 12 Ga. 362, testatrix directed her residuary estate to "be distributed and divided among the hereafter-named legatees in manner and forms as follows;" then proceeded to recite the fact that upon an earlier division there was a portion set off "to each individually, differing in amount, and subject to an equalization at a subsequent and final division of said estate," then going on to recite that each of her four children had received property valued at various amounts stated, and directing that "the individual receiving more than a share shall receive that much less, and those receiving less than a share, as much money as shall equalize them all, when the final division shall be made. It is my will and desire that the following named legatees shall receive share and share alike, under the provisions of the foregoing items in this my will, to wit: Martha P. Triplett, Robert R. Randolph, Isabella Randolph, Louisa Maria Randolph, Jancintha Dorothy Randolph, Edmund Randolph, Thomas Randolph, Richard Randolph, the children of my son Thomas P. Randolph, deceased; and Eliza Bullock Randolph, Eugenia Randolph, Richard Randolph, Anne Randolph, the children of my son Richard H. Randolph, deceased." Of the persons above named the first two were the living children of the testatrix,—the daughter having two children living and the son one child,—while the others were, as stated in such provision, the children of her deceased son Thomas and the children of her deceased son

Richard. It was held that, taking the whole will together, the intention of testatrix was apparent that legatees between whom she desired an equal division to be made were her two living children and each family of the children of her two deceased sons, and that this construction was strengthened by the surrounding circumstances, the condition of her family, and the division which she had previously made of a part of her property, to which she expressly referred.

In *Fraser v. Dillon* (1887) 78 Ga. 474, 3 S. E. 695, testator by one item of his will devised certain property, after the death of his wife, "to Sarah Mousseau and the children of Leonora Pellertier (now deceased) her two children," and by another item devised other realty "to Sarah Mousseau, and the children of Leonora Pellertier and James, Benjamin, and David"—Sarah Mousseau and James, Benjamin and David being children of the testator, and Leonora Pellertier a deceased daughter of the testator—it was held that, construing the will in the light of the presumption that the testator intended that his property should follow the natural course of descent, he intended by the devise to the children of Leonora Pellertier together with the other persons who were his children and the brothers and sisters of Leonora, to give those children the same share or part which their mother would have taken had she been alive. The court distinguishes the case of *Blackler v. Webb* (1726) 2 P. Wms. 384, 24 Eng. Reprint, 777, on the ground that in such case the devise was to the children of a living daughter, whereas, in the case before them, it was to the children of a deceased daughter.

In *White v. Holland* (1893) 92 Ga. 216, 44 Am. St. Rep. 87, 18 S. E. 17, where testatrix gave her husband certain property for his life, and directed that after his death the same should be divided equally between D, H, and the lawful children of G, and by another item directed that the remainder of her property be sold and the proceeds equally divided between D, H, and the lawful children of G, and

it appeared that D and H were sisters, and G a brother of the testatrix, all in life and all having children when the will was executed; that the testatrix was very fond of her sisters and of their children and the children of her brother, and had a favorite among the children in each of the three families, and that she did not desire her brother should have any of her property, both on account of his financial embarrassment and of certain conduct in his past life, it was held that, in view of such facts, the intention was that the children of G should take per stirpes, and not per capita.

In *DOLLANDER v. DHAEMERS* (reported herewith) ante, 8, where testator, who had given his wife the use of all his property during her life or widowhood, went on to provide: "Upon her death or in event of her remarriage, all my said property shall be vested in my children, Leonie Dhaemers, the children of Mary Duyvetter deceased, Nellie, Cathlyn, Angelina, Almose, Charles, Martin, Jacob, Frank, and Mandus Dollander, share and share alike," it was held that as there was nothing in the will itself to indicate that the testator intended to favor his deceased daughter's children more than he did the children of any of his other children, and as the arrangement of the names of his children, interwoven with the reference to the children of his deceased daughter as a class, and without naming them, indicated that he was thinking of the grandchildren as a class representing the deceased daughter, rather than as individuals who were to receive separate and exclusive shares of his property, the distribution must be per stirpes, and not per capita. The court concedes, however, that this conclusion is opposed to the majority of the English and American cases involving similar testamentary provisions.

In *Henry v. Thomas* (1889) 118 Ind. 23, 20 N. E. 519, where a testatrix who had no children gave her husband a money legacy, and then provided that the balance of her estate should "be divided equally between my brothers and my sisters, and the children of the

deceased brothers and sisters, and the brothers and sisters of [a deceased husband], and the children of deceased brothers and sisters, except the following, to wit, the heirs of Henry Brinegar, deceased, to whom I will the sum of one dollar, and to Scilda Rohbacke I will one dollar, and to Martha Barrett one dollar, and to Milton Henry, one dollar," it was held that, taking into consideration the presumption that the testatrix would make her kindred and those of her husband the objects of her bounty in proportion to the degree of kinship existing between her and them, the proper construction to be given to the will, and the manifest intention of the testatrix, was to give to the children of each deceased brother and sister of herself and deceased husband the same share that their parent would have taken if living, inasmuch as the words "to be divided equally" may be construed as applicable as well to a division among classes as among individuals.

In *Luke v. Marshall* (1831) 5 J. J. Marsh. (Ky.) 353, where testator, whose daughter Maria Paxton was dead leaving children surviving, and whose daughter Jane Sullivan was living and had no children, gave his property to his second wife with remainder to her issue, and with power, in default of issue, "to dispose of it among my children by my first wife as she pleases," and further provided that if she should die without disposing of the property it should "go to my son Charles, to the children of Maria Paxton and Jane Sullivan," it was held that the phraseology of the will authorized the inference that the testator intended that the devisees in remainder should take distributively, just as they would have done if they had been his only heirs and he had died intestate, and that the interest of his living children should be equal to the interest of all the children of his deceased daughter.

In *Lachland v. Downing* (1850) 11 B. Mon. (Ky.) 32, where the testator directed his residuary estate to be "equally divided after my death between my brother John Downing, my

two sisters, Elizabeth Cameron and Nancy Gibson, and the children of sister Nelly Lachland, to them and their children forever, it being my desire that the portions allotted to my brother John and my two sisters and the children of my deceased sister Nelly Lachland shall be made as nearly equal as possible, both in kind and in amount," it was held that as no reason appeared why the testator, who was so particular in desiring equality between his living brothers and sisters, should place the children of a deceased sister each upon an equality with the living, and as it would have been so easy to indicate this individual equality, if it had been intended, by inserting the words "each of" before "children," the sister's children took as a class, and hence per stirpes rather than per capita.

In *Wells v. Newton* (1868) 4 Bush (Ky.) 158, where testator gave the residue of his estate to be divided equally between his children, individualized by their respective names, and his grandchildren by a deceased daughter, designating them also by their names,—“Angelia Wells and Jerome Wells,”—and further directed that those of his children who had not received certain personal property from him should have it out of the estate “to make them all equal,” and also directed that Angelia Wells and Jerome Wells should each receive personal property of like description, it was held that as, had the classification of “children” and “grandchildren” been omitted, and the devise had been to the same persons by their names only, each of them would certainly have taken per capita equal proportions, such words must be understood as having been used for identifying the persons specially named, and not for qualifying the interest of each grandchild more than that of each child; and that this construction was confirmed by the fact that the testator had made the same special provision in the case of each grandchild that he had in the case of his children.

In *Purnell v. Culbertson* (1876) 75 Ky. 369, where testator, after devis-

ing his estate to his wife during her life, directed that at her death it should be “divided equally between my nephew, Julius Culbertson of this county, Mattie Ervine, Ettene Case, and the children (two) of Thomas B. Purnell, nieces and nephew of mine,” and it appeared that Julius Culbertson was the son of testator's brother, and Mattie Ervine, Ettene Case, and Thomas B. Purnell were all the children of a sister, so that according to the Laws of Descent and Distribution Julius Culbertson would have been entitled to half the testator's estate, and his cousin and second cousins to the other half, it was held that as it was plain that the testator did not intend to follow the Laws of Descent and Distribution in the division of his estate among these collateral kindred, nor intend to give to each class of children what their ancestor would have been legally entitled to, had he been living, but, on the contrary, directed that his property be “divided equally,” the children of Thomas Purnell took per capita, and not per stirpes.

In *Gulley v. Lillard* (1911) 145 Ky. 746, 141 S. W. 58, testator, after reciting the amount of an advancement to a son, directed that “all of my other children, to wit, Mrs. Sarah Ellen Rippey or her lawful heirs; the lawful heirs, the children of Mrs. Mary Wallace Miles, deceased; Mrs. Bannie M. Boswell or her lawful heirs, and Dr. Gustavas B. Lillard or his lawful heirs,” should receive a like amount, before such son should participate, “and then the residue of my estate, both real and personal, be divided equally among all my children or their lawful heirs.” In another clause, dealing with prospective contestants of his will, the testator declared that the bequest which would be forfeited by such contestants “shall go to my other children if they be living, but, if they be dead, then to their heirs, share and share alike.” It was held to be manifest that the testator meant to deal with classes rather than individuals in considering the offspring of his children, since, instead of naming them,

he invariably dealt with them in groups, each child's offspring representing a group and as standing in the place of the deceased child who otherwise would have been his devisee; and accordingly that the children of Mrs. Miles took per stirpes, and not per capita.

In *White v. White* (1916) 168 Ky. 752, 182 S. W. 942, where testatrix, after giving her brother William the use of certain real property for nine years, devised it "to my brothers [naming them] and my three nephews [naming them]. If any of them should die, to revert to the surviving one or ones," it was held that as the testatrix did not, in the clause above quoted, speak of the nephews as a class, or use any language that could reasonably be construed to mean that she intended that they, as a class, should take only per stirpes, or as the representatives of her deceased brothers, but, on the contrary, mentioned their names, just as she did those of her brothers, and used the words "share and share alike" with respect to all of them as individuals and as members of a single class, the nephews took per capita.

In *Fischer v. Lange* (1921) 190 Ky. 699, 228 S. W. 684, where testator gave the residue of his estate "in equal shares to my said daughter, Elizabeth Anna Fischer, and the two children of my deceased daughter, Elmer Lange and Nober Lange, to have and to hold to them, their heirs and assigns forever," it was held that, the grandchildren being named, and the gift being "in equal shares," they took per capita, and not per stirpes.

In *Kaufman v. Anderson* (1907) 31 Ky. L. Rep. 888, 104 S. W. 340, it was held, construing a devise to "my brothers and my sister's, Mrs. Baringer's, children, the children to share equally with my brothers Henry, Peter, and Thomas," that the direction that the children were to share equally indicated that they were to take per capita.

In *Maddox v. State* (1815) 4 Harr. & J. (Md.) 539, it was held that, under a gift of residuary estate "to be

equally divided between my brother Justinian and my brother George's children," the brother took, as a tenant in common, an equal part, and no more, with each of the children of George.

In *Benson v. Wright* (1848) 4 Md. Ch. 278, a bequest of property "in trust for the use of the children of Margaret Swornstedt, the daughter of my late husband Peter Benson; the children of William Benson, the son of my said late husband, and George Benson, also a son of my said late husband, equally as tenants in common, their heirs and representatives forever," the children of the persons named, born before the death of the testatrix and George Benson, took per capita and equally.

In *Brittain v. Carson* (1877) 46 Md. 186, where testator directed his residuary estate to "be equally divided between my said daughter, Amelia J. Brittain, and the children of Virginia Carson,"—Virginia Carson being a deceased daughter,—it was held that, construing the language used in the clause referred to,—there being nothing in other parts of the will bearing upon the intention of the testator,—the grandchildren were to take per capita.

In *Courtenay v. Courtenay* (1921) — Md. —, 113 Atl. 717, where testatrix gave her residuary estate to her sister Elizabeth, should she survive her, and further provided that, in the event she should not survive, it should be "divided equally between my brother, William Courtenay . . . and the three sons of my deceased brother, David Courtenay, . . . namely, Charles Dana Courtenay, David Kirby Courtenay, Francis Chappelle Courtenay, and their mother, Frances Caroline (Chappelle) Courtenay, . . . or their respective heirs and assigns, share and share alike," it was held that, notwithstanding the use of the word "between," the language used plainly contemplated a distribution per capita, the court saying: "The estate is bequeathed 'equally' and 'share and share alike' to the five persons mentioned, 'or their respective heirs and assigns.'"

The word 'between' is said to indicate a division into two parts, but this term is often used as the equivalent of 'among,' and it could not be given the suggested effect consistently with the intent expressed by the provision as a whole."

In *Russell v. Welch* (1921) 237 Mass. 261, 129 N. E. 422, where testatrix bequeathed a sum of money "to, and equally per capita among, the children now living of my brother, Henry Sturgis Russell, deceased, and my sisters, Elizabeth Russell Lyman, Marian Russell, and Sarah Russell Ames, and the children of my sister, Annie Russell Agassiz (deceased), or such one or more of them as may be living at the decease of my said husband, provided that in case any one or more of my said sisters, or any one or more of the children of my said brother Henry, or any one or more of the children of my said sister Annie, shall die before my said husband and leave a child or children surviving the parent, then such child or children shall take the share that would have gone to the parent, and the children, if more than one, shall take in equal shares what their parent would have had if living—with cross remainders between said families, should any of them be extinct at my decease," it was held that the force of the words "equally per capita" was not overcome by the final clause of the portion of the will above quoted, which by itself bears an indication of a gift per stirpes—especially as it would have been simple so to word the will as to create a per stirpes distribution, if that had been desired.

In *Eyer v. Beck* (1888) 70 Mich. 179, 38 N. W. 20, it was held that a will by which testator directed that certain property "be equally divided, after the payment of preferred debts, among my heirs, to wit, John Beck, the children of Christian Beck, Jr., deceased, Elizabeth Eicher," etc., — Christian Beck being a deceased son of the testator,—manifested by its phraseology an intention that the children of Christian Beck should take per stirpes, especially as the will did not name them, and gave no

indication that they were regarded as nearer in affection than his other grandchildren by the testator, who must have known that his named children might all or any of them die during his lifetime, leaving descendants.

In *Nichols v. Denny* (1859) 37 Miss. 59, where a testator gave the residue of his estate "to be divided equally between the children of my brother, Philip R. Nichols, and my sister, Fanny A. Denny," it was held that there was no evidence of an intention on the part of the testator that the estate so devised should vest in the children as a class, only one half to be equally divided among them, and the other half to vest in his sister, Mrs. Denny.

In *Crawford v. Redus* (1877) 54 Miss. 700, a bequest to "be equally divided between my sons and daughters now living, and my grandchildren Lucy and Molly, daughters of my son A. F. Redus, deceased, and Mary Martha Talliferro and Thomas Burnett, children of my daughter Silbrino Coats, deceased," was held to import, in the absence of other provisions showing a contrary intention, the taking of an equal share by each legatee.

In *Cuthbert v. Laing* (1909) 75 N. H. 304, 73 Atl. 641, testator bequeathed the residue of his estate "in equal shares" to his four children, and to two children of a deceased son, naming the legatees, and provided that, in case of the death of any of the legatees named, their share should go to the survivors. It was held that as there was no satisfactory evidence that the testator intended the grandchildren to take only the statutory share of their deceased parents, but as, on the contrary, the provision relating to survivorship showed that he meant to treat all alike, the grandchildren took per capita, and not per stirpes.

In *Stokes v. Tilly* (1852) 9 N. J. Eq. 130, where testatrix gave her residuary estate "to be equally (divided) between the child or children of my nephew, Acquilla S. Ridgway, and my sister, Rebecca Tilly, each one to

have an equal share thereof, and his children, or, if but one child he should leave, to have its or their share with my sister, . . . and for all my nieces and nephew, Wallace Lippincott, the children of my deceased nephew, Stacy Lippincott, to take their equal share therein with my sister Rebecca, and the children of Acquilla S. Ridgway," it was held that as there could be no doubt but that the children of Acquilla S. Ridgway were to take per capita, and as the children of Stacy Lippincott were to have an equal share with the children of Acquilla, the children of Stacy Lippincott took per capita.

In *Thornton v. Roberts* (1879) 30 N. J. Eq. 473, it was held, construing a provision that in a certain event a sum of money was "to go to, and be equally divided between, all my nieces and my nephew W, and the children of my deceased nephew S," that the case was one for the application of the rule that under a gift to one or children of another, *prima facie*, the persons all take per capita, and not per stirpes.

In *Fisher v. Skillman* (1867) 18 N. J. Eq. 229, where the will directed that the proceeds of sales directed to be made, together with testator's personal property not specially bequeathed, "be equally divided, share and share alike, between my children and their legal heirs, that is to say, to [several children named], each a share, and the children and heirs of Abraham L. Skillman, and of Martha Holcomb, and of Caroline Maria Fisher, each a share," it was held that, giving the words used their natural meaning, the grandchildren did not take collectively or per stirpes, but individually per capita.

In *Macknet v. Macknet* (1873) 24 N. J. Eq. 277, where testator, after giving the use of his homestead to his son Theodore for life, directed his executor to "sell it upon Theodore's decease, and to divide the proceeds of such sale or sales among my children and the children of my son Theodore, each to have an equal share or part thereof," it was held that there was nothing to prevent the application of

the rule that, under a bequest to one and the children of another, such persons all take per capita, and not per stirpes.

In *Ferrer v. Pyne* (1880) 81 N. Y. 281, where a testator having three living children, Anita, Joseph, and Henry, and two deceased daughters, Irene and Isabella, directed the residue of his estate "to be equally divided between Anita, the children of Irene, the son of Isabella, and Henry," it was held that as his living children were named by him, while the children of the daughters who were dead were spoken of not by name, but as "the son of Isabella" or "the children of Irene," evidently giving to them the place as recipients of his bounty which Isabella or Irene, if living, would have filled, and as, in a preceding clause of the will, he had made a pecuniary bequest "to the children of Irene," the children of Irene took the residuary bequest as a class, and not as individuals, and therefore the residuary estate must be apportioned among the legatees per stirpes, and not per capita.

In *Vincent v. Newhouse* (1881) 83 N. Y. 505, where a testator who had devised to his wife a life estate in certain realty directed that at her death such realty should be sold, and the proceeds "be equally divided between my daughters, Sylvia, Harriet, and Janetta, and the children and heirs of my sons Benjamin and Sumner, and of my daughter Cynthia, share and share alike," and by a subsequent clause gave his residuary estate to his wife, his daughters Sylvia, Harriet, and Janetta, "and the children of my two sons Benjamin and Sumner, to be equally divided among them, share and share alike," it was held that as the will declared it to be testator's purpose to make such a distribution of his property "as shall be just and equitable," and as other specific devises in the will so discriminated between the children and grandchildren as to make it manifest that the testator referred to the children of each son as a class, together representing the son, and not as individuals, they took under the provi-

sion in question per stirpes, and not per capita.

In *Lee v. Lee* (1863) 39 Barb. (N. Y.) 172, 16 Abb. Pr. 127, where testator directed his residuary estate "to be divided between my brother William Lee, and the children of my deceased sister Ellen Keany, and the daughter of my brother John Lee, in equal proportions, share and share alike," it was held that there was no evidence of an intention on the part of the testator to divide his estate into classes, and accordingly that the beneficiaries took per capita.

In *Re Stocum* (1905) 94 N. Y. Supp. 588, testator created a trust for the benefit of his daughter during her life, directing that "upon her death the said trust estate shall be divided equally among my son, Frank L. Stocum, and the surviving grandchildren of my sons John L. Stocum and James B. Stocum, and my daughter Catherine Chapman, share and share alike," and by a codicil provided that, if his son Frank should present against his estate a claim which the testator did not consider well founded, the gift made to him in the will should stand revoked, and that the remainder of the trust estate, upon the death of his daughter, should go "unto the surviving grandchildren of John L. Stocum and James B. Stocum, and my daughter Catherine Chapman, share and share alike." It was held, in view of the surrounding circumstances, that by the term "grandchildren" the testator meant his own grandchildren, and not those of his children, and that they were intended, both in the will itself and in the codicil, to take per stirpes, and not per capita.

In *Re Kleeman* (1908) 61 Misc. 560, 115 N. Y. Supp. 982, where testator gave his wife's brother Alfred the use of certain realty during his life, directing that after his death it should be sold and the proceeds "divided between my wife's brother, Frank Brett of Chicago, and the children and grandchildren of my wife's sister, Adeline Churchill," it was held that, notwithstanding the use of the word "between," such provision evidenced an intention that the testator contem-

plated a distribution among individuals and not classes, the court saying: "Not only the children, but the grandchildren, of the deceased sister, are included in the provision; and it is within the beneficial purpose that a grandchild whose parent is living shall take a share equal to its parent's share. It cannot be imagined that the idea of representation by stock was in the mind of a testator whose will ordains that the ancestor of the stock should share equally with his descendants." Further confirmation of this construction was found in the circumstance that in another paragraph, in which the beneficiaries bore a like relation to each other and to the testator's grace and consideration, he was particular to provide for a distribution per stirpes.

In *Martin v. Gould* (1832) 17 N. C. (2 Dev. Eq.) 305, where testator gave his residuary estate "to be equally divided between my son Daniel and my three grandsons, to wit [naming them], to them and their heirs forever," it was held that although, taking the residuary clause by itself, the grandsons would not take as a class, but each an equal share with the uncle, yet, in view of a preceding clause of the will showing that the testator meant to deal equally between his two sons, and to make the children of his deceased son stand in their father's stead, the son took one half the residue and the grandsons the other.

In *Harris v. Philpot* (1848) 40 N. C. (5 Ired. Eq.) 324, where testator directed certain property "to be equally divided between my two sons William Harris and my son Robert Harris, and my daughter Sarah Gillis, and the heirs of my son Lawson, deceased," it was held that the word "heirs" meant the children of Lawson, and that the division must be per capita.

In *Henderson v. Womack* (1849) 41 N. C. (6 Ired. Eq.) 437, testator gave to his sons Thomas and John, "and to Elizabeth Fielder's children" (Elizabeth being his daughter), certain property "to be equally divided between them with what they have had

heretofore, to have and to hold during their natural lives," adding: "The reason I give this property to Elizabeth Fielder, my daughter's children, is that I am fearful Sam Fielder will spend it." He also directed that, if there should be any surplus after payment of debts, expenses, and legacies, "such a surplus shall be equally divided and paid over to my said wife and three sons, and Elizabeth Fielder's children to have their mother's part of the surplus." It was held that the reason assigned for giving the property to the daughter's children instead of the daughter herself, and the direction in the residuary clause that her children should have their mother's part of the surplus, and the provision for equalization, all manifested an intention that the children of Elizabeth should come in, not as individuals, but as a family.

In *Pardue v. Givens* (1854) 54 N. C. (1 Jones, Eq.) 306, where testator devised certain lands to "my children [naming them], and the surviving children of my son Samuel Givens, and Jane, the widow of my son John, and her children," it was held that the surviving children of the testator's deceased son Samuel, and the widow and children of his deceased son John, each took as a class, and hence per stirpes, and not per capita.

In *Gilliam v. Underwood* (1856) 56 N. C. (3 Jones, Eq.) 100, where testator, who had given a living son a sum of money, and to "my son John Underwood's children" a like sum,—John being deceased,—directed that any residue should "be equally divided between my daughter Lucy, my son John's children, and my son Berry," it was held that as in the only other clause where John's children were mentioned, they were referred to as a class, and as such had a legacy of an equal amount with the testator's living son Berry, there was a strong indication that the testator intended that the children of his deceased son John should stand in his stead, and take only what he would have taken had he been living.

In *Lockhart v. Lockhart* (1857) 56

N. C. (5 Jones, Eq.) 205, where testatrix, who had bequeathed certain property to "the children of my deceased son John," in a subsequent clause, directed the residue "to be equally divided between the children of my deceased son John J. Lockhart, and my sons Benjamin F. Lockhart and Joseph G. Lockhart," it was held that, as in the first item she had treated the children of her son John as a class, it was presumed that she intended also to treat them as a class in the division of the residue.

In *Shinn v. Motley* (1857) 56 N. C. (3 Jones, Eq.) 490, where testator directed the conversion of his residuary estate into money, "to be equally divided between my sons [naming them], and my daughters, Martha Rhinehart, Kiziah Sossaman, Leah Love, Sally Plott, Elizabeth Biggers, Rowena Moses, Lavina Faggart, and Nancy Furr, all married women. But the amount of this division which would come to the shares of my daughters Martha Rhinehart, Kiziah Sossaman, and Nancy Furr is not to go to them, but to all their children which now are or hereafter may be; the grandchildren of them, three daughters, shall equally inherit it, their mothers' share,"—it was held to be clear that the children of the daughters were to take per stirpes.

In *Roper v. Roper* (1859) 58 N. C. (5 Jones, Eq.) 16, 75 Am. Dec. 427, where testator directed that his residuary estate should be "divided equally among the following heirs: my son John W. Roper, my grandson John T. Roper, Mourning Capel's children that she has now or may hereafter have, Nancy Tyson's children that she has now or may have hereafter, Martha Gay's children that she has now or may hereafter have, James T. Roper's children that he has now or may have hereafter, each one to share in equal proportion, share and share alike," it was held that the inconvenience of a result which would require the shares of the son, John W. Roper, and grandson, John T. Roper, to be altered and diminished with the birth of each after-born child of testator's daughters and son James, and

the fact that the testator had enumerated the children of his children whom he had recognized as living, as among the "heirs" to whom the bequest was made, afforded evidence of an intention that the division should be per stirpes.

In *Lane v. Lane* (1864) 60 N. C. (Winst. Eq.) 84, where testator bequeathed to "my grandchildren, the children of my deceased daughters, Eliza, Augusta, Susan, and Virginia," certain property "to be equally divided between them, share and share alike," and directed other property to be sold and the proceeds "distributed equally between my children, Thomas, Walter, and Margaret, and the children of my deceased daughters, Eliza, Augusta, Susan, and Virginia, share and share alike," it was held that the words used in themselves clearly imported a purpose that the grandchildren should take per capita.

In *Waller v. Forsythe* (1868) 62 N. C. (Phill. Eq.) 358, where testator gave certain property to his daughter, Nancy Waller, for life, and then "to be equally divided between the children of the said Nancy Waller and my son William and John, it was held that there was nothing to take the case out of the general rule that, under a gift to A and the children of B, the division must be per capita.

In *Gerrish v. Hinman* (1880) 8 Or. 348, a will by which testator devised the residue of his estate, at his wife's decease, "to each of my living children and the children of my deceased daughters alike, to be divided as a majority of them shall say, by sale or otherwise," was held, in view of the fact that the number and names of the children of the deceased daughters were not mentioned in the will, but were merely referred to as a class in their representative capacity, to evince a purpose on the part of the testator to give them the share their mothers would have taken if they had survived him, and accordingly that the children of the deceased daughters took per stirpes.

In *Minter's Appeal* (1861) 40 Pa. 111, where testator provided: "The balance and residue of my estate, I

order and direct my executors to divide equally, share and share alike, amongst the children of my brother, Adam Minter, deceased, and the children of my brother, Martin G. Minter, deceased, and to my sister Barbara Saval. It is my will that said Barbara, and the children of said brothers, Adam Minter and Martin G. Minter, shall have the residue of my estate, share and share alike," it was held that, by this mode of expressing himself, the testator had made three classes and three equal shares. It is to be noted that the words "share and share alike," as used in the first clause above quoted, preceded the entire bequest—a circumstance relied on in *Dible's Estate* (Pa.) *infra*, as distinguishing the case from one in which such words were put at the end of the bequest and so showed an intent to qualify each legacy.

In *Risk's Appeal* (1866) 52 Pa. 269, 91 Am. Dec. 156, testator directed his real and personal estate to remain unsold until the death of his wife, and one third of the income thereof to be paid to her and two thirds of it to accumulate until her death, when the fund was to be divided equally between his three "beloved children, George, Joseph, and Catharine," and directed that after his widow's death his real estate should be divided between his "beloved children, George, Joseph, and children of Catharine Risk, equally," or that, if they should be unable to agree upon such division, it should be sold and the money equally divided between George, Joseph, and the children of Catharine, after giving George \$1,200 out of the proceeds of the sale. It was held that the children of Catharine took, not individually, but per stirpes, the court saying: "It is observable that the special provision for the widow, for the accumulation of a fund from the proceeds of the personalty and real estate during her life, and for the preference of George as to \$1,200, were sufficient motives for making a will in this instance, whilst no motive is discernible for making each of the grandchildren equal with his own children, all of whom he repeatedly

calls 'beloved.' He probably thought his daughter Catharine sufficiently provided for by the third clause, and by the fact that she had a husband, and therefore intended that her share of the residuum should vest in her children, but nothing warrants the conclusion that he meant her children to take more than would have been her share. Deriving his impressions, no doubt, from the Statute of Distributions, 'he believed equality among his three children, after the preference to George, would be wise and just, and the only peculiarity of the will is that he gave Catharine's share to her children instead of herself. This is exactly what the law would have done, had Catharine been dead and had he died intestate; and it is no objection to the will that, whilst it might have altered the law of descent, it did substantially adopt the policy of the law. Had he meant the children to take per capita he would doubtless have named them, but, meaning that they, as a class, should be substituted for their mother and take one of three shares, he grouped them three times over in the fourth clause, as 'the children of my beloved daughter Catharine.' 'Equally' means that the class should share equally with George and Joseph. This is the grammatical construction of this adverb, for the names George and Joseph, and the class, are connected by copulatives that apply all the qualifying terms to them alike. Now if similar words in other wills have been interpreted devises per capita, it has been because no inconsistent interest was perceptible in the whole will; but, in the preference to George and the equality provided for the rest, we find in this will an intent that is wholly inconsistent with a per capita division among Catharine's children, and therefore we reject it without intentional violence to the authorities."

In Dible's Estate (1875) 81 Pa. 279, where testator, who had given a farm to one son and money legacies to each of his living sons and daughters, and a legacy to "the heirs of" a deceased son, and "the heirs of" a

deceased daughter, and to certain named grandchildren, went on to provide that, should there be any surplus proceeds of realty directed to be sold for the purpose of paying bequests, "then my will is that the balance be equally divided amongst my three last-named sons, my two daughters, and grandchildren within mentioned, share and share alike," it was held that all the grandchildren were entitled to take per capita, the court saying: "It is unlike the bequest in Minter's Appeal (1861) 40 Pa. 111. There the words 'share and share alike' preceded the entire bequest; here they follow, and, being separated from the words 'equally divided,' and carried to the end of the bequest, tend to show an intent to qualify each legacy by referring to the persons preceding. In Minter's Appeal the intent to bequeath by classes was evidenced by separating each one successively by the copulative conjunction 'and.' Here it is otherwise, and all are thrown into a single expression, as it were, at one breath."

In Green's Estate (1891) 140 Pa. 253, 21 Atl. 317, where testator, who, without formally adopting them, had brought up in his family two sisters, one of whom was named Josephine Lukens, and the other of whom had become the wife of John R. Ash, made a will by which he gave one half of his property to his wife, and directed "the other half to be divided equally between Josephine Lukens and the children of John R. Ash; in the event of the death of Josephine Lukens, her portion to go to the children of John R. Ash," it was held that the use of the word "between," instead of among, and the further provision that in the event of the death of Josephine her share should go to the children of John R. Ash, without naming or in any way individuating them, indicated that the testator intended to treat such as a class, and meant that Josephine should take one half and the children the other.

In Thompson's Estate (1900) 10 Pa. Dist. R. 276, construing a gift to a share of an estate "to my sister,

Charlotte Taylor, and the sons of my brother, Hugh Thompson, living at the time of my decease," it was held that the gift was to the testatrix's sister as an individual, and to the sons of her brother as a class, and therefore that the distribution must be per stirpes.

In *Miller's Estate* (1904) 26 Pa. Super. Ct. 453, construing the following bequest made by an evidently somewhat illiterate testator: "To my brother Christian Miller's children, William Wilson's children, my sister Mrs. Staub, my sister-in-law Mrs. Andrew Miller's children to be equal beneficiaries in balance of my property or money after the condition of this had been complied with," it was held that as the intention of the testator, as expressed in his will, left the question of distribution in doubt, and as the beneficiaries did not stand in the same degree of relationship with the testator, the court would follow the Law of Distribution, and presume that it was the testator's intention that the beneficiaries should take per stirpes; and this notwithstanding one of them was not of the blood of the testator.

In *Sipe's Estate* (1906) 30 Pa. Super. Ct. 145, where testatrix, after directing the place and manner of her burial and providing for the care of her grave, directed all her estate to be converted into money, adding: "And after the same has been converted as aforesaid, I give, devise, and bequeath as follows: "To my brother, Daniel Boeckel, to the children of Elizabeth, my sister intermarried with George Sipe, and to the children of my sister Louisa, intermarried with John Sipe, and to the children of Michael Boeckel, share and share alike," and the persons named as parents, who were a brother and sisters of the testatrix, were deceased, it was held that as the nephews and nieces were not designated by name, but were grouped in classes, each class being designated by the name of the deceased parent, and as no brother or sister, or nephew or niece, was excluded, there was little doubt that a per stirpes distribu-

tion was intended; and that the words "share and share alike" were not conclusive of a contrary intention, since such expression was appropriate to a division among classes.

In *Hertz's Estate* (1912) 22 Pa. Dist. R. 250, where testator, who had given a legacy of \$400 to Samuel Murphy and Hattie Murphy, the children of a living sister, bequeathed "unto my brothers and sisters, and the above said Samuel and Hattie Murphy, the balance of my estate, at the death of my wife, share and share alike," it was held that the fact that the mother of Samuel and Hattie Murphy was living at the date of the will, and received an equal share with the rest of the brothers and sisters, and the fact that the bequest was made to Samuel and Hattie Murphy, not as a group, but as individuals, and the further fact that these children were the special objects of the testator's bounty, together with the expression at the end of the clause, "share and share alike," pointed to the conclusion that they were to take per capita, and not per stirpes.

In *Jose v. Uson* (1914) 27 Philippine, 73, where testatrix, after giving certain property to her husband, directed that "at his death my sisters and nieces hereinafter named succeed him as heirs," then proceeded to enumerate her living sisters and the children of her deceased sister, concluding with the phrase: "so that they may have and enjoy it in equal parts as good sisters and relatives," it was held that an intention was clearly manifested that the sisters and nieces should take per capita rather than per stirpes.

In *Archer v. Munday* (1882) 17 S. C. 84, where a testator having but two children, a son and a daughter, made a will the intent of which appears to have been to make an equal division between the daughter on the one hand, and the son and his children on the other, it was held that a devise of land "to be equally divided between my daughter, Frances E. Archer, and the children of my son James M. Calvert, to them and their

heirs forever," in view of the general scheme of the will and the language used, was to be construed as dividing the land into two equal parts.

In *Puryear v. Edmondson* (1871) 4 Heisk. (Tenn.) 43, where testator directed certain property to be sold and the proceeds "equally divided between my brother John Winstead's children, and my nephew Koning, and my sister Mason Wilson and her children—all to be made equal," and in a codicil repeated such provision, stating: "Each one to have an equal share," it was held to be clear that the testator intended to vest each of the persons designated with an individual interest.

In *Kimbrow v. Johnston* (1885) 15 Lea (Tenn.) 78, where testatrix desired certain personal property to "be divided equally between A. E. Ford, Sallie Taylor [both of whom were her daughters], Eleanor Malloy [one of the children of a living daughter], Mary's daughters, James's daughters,"—Mary and James being deceased children of the testatrix, both of whom had left sons as well as daughters,—it was held that, as the will showed a selection by the testatrix of the objects of her bounty out of persons standing in the same relation to her with others of the same stirps, the division should be per capita.

In *Crow v. Crow* (1829) 1 Leigh (Va.) 74, testator directed certain property to "be equally divided between my children, to wit, the heirs of William Crow, namely, William, Robert, Patsey, Nancy, Henry, Ennis, and John (heirs of William Crow, deceased), Thomas, Moses, John Crow, and the children of my deceased daughter Massey Jones, and the children of my deceased daughter Sarah Crane, to them and their heirs; but the children of my daughter Massey Jones are to take only such part as their mother would take if she was still alive, that is to say, a child's part; and in like manner, the children of my daughter Sarah Crane are to take only such part as their mother would take, if she was still alive, that is to say, a child's part." It was

held that, as, if the testator had not added the provision that the children of the two daughters should take only their mother's share, all the children and grandchildren who were the objects of his bounty must have taken equally, and as the exception in the case of the two daughters indicates that the testator knew that, under the former part of the clause, all the objects of it would take per capita, it should be regarded as evincing merely an intention that the children of the daughter should take per stirpes; and that no different implication could be drawn from the fact that he called William's children his "heirs," since the clause in question, and another clause of the will, showed that the testator knew nothing of the technical distinction between "children" and "heirs," but used both words in the same sense; nor from the use of the words "a child's part," in the provision relative to the daughter's children; and accordingly that the children of William took per capita, rather than per stirpes.

In *Hamlett v. Hamlett* (1841) 12 Leigh (Va.) 350, where testator gave to his wife such part of his personal estate as she should think proper for her support, with liberty "to lend any part thereof to such of my children as she shall think proper, but if she shall lend any part to any of them, the part so loaned should at her decease be returned in order to make fair and equal division as I may hereafter direct," and, after making various gifts to children and grandchildren, went on to state: "My desire is that, after the decease of my wife, the whole of my estate except the part hereinbefore disposed of, may be divided in manner and form following, viz.: Equally among James Hamlett, Mary Jeffress, Patsey Wilson, Nancy Jeffress, Narcissa Jeffress, the children of my son George Hamlett and Lucy his wife, the children of my daughter Elizabeth Averett, the children of my son Bedford Hamlett, deceased, and the children of my daughter Obedience," it was held, on grounds which are not re-

ported, the opinion having been mislaid, that the grandchildren took per stirpes, and not per capita. In *Collins v. Feather* (W. Va.) *infra*, it is suggested that the decision in *Hamlett v. Hamlett* was arrived at in view of the circumstance that the five children named as takers under the will had, among them, thirty-one children, while four sets of grandchildren named in the will numbered twenty-one at the time of testator's death, and five more were born before the death of the widow, the date fixed for the division, so that, under a per capita division, there would have been thirty-one shares, of which only five were to belong to the children of the testator who had thirty-one of his grandchildren dependent upon them, while the other grandchildren, representing only four of the testator's children, would have taken over five sixths of the assets.

In *Collins v. Feather* (1902) 52 W. Va. 107, 61 L.R.A. 660, 94 Am. St. Rep. 912, 43 S. E. 323, a testator having two sons and two daughters living, eight grandchildren of a deceased daughter, and the widow and two children of a deceased son to provide for, gave to one of the sons valuable real estate and \$1,000; to the other valuable real estate, imposing upon him, as a condition subsequent, the support of his mother, testator's widow; and to the widow of the deceased son and her two daughters, other real estate; and then disposed of the residuum of his estate as follows: "I will and bequeath that after all the bequests of this, my last will, is complied with, that the remainder of my personal property be equally divided between my children, and grandchildren of my daughter Sarah, who was married to Henry E. Cale; to my daughter Mary Jane, now married to Ethbell Falkenstein, my daughter Margaret, now married to Joseph Michael, J. W. Feather, and Michael Feather, I will and bequeath that my two daughters, Margaret Michael and Mary Jane Falkenstein, each receive \$1,000 apiece out of my personal property before the above last-named division is made." It

was held that each of the eight children of Sarah Cale took one twelfth of the personal property, after payment of the specific legacies charged thereon.

In *Northey v. Strange* (1716) 1 P. Wms. 340, 24 Eng. Reprint, 416, it was held that, under a request to testator's children and grandchildren, the children and grandchildren must take per capita and not per stirpes, they all taking in their own right, and not by way of representation.

In *Blackler v. Webb* (1726) 2 P. Wms. 383, 24 Eng. Reprint, 777, where testator gave the residue of his personal estate equally to his son James, and to his son Peter's children, to his daughter Traverse, and to his daughter Webb's children, and his daughter Man, it was held that, as testator's daughter Webb was living so her children could not represent her, and as to determine that the grandchildren should take per stirpes would be to go too much out of the will and contrary to the words, when the meaning of the testator might be according to his words, the grandchildren did not take per stirpes, as a class, but per capita.

In *Tyndale v. Wilkinson* (1856) 23 Beav. 74, 53 Eng. Reprint, 29, 2 Jur. N. S. 963, 4 Week. Rep. 695, where a testator who had a son and two daughters, A and C, living, another daughter, B, who was dead, having left five daughters, bequeathed a sum of money to one of his living daughters for life with remainder to her children, a like sum to the other daughter for life with remainder to her children, and a like sum to the five daughters of B, and then gave the residue equally among his son, his daughter A, the five daughters of B, and his daughter C, to be settled as he had directed the several sums above mentioned, among them and their issue, it was held that the five daughters of B did not take as a class, but as individuals; and hence per capita.

In *Davis v. Bennet* (1862) 4 DeG. F. & J. 327, 45 Eng. Reprint, 1209, 31 L. J. Ch. N. S. 337, 8 Jur. N. S. 269, 5 L. T. N. S. 815, 10 Week. Rep. 275,

where testator directed that the residue of his personal estate should "be equally divided between my sisters Jane and Mary, and the lawful issue of my deceased sisters Elizabeth and Ann, in equal shares if more than one of such respective lawful issue," it was held that the word "respective" showed that the issue of Elizabeth were to be taken separately from the issue of Ann for the purpose of division, and therefore that there must be two subject-matters of subdivision, and accordingly that the issue of the deceased sisters took per stirpes.

In *Lenden v. Blackmore* (1840) 10 Sim. 626, 59 Eng. Reprint, 759, where testatrix gave the residue of her estate to certain persons for life, "after both their deaths to be equally divided between [certain persons named], daughters of my sister Elizabeth Feyer, and Elizabeth Blackmore, daughter of my sister Susannah May, and her children," it was held that the legatees named and the children of Elizabeth, including one born during the continuance of the precedent estate, each took an equal part.

In *Payne v. Webb* (1874) 31 L. T. N. S. (Eng.) 637, 22 Week. Rep. 43, where testator gave the residue of his estate to his living sons and daughters, naming them, "and to the children born of the body of Eliza Hulbert aforesaid, deceased, and the children born of the body of Lucy Hampton, deceased, to be divided among them in equal shares and proportions," Vice Chancellor Malins said that if he were at liberty to conjecture what the testator meant he would have no doubt he intended to divide his property into seven shares between his five surviving children and the children of his two deceased daughters, but in order to put that construction on the will he must find words to warrant it, and that the fact that the testator repeated the word "to," referring to the children of his deceased daughters, was not a sufficient circumstance to overcome the effect of the other words in the will, which was to throw the children and grandchildren into one class, to take in equal shares.

In *Re Walbran* [1906] 1 Ch. (Eng.) 64, 93 L. T. N. S. 745, where testatrix directed the proceeds of sale of her realty to be divided into two parts, one of which she gave to a nephew, "and the other equal part to be divided equally between the children of Francis Maximilian Walbran" and James Walbran, another nephew, it was held that the reason for passing over Francis in favor of his children was discernible in the fact that he had deserted, or at all events was living away from, his family, and as the word "between" implies division into two parts rather than more, and as it would be capricious to make a class of one nephew and the children of another, and divide among them in equal shares,—the division must be into moieties, one for the children of the testatrix's nephew Francis, and the other for her nephew James.

For instances of bequests to "descendants," see III. f, *supra*.

For instances of bequests to one and his "family," see III. s, *infra*.

3. *Under a bequest to certain persons "and their descendants."*

In *Tucker v. Billing* (1856) 2 Jur. N. S. (Eng.) 483, where testator gave his wife the residue of his property for life, "and after her decease to the brothers and sisters of myself and my said wife, and to their descendants," in such proportions as his wife should appoint, and the wife failed effectually to appoint, it was held that the context showed that "descendants" were to take only by way of substitution, and not in competition with a living parent.

r. *Under a bequest to one and his or her children.*

1. *In general.*

For instances of bequests to one and his "family," see III. s, *infra*.

For instances of bequests to several for life, and at their decease to their children, see III. u, *infra*.

Where a bequest is to one and his or her children, the question is not, strictly speaking, between a distribution per capita and a distribution per stirpes, because there is no stirpes or

stock represented by the children, whose share it may be supposed to have been the intention of the testator to give them, but whether the children take as a class or as individuals. Inasmuch, however, as cases involving this question are closely related to those involving stirpital distribution proper, they have been included in this annotation.

The rule in such cases is that, under a gift to parents and children, where there are children living at the time, the children will, in the absence of a qualifying context, take with their parents. *Moore v. Ennis* (1913) 10 Del. Ch. 170, 87 Atl. 1009; *Davis v. Sanders* (1905) 123 Ga. 177, 51 S. E. 298; *Central Trust Co. v. Richards* (1901) 35 Misc. 247, 71 N. Y. Supp. 773; *Cannon v. Apperson* (1885) 82 Tenn. 553; *Crow v. Crow* (1829) 1 Leigh (Va.) 74 (obiter); *Whittle v. Whittle* (1908) 108 Va. 22, 60 S. E. 748; *Paine v. Wagner* (1841) 12 Sim. 184, 59 Eng. Reprint, 1102; *Law v. Thorp* (1858) 4 Jur. N. S. (Eng.) 447, 6 Week. Rep. 480, 27 L. J. Ch. N. S. 649; *Cobban v. Cobban* [1915] S. C. 82, 52 Scot. L. R. 89.

See also *Graves v. Graves* (1889) 55 Hun, 58, 8 N. Y. Supp. 284, affirmed on opinion below in (1891) 126 N. Y. 636, 27 N. E. 411, where it is said that where the gift is to one person and the children of the same person, to be divided equally between them, all the beneficiaries, whether named individually or designated in a class as the children of the one named, take in equal shares per capita. Other instances in which the gift was accompanied by a direction for equal division are: *Armstrong v. Moran* (1850) 1 Bradf. (N. Y.) 314; *Robinson v. Harris* (1906) 73 S. C. 469, 6 L.R.A.(N.S.) 330, 53 S. E. 755; *Heron v. Stokes* (1842) 2 Drury & War. 89; 1 Connor & L. 270, 4 Ir. Eq. R. 284; *Cunningham v. Murray* (1847) 1 DeG. & S. 366, 63 Eng. Reprint, 1107; *Re Fox* (1865) 35 Beav. 163, 55 Eng. Reprint, 857; *Bradley v. Wilson* (1867) 13 Grant, Ch. (U. C.) 642; *Dryden v. Woods* (1881) 29 Grant, Ch. (U. C.) 430.

Review of the decisions.

In *Moore v. Ennis* (1913) 10 Del. Ch. 170, 87 Atl. 1009, where testator gave to seven of his nine children a sum of money outright, absolutely and without any qualifying words, and then gave to each of his two sons legacies with the additional words "and their children," it was held that both the general rule that where there is a gift to A and his children, and A has children living, they take jointly and in equal shares, and the fact that testator had indicated an intention in the gifts to these two sons, different from the gifts to the others, to benefit their children, such children took equally with their parent.

In *Davis v. Sanders* (1905) 123 Ga. 177, 51 S. E. 298, where testator directed his personal property to be "divided equally between my wife Fannie J. Leverett, my daughter-in-law Ella Leverett and her children, my daughter Sallie Pound and her children, and Bettie Sanders and her children now or hereafter born, my idea being to divide said personalty into four shares, my said wife to have one, my daughter-in-law and two daughters and their children to have the other three," it was held that the children were to take equally with the parents.

In *Graves v. Graves* (1889) 55 Hun, 58, 8 N. Y. Supp. 284, affirmed on opinion below in (1891) 126 N. Y. 636, 27 N. E. 411, construing a gift "to my adopted daughter Augusta C. Graves . . . and to the child or children of said Augusta C. Graves, who shall be living at the time of my death, to be divided equally share and share alike between the said Augusta C. Graves and the said child or children," it was held that, notwithstanding the use of the word "between," the terms of the provision in question, and especially the direction for equal division, indicated that each of the children of Mrs. Graves took a share equal to that of its mother.

In *Central Trust Co. v. Richards* (1901) 35 Misc. 247, 71 N. Y. Supp. 773, the testator gave the residue of

his estate "equally to my brothers and sisters and their children living at the time of my decease, and also the father and brothers of my beloved wife, and their children, now living and who may continue to be living at my decease," it was held to be plain from reading the will that the testator intended that his estate should be divided per capita between his brothers and sisters and the children of such brothers and sisters who might be living at the time of his death, and the testator's wife's brothers and their children who might be living at such time.

In *Armstrong v. Moran* (1850) 1 Bradf. (N. Y.) 314, it was held that under a bequest to testator's brother "and his children," "to be equally divided between them," the brother and his children took as tenants in common.

In *Pollard v. Pollard* (1880) 83 N. C. 96, where testator directed land to be sold and the proceeds divided between a son and grandson "and their children, the children to take the share of a parent who may die before my death," it was held that the children of the legatees named were not entitled to take in competition with their living parents, but, in view of the superadded clause, "the children to take the part of the parent who may die before my death," that they took by way of substitution.

Under a bequest to A and his children, and B and his children, "to each share and share alike," it is clear that testator intended each of such children to take per capita. *Robinson v. Harris* (1906) 73 S. C. 469, 6 L.R.A.(N.S.) 330, 53 S. E. 755.

In *Whittle v. Whittle* (1908) 108 Va. 22, 60 S. E. 748, testatrix, whose whole estate consisted of personal property, provided that, should there be any residue after the payment of legacies, "I wish it to be distributed between Mary Tremaine and her daughters, in trust to Dr. G. L. Sinclair, and to S. Blackiston and her daughters, Kate Whittle, Emily Jones, Jane Barr, and Gilberta S. Whittle." Mary Tremaine and S.

Blackiston were nieces of testatrix, Jane Barr and Gilberta S. Whittle were the nieces both of the testatrix and of her husband, and Kate Whittle and Emily Jones were the nieces of testatrix's husband. It was held that the implication of an intention that Mrs. Tremaine and Mrs. Blackiston and their daughters should take per capita with the other legatees named, arising from the form of the gift, was strengthened by the circumstance that the testatrix had given legacies of equal amounts to nieces and their daughters, making no discrimination between them, though they stood in different degrees of relationship to her, so that, if there had been no residue of her estate, each would have shared equally in her property, taken in conjunction with the circumstance that she was in doubt as to whether there would be any residue, as was shown not only by the provision itself, but by the direction in a codicil that there should be a small abatement of the legacies if necessary to pay her nurse \$500.

In *Heron v. Stokes* (1842) 2 Drury & War. (Ir.) 89, where testator gave property to be "equally divided between my sister Anne Owen and any daughters . . . she may have then living, and my sister-in-law Charlotte Heron . . . and any children she may have by my late brother Edward then living, share and share alike," it was held that although the probable intention of the testator was to give one half to Anne and her daughters, and the other to Charlotte and her children, and notwithstanding such construction was favored by the expression "equally between," which was, in strictness, applicable only to two, yet by the settled construction of the words legatees took per capita.

In *Cunningham v. Murray* (1847) 1 DeG. & S. 366, 63 Eng. Reprint, 1107, a bequest to two persons named "and their several children, to be divided between them in equal shares and proportions," was held to be to them and their children equally per capita, as tenants in common.

In *Law v. Thorp* (1858) 4 Jur. N. S. (Eng.) 447, 6 Week. Rep. 480, 27 L. J.

Ch. N. S. 649, where testator gave property in trust for his daughter for life, and directed that after her decease it be divided "among all her children and their issue, such children and their issue to be entitled, as amongst themselves, to the benefit of survivorship and accruer of surviving shares," it was held that as it was not possible so to construe such provision as intending that the issue should take by way of substitution, but as, on the contrary, the provision that the issue as well as the children were to be entitled to the benefit of survivorship showed that they took in common with their parents, the children and their issue took per capita.

In *Re Fox* (1865) 35 Beav. 163, 55 Eng. Reprint, 857, 13 Week. Rep. 1013, it was held that under a bequest to testator's sister for life, remainder "to my surviving brothers and sisters and their children, to be divided equally between them," the persons entitled take per capita, and not per stirpes.

In *Bradley v. Wilson* (1867) 13 Grant, Ch. (U. C.) 642, it was held that under a bequest "to my two sisters, namely, Mary and Sarah, and to their children, all to share alike if living," the legatees, being "all to share alike," took per capita.

In *Dryden v. Woods* (1881) 29 Grant, Ch. (U. C.) 430, where testator directed that at the death of his wife his real estate should be sold, and the proceeds, together with the proceeds of his residuary personal estate, should be "equally divided among my four daughters and three sons and their children," it was held that the children took concurrently with the parents.

2. To husband or wife of testator and their children.

In the case of a bequest to the husband or wife of the testator, and their children, the children will ordinarily, in the absence of a qualifying context (as in *Ghriskey's Estate* (1915) 248 Pa. 90, 93 Atl. 824), take equal shares with the parent. See *Lord v. Moore* (1849) 20 Conn. 122; *Proctor v. Smith* (1871) 8 Bush (Ky.)

81; *Edwards v. Kelly* (1903) 83 Miss. 144, 35 So. 418; *Morgan v. Pettit* (1885) 3 Dem. (N. Y.) 61; *Seabury v. Brewer* (1869) 53 Barb. (N. Y.) 662.

In *Feemster v. Good* (1880) 12 S. C. 578, it is said that, in the case of a gift to wife and children without naming them, it is not necessary, in order to ascertain who are the individuals embraced in such class, to resort to the Statute of Distribution, and hence they all take in equal shares, and not in the proportion prescribed by the statute.

Review of the decisions.

In *Lord v. Moore* (1849) 20 Conn. 122, where a testator having a wife and four children, after making specific devises to each of them, gave his residuary estate in trust "for my said wife and all the children which I may leave," directing the trustees to divide the income "equally between my said wife and said children and their heirs," it was held that the words "wife and children" were used merely as descriptive of the persons who were to take shares in the income, and that the mere fact that there were four children, and therefore that the wife's share was only one fifth of the property, was wholly insufficient to show that the testator did not intend that each of them should take an equal share.

In *Proctor v. Smith* (1871) 8 Bush (Ky.) 81, it was held that under a bequest by testator "to my wife Angelina and her three children, Beatrice, Dunlap, and Scotta conjointly," the children took individually, each a one-fourth.

In *Edwards v. Kelly* (1903) 83 Miss. 144, 35 So. 418, where the joint will of the husband and wife provided that, in case of the death of either, the property of the one first dying should vest in the survivor, unless the survivor should marry again, when the property inuring to the survivor's benefit by the death of the other should be divided equally "between" the survivor and the children of their marriage, it was held that the gift was not to the husband and to a class composed of their children, but to a

class consisting of the husband and children.

In *Morgan v. Pettit* (1885) 8 Dem. (N. Y.) 61, where testator, who left him surviving a wife and two children, directed that on the arrival of his youngest child at lawful age, his estate should "be divided equally between my said wife and children," it was held that the language used by the testator must be construed to mean that his wife should take the same share in the residue of his estate as each of his children, and no more.

In *Seabury v. Brewer* (1889) 53 Barb. (N. Y.) 662, where testator directed his estate "to be appropriated equally for the benefit of my wife, Emily H. Brewer, and of my children, Seabury Doane Brewer and Florence Kipp Brewer," it was held to be very clear that the parties named took per capita, and not per stirpes.

In *Ghriskey's Estate* (1915) 248 Pa. 90, 93 Atl. 824, where testatrix directed her residuary estate "to be divided equally between my husband and our children, the children's money to be held in trust until they are twenty-one years respectively," it was held that, there being nothing in the will or the extraneous circumstances indicating that the word "between" was not used by the testatrix in its ordinary meaning as having reference to two parties, the preponderance of probabilities was that testatrix intended her husband to take one moiety and her children the other.

a. Under a bequest to one and his "family."

For instances of bequests to the "family" of one individual or married couple, see III. d, supra.

For instances of bequests to the "families" of several individuals, see III. m, supra.

For instances of bequests to one and his or her children, see III. r, supra.

In *Hall v. Stephens* (1877) 65 Mo. 670, 27 Am. Rep. 302, it was held that, under a devise to one and his family, he and his children took in equal shares.

t. Under a bequest to persons named or to members of a class and/or "their representatives."

For instances of bequests to "legal representatives," see III. i, supra.

For instances of bequests to persons named, see III. j, supra.

Under a gift to members of a class living and the representatives of those deceased, such representatives must necessarily take per stirpes, since, if any person is under the necessity of making his claim as representative, he must take the share in the same manner as the persons he represents. *Re Bates* (1893) 159 Mass. 252, 34 N. E. 266; *Dwight v. Gibb* (1913) 208 N. Y. 153, 101 N. E. 851; *Rowland v. Gorsuch* (1789) 2 Cox, Ch. Cas. 187, 30 Eng. Reprint, 86; *Alker v. Barton* (1842) 12 L. J. Ch. N. S. (Eng.) 16.

And under a gift to certain persons if living, or their representatives if deceased, the word "representatives" imports a division per stirpes. *Booth v. Vicars* (1844) 1 Colly. Ch. Cas. 6, 63 Eng. Reprint, 297, 13 L. J. Ch. N. S. 147, 8 Jur. 76.

Review of the decisions.

In *Re Bates* (1893) 159 Mass. 252, 34 N. E. 266, where testator directed his estate to be closed upon the death of his last remaining child, "and the amount left to be equally divided among my grandchildren and the representative of any deceased grandchild," it was held that the term "representative" imported the distributees of each deceased grandchild under the Statute of Distribution.

In *Dwight v. Gibb* (1913) 208 N. Y. 153, 101 N. E. 851, affirming (1912) 150 App. Div. 573, 35 N. Y. Supp. 401, testator directed a share of his estate to be held in trust for each of his three daughters during their natural life, and "upon the decease of my said daughters, respectively, to pay over, transfer, and deliver the principal of the part aforesaid, so holden in trust for the use of the daughter so respectively deceased, to the child or children of such deceased daughter respectively; and in default of such child, or children, then to my other children named in this will, and to their legal representatives, in equal

proportions." One of the daughters having died without issue, and the others having died leaving issue, it was held that the portion to which the grandchildren of one of them were entitled, out of the share of the one dying without issue, was to be divided among them per stirpes.

In *Rowland v. Gorsuch* (1789) 2 Cox, Ch. Cas. 187, 30 Eng. Reprint, 86, where a will provided: "As to the residue of my fortune, I will and desire that the descendants or representatives of each of my first cousins, deceased, partake in equal shares in proportion with my first cousin now alive," it was held that as the descendants, under the terms of the will, take as "representatives" of deceased first cousins, they must take per stirpes.

In *Alker v. Barton* (1842) 12 L. J. Ch. N. S. (Eng.) 16, where testator bequeathed a sum of money upon trust for his daughter Margaret during her life, and after her death "equally among her children and their representatives, share and share alike; but if my said daughter Margaret shall happen to die without issue or the representatives of such issue," then over, it was held that the word "representatives" meant such children of the issue as could take by representation, and consequently that division was to be per stirpes.

In *Booth v. Vicars* (1844) 1 Colly. Ch. Cas. 6, 63 Eng. Reprint, 297, where testator directed the residue of his personal estate to be held in trust for his wife for life, and at her death to "go and be paid unto and to the use of the said Nicholas Vicars and Mary Brown . . . to be equally divided between them, share and share alike, if then living; but, if dead, to go and be equally divided to and among the respective next legal representatives of the said Nicholas Vicars and Mary Brown, share and share alike," it was held that the word "representatives" imported a division per stirpes, and that such construction was supported by the consideration that, if one of the two persons mentioned in the will had survived the tenant for life, only a moiety could have gone under the clause of substitution.

u. Under a bequest to several for life, and then to their children.

For instances of bequests to the children of several persons, not preceded by life estates in their parents, see III. 1, *supra*.

For instances of bequests to one and his or her children, see III. r, *supra*.

Although the cases on the question are not wholly reconcilable, they appear to warrant the following generalizations:

Where the gift to the children is to take effect only after the deaths of all the tenants for life, so that the whole fund goes over together, instead of in separate shares at different times, they take as members of a single class; and hence per capita. See *Dole v. Keyes* (1887) 143 Mass. 237, 9 N. E. 625; *Duckett's Estate* (1906) 214 Pa. 362, 63 Atl. 830; *Remillard v. Chabot* (1903) 33 Can. S. C. 328; *Re Ianson* (1907) 14 Ont. L. Rep. 82; *Malcom v. Martin* (1790) 3 Bro. Ch. 50, 29 Eng. Reprint, 402; *Pearce v. Edmeades* (1838) 3 Younge & C. Exch. 246, 160 Eng. Reprint, 693, 8 L. J. Exch. N. S. 61, 3 Jur. 245; *Nockolds v. Locke* (1856) 3 Kay & J. 6, 69 Eng. Reprint, 999, 2 Jur. N. S. 1064, 5 Week. Rep. 3; *Swabey v. Goldie* (1875) L. R. 1 Ch. Div. (Eng.) 380, 33 L. T. N. S. 306; *Re Stone* [1895] 2 Ch. (Eng.) 196, 64 L. J. Ch. N. S. 637, 12 Reports, 415, 72 L. T. N. S. 815, 44 Week. Rep. 235.

But even in such a case ground for stirpital distribution may be found in the circumstance that the children of each, upon the death of the parent, are given the intermediate income (see *Kidwell v. Ketler* (1905) 146 Cal. 12, 79 Pac. 514; *Heath v. Bancroft* (1881) 49 Conn. 220; *Potts v. Shirley* (1906) 28 Ky. L. Rep. 872, 90 S. W. 590; *Levering v. Levering* (1859) 14 Md. 30; *Barker v. Barker* (1916) 172 App. Div. 244, 158 N. Y. Supp. 419, affirmed on reargument in (1916) 161 N. Y. Supp. 1117; *Re Campbell* (1886) L. R. 33 Ch. Div. (Eng.) 98, 55 L. J. Ch. N. S. 911, 55 L. T. N. S. 463, 34 Week. Rep. 629), though such a distribution is not always to be inferred from a gift of

the intermediate income (see *Re Stone* [1895] 2 Ch. (Eng.) 196, 64 L. J. Ch. N. S. 637, 12 Reports, 415, 72 L. T. N. S. 815, 44 Week. Rep. 235, and *Re Ianson* (1907) 14 Ont. L. Rep. 82); especially where the gift is not of the entire income, but only of so much as shall be necessary for maintenance (see *Nockolds v. Locke* (1856) 3 Kay & J. 6, 69 Eng. Reprint, 999, 2 Jur. N. S. 1064, 5 Week. Rep. 3).

And the foregoing rule is, of course, inapplicable, where the children are given the intermediate income, and the will directs that they shall take the principal in the same proportions as the income. See *Bradshaw v. Melling* (1853) 19 Beav. 417, 52 Eng. Reprint, 412, 23 L. J. Ch. N. S. 603.

A superadded direction that, if there is but one child, the whole is to go to such child, is an argument in favor of a per capita distribution (see *Pearce v. Edmeades* (1838) 3 Younge & C. Exch. 246, 160 Eng. Reprint, 693, 8 L. J. Exch. N. S. 61, 3 Jur. 245; *Swabey v. Goldie* (1875) L. R. 1 Ch. Div. (Eng.) 380, 33 L. T. N. S. 306), but is not conclusive (see *Doe ex dem. Patrick v. Royle* (1849) 13 Q. B. 100, 116 Eng. Reprint, 1201, 18 L. J. Q. B. N. S. 145, 13 Jur. 745).

Where the gift can be construed as being to the children of each parent at the death of such respective parent, they will ordinarily take per stirpes.

Alabama.—*Bethea v. Bethea* (1896) 116 Ala. 265, 22 So. 561.

Massachusetts.—*Dole v. Keyes* (1887) 143 Mass. 237, 9 N. E. 625, (obiter).

New Jersey.—*Stoutenburgh v. Moore* (1883) 37 N. J. Eq. 63, affirmed without opinion in (1884) 38 N. J. Eq. 281; *Wright v. Gaskill* (1908) 74 N. J. Eq. 742, 72 Atl. 108.

New York.—*Jackson ex dem. Hunt v. Luquere* (1825) 5 Cow. 221; *Bool v. Mix* (1836) 17 Wend. 119, 31 Am. Dec. 285.

Tennessee.—*Lee v. Villines* (1914) 129 Tenn. 625, 167 S. W. 1117.

Vermont.—*Austin v. Rutland R. Co.* (1872) 45 Vt. 215.

England.—*Taniere v. Pearkes* (1825) 2 Sim. & Stu. 383, 57 Eng. Reprint, 392, 4 L. J. Ch. 81, 25 Revised

Rep. 229; *Flinn v. Jenkins* (1844) 1 Colly. Ch. Cas. 265, 63 Eng. Reprint, 457, 8 Jur. 661; *Arrow v. Mellish* (1847) 1 De G. & S. 355, 63 Eng. Reprint, 1102; *Willes v. Douglas* (1847) 10 Beav. 47, 50 Eng. Reprint, 499, 11 Jur. 702; *Doe ex dem. Patrick v. Royle* (1849) 13 Q. B. 100, 116 Eng. Reprint, 1201, 18 L. J. Q. B. N. S. 145, 13 Jur. 743; *Laverick's Estate* (1854) 18 Jur. 304, 2 Week. Rep. 113; *Waldron v. Boulter* (1856) 22 Beav. 284, 52 Eng. Reprint, 1117; *Turner v. Whittaker* (1856) 23 Beav. 196, 53 Eng. Reprint, 77, 2 Jur. N. S. 848, 4 Week. Rep. 689; *Coles v. Witt* (1856) 2 Jur. N. S. 1226; *Archer v. Legg* (1862) 31 Beav. 187, 54 Eng. Reprint, 1109, 10 Week. Rep. 703; *Sutcliffe v. Howard* (1868) 38 L. J. Ch. N. S. 472, 17 Week. Rep. 819; *England v. England* (1869) 20 L. T. N. S. 648, 17 Week. Rep. 719; *Re Nott* (1872) 20 Week. Rep. 569, 26 L. T. N. S. 679; *Barnaby v. Tassell* (1871) L. R. 11 Eq. 363, 24 L. T. N. S. 221, 19 Week. Rep. 323; *Wills v. Wills* (1875) L. R. 20 Eq. 342, 44 L. J. Ch. N. S. 582, 23 Week. Rep. 784; *Re Hutchinson* (1882) L. R. 21 Ch. Div. 811, 51 L. J. Ch. N. S. 924, 47 L. T. N. S. 573.

In this connection it may be noted that it is very generally held that, where the gift is to several persons for life and at "their death" to "their" children, the fact that the phrase "their death" must be read "their respective deaths" may warrant the reading of the phrase "their children" as "their respective children." See *Wright v. Gaskill* (1908) 74 N. J. Eq. 742, 72 Atl. 108; *Jackson ex dem. Hunt v. Luquere* (1825) 5 Cow. (N. Y.) 221; *Bool v. Mix* (1836) 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Crim v. Knotts* (1852) 25 S. C. Eq. (4 Rich.) 340; *Re Armstrong* (1918) 15 Ont. Week. N. 271; *Taniere v. Pearkes* (1825) 2 Sim. & Stu. 383, 57 Eng. Reprint, 392, 4 L. J. Ch. 81, 25 Revised Rep. 229; *Flinn v. Jenkins* (1844) 1 Colly. Ch. Cas. 265, 63 Eng. Reprint, 457, 8 Jur. 661; *Willes v. Douglas* (1847) 10 Beav. 47, 50 Eng. Reprint, 499, 11 Jur. 702; *Laverick's Estate* (1854) 8 Jur. (Eng.) 304, 2 Week. Rep. 113; *Turner v. Whittaker* (1856) 23 Beav. 196, 53

Eng. Reprint, 77, 2 Jur. N. S. 848, 4 Week. Rep. 689; *Archer v. Legg* (1862) 31 Beav. 187, 54 Eng. Reprint, 1109, 10 Week. Rep. 703; *Barnaby v. Tassell* (1871) L. R. 11 Eq. (Eng.) 363, 24 L. T. N. S. 221, 19 Week. Rep. 323; *Re Hutchinson* (1882) L. R. 21 Ch. Div. (Eng.) 811, 51 L. J. Ch. N. S. 924, 47 L. T. N. S. 573. Such reading, however, is precluded where the testator goes on to say what he means by "their children," by adding: "That is to say, the children of A & B" (see *Abrey v. Newman* (1853) 16 Beav. 431, 51 Eng. Reprint, 845, 22 L. J. Ch. N. S. 627, 17 Jur. 153, 1 Week. Rep. 156); or where, instead of the phrase "their children," he uses the phrase "the children of the said A & B" (see *Re Ianson* (1907) 14 Ont. L. Rep. 82, and *Swan v. Holmes* (1854) 19 Beav. 471, 52 Eng. Reprint, 433). But compare *Milnes v. Aked* (1858) 6 Week. Rep. (Eng.) 430, and *Wills v. Wills* (1875) L. R. 20 Eq. (Eng.) 342, 44 L. J. Ch. N. S. 582, 23 Week. Rep. 784, where a construction per stirpes was given.

The rule that, where the gift to the children takes effect at the deaths of their respective parents, they take per stirpes, has been treated as inapplicable where the gift is in the first instance to the children as a single class, followed by a gift of the use to their respective parents for life. *Hill v. Spruill* (1846) 39 N. C. (4 Ired. Eq.) 244; *Wetherill's Estate* (1912) 21 Pa. Dist. R. 305. *Contra*: *Crim v. Knotts* (1852) 25 S. C. Eq. (4 Rich.) 340.

And such rule has been held inapplicable where there is a limitation over, in case of the death of any of the life tenants without children, to the children of the others, since in such case an intention is apparent that all the children are to take as one class. See *Walters v. Crutcher* (1854) 15 B. Mon. (Ky.) 2.

Nor does it apply where the gift over is to the children of the one so dying, and of the survivors or survivor, in equal shares. See *Peacock v. Stockford* (1853) 3 DeG. & G. 73, 43 Eng. Reprint, 30.

It will apply, however, where such limitation over is to the other life tenants in equal shares. See *Shepard*

v. Shepard (1887) 60 Vt. 109, 14 Atl. 536.

Where the gift in remainder is to the children "that each may have surviving them," the word "each" operates to distribute such children into classes, and they will accordingly take per stirpes. *Bethea v. Bethea* (1896) 116 Ala. 265, 22 So. 561; *England v. England* (1869) 20 L. T. N. S. (Eng.) 648, 17 Week. Rep. 719.

A gift over in the case of the death of any child before attaining a vested interest, not to the other members of the class, but to the surviving brothers and sisters, shows that they are to take per stirpes. *Archer v. Legg* (1862) 31 Beav. 187, 54 Eng. Reprint, 1109, 10 Week. Rep. 703.

Review of the decisions.

In *Bethea v. Bethea* (1896) 116 Ala. 265, 22 So. 561, where testator bequeathed certain property to his three sons "during the terms of their natural lives, and then to the children that each may have surviving them," it was held that the word "each" was clearly distributive of the grandchildren of the testator referred to, into classes or stirpes, indicating his intention for them to take in this manner, and not per capita.

In *Kidwell v. Ketler* (1905) 146 Cal. 12, 79 Pac. 514, testator created a trust for the benefit of his niece Katie and nephew Willie during their lives, providing that, if either of them should die without issue, the whole of the income should be paid to the survivor during his or her natural life, and that, in case either of them should die with issue surviving, then and in that case one half of the net income should be expended for the maintenance and education of such issue until both Katie and Willie should have deceased, "when the said investment property, and the net proceeds thereof then remaining, shall become the absolute property of the issue of the said Katie and Willie then surviving." It was held that, as it was apparent that in the disposition of the income to arise from the trust property the testator contemplated a distribution per stirpes, it would seem to be reasonably certain that he also contemplated

a division of the corpus of the trust in *like manner*.

In *Heath v. Bancroft* (1881) 49 Conn. 220, testator, in a will confusedly and inaccurately expressed, directed his personal estate to be invested and a portion of the income to be paid to his widow for life, and the remainder to be divided between his sons and daughters in stated proportions, adding: "And in case any one or more of my said children shall die without a lawful heir or heirs, his, her, or their part to be divided between the surviving children in proportion bequeathed to them as aforesaid; and at the decease of my said children my will is that the principal of said personal estate be divided as follows: That the first of my said children that shall die, and others until the last of them shall decease, leaving lawful heirs, they severally shall receive the interest of their ancestor until the last of my said children be deceased; and at the death of the last of my said children the whole to be equally divided between the lawful heirs of my said children according to the number of their heirs as shall then survive collectively." It was held that the per stirpes rule was clearly applicable to the income until final distribution of the property, and that the words, "according to the number of their heirs as shall then survive collectively," did not require a different distribution of the principal. The court in discussing the question said: "What do these words mean? In the confused and inaccurate expressions of which the will is full, it is very doubtful whether they had any meaning to the testator, but so far as we can give them any meaning they seem to indicate an intention to have an enumeration of the heirs then surviving. As this enumeration would be necessary in case of a per capita division, and not necessary in case of a per stirpes division, the language would seem to favor a per capita distribution. The word 'collectively' also somewhat aids this construction, as it indicates that the testator had in mind the heirs of his children as a whole, and an equal division among

them by numbers, and not an unequal division by representation. On the other hand, however, the ascertainment of all the heirs would be necessary to complete distribution under any rule; and under any rule the heirs then living would alone take, whether they took per capita or by representation; while the direction of an equal division has been held to be as applicable to a per stirpes as to a per capita division. *Raymond v. Hillhouse* (1878) 45 Conn. 473, 29 Am. Rep. 688. The language is not, therefore, decisive of an intention to distribute the property per capita, while there are, we think, over balancing considerations in favor of the per stirpes rule. In the first place the testator had, we think, clearly, although in the same awkwardness of language, given the annual income during the long period of the lives of his children, or some of them, to his children and their representatives, and it is difficult to see why he should have adopted a different rule as to the division of the principal. In the next place, the per stirpes rule is one of much more easy practical application. The testator must have expected that, leaving so large a number of children, his descendants, living at the time—presumably, as it has proved, very remote—when the last of his children should die, would be very numerous and widely scattered, and consequently very difficult of ascertainment, if, indeed, it would be possible to ascertain them all. Yet this complete ascertainment and enumeration of the heirs, however numerous and however widely scattered, would be an unavoidable preliminary of the distribution of the property. The share of no one heir could be determined until the whole number of the participants in the distribution was known. The property would in all probability be locked up at the very outset, and a distribution of it indefinitely delayed. If the language of the will were clear, the difficulty of carrying it out could not affect its construction; but while it is obscure it is a legitimate consideration, inasmuch as it would be presumed that a testator intended a

construction that could be carried out, as against one that could not, or could be only at great trouble and expense. Under the *per stirpes* principle, the nonascertainment of some of the heirs cannot affect the shares of any others not of the immediate division or subdivision to which the undiscovered heirs may belong. A further consideration in favor of the *per stirpes* rule is that this rule has for two centuries commended itself to the judgment of the community as one of justice, and has been and is the rule applied by the law in case of intestate estates. In these circumstances, this rule will be applied in the construction of a will where the language of the will leaves the intent of the testator in serious doubt. If we should regard the language here used as so utterly obscure that no conclusion could be reached as to its meaning, we should treat the will as so far void for uncertainty, and the property given by it would become intestate estate. It is arriving at the same practical result to give the will a *per stirpes* construction."

In *Walters v. Crutcher* (1854) 15 B. Mon. (Ky.) 2, where testator devised his slaves in trust for his four children during their lives, and at their death, or the death of either of them, their one-fourth part to their children, should they leave any, but should either of them die without leaving a child or children, their part to go to the children of the others, it was held that as the devise was to the children of the others as one class, and as there was nothing in the will that indicated an intention that the children of the others, where one should die without children, were to take in the place of their parents, or the share of their parent, or in any other manner than they would take under a general devise to them as grandchildren, they constituted but one class of devisees, and must take *per capita*, and not by representation.

In *Potts v. Shirley* (1906) 28 Ky. L. Rep. 872, 90 S. W. 590, a testator, who, by his will, after directing an equalization of his four children according

to advancements, gave to each one fourth of his personal estate, by a codicil, executed some eight years thereafter, gave his personal property in trust during the lives of his children, and of the survivor of them, to pay the income to each for their lives, with the further provision that, upon the death of any one, the share of income which such one would have taken should go to her descendants, if any, according to the law of descent, and concluded by devising the trust fund, upon the termination of the trust, "to my grandchildren or their descendants in equal portions, that are now living or may be hereafter born." It was held that the natural import of the language indicated an intention on the part of the testator to make an equal distribution of his personal estate among all his grandchildren without respect to the number of each family; and that no implication of a different intention could be drawn from the fact that in his will he had given life estates to his four children, with remainder to his grandchildren and great-grandchildren *per stirpes*.

In *Levering v. Levering* (1859) 14 Md. 30, construing a will by which testatrix devised the income from certain property to her daughters Hannah and Sarah during their lives, providing that, "in the case of the death of either of them, then and in that case the rents, issues, and profits of the one so dying shall be equally divided between the heirs of the said deceased," and further provided that after the death of both the property should be sold and the proceeds distributed "unto and among the heirs and representatives of the said Hannah Levering and Sarah Levering," it was held that as the testatrix had clearly shown an intention to give to the children of one daughter the rents, issues, and profits of one half the estate, irrespective of the number of such children, it was to be supposed that she had a like intention of giving to the children of each mother each one half of the principal.

In *Dole v. Keyes* (1887) 143 Mass. 237, 9 N. E. 625, where testator gave

the income and improvements of his residuary estate to his children, adding: "And at their decease the said real and personal estate shall revert to their children, and also the above-described estate given to my beloved wife, after her decease," it was held that the gift to the children of the life tenants was to be regarded as taking effect after the death of both rather than upon the respective deaths of each, and for that reason, and also because such remainder was evidently given in the same proportions as the remainder after the wife's death, which is limited by the same clause, the testator's grandchildren took per stirpes.

In *Stoutenburgh v. Moore* (1883) 37 N. J. Eq. 63, affirmed without opinion in (1884) 38 N. J. Eq. 281, where testator gave the income of his residuary estate to his two sons, "to be equally divided between them during their lives, and at their death to be equally divided between my grandchildren, to them, their heirs and assigns," it was held that the grandchildren did not take as a single class, but per stirpes.

In *Wright v. Gaskill* (1908) 74 N. J. Eq. 742, 72 Atl. 108, where testator bequeathed to his nephew John and his niece Elizabeth, children of his brother, a certain farm and personal property thereon "for and during the term of their natural life or lives of them, the said John and Elizabeth P. Gaskill, and after to their lawful issue," it was held that, that there being two life tenants of the estate in question, each having an undivided half interest in the whole, the issue of each upon the death of their ancestor succeeded to an undivided half, and accordingly took per stirpes, and not per capita.

In *Jackson ex dem. Hunt v. Luquere* (1825) 5 Cow. (N. Y.) 221, and *Bool v. Mix* (1836) 17 Wend. (N. Y.) 119, 31 Am. Dec. 285, a devise to two daughters of land, "to be equally divided between them share and share alike, and to be to them, for and during their natural life; and after their death, then to be to their and each of their children and to be

divided between them share and share alike," was held to give the remainder to their respective children per stirpes, and not per capita.

In *Barker v. Barker* (1916) 172 App. Div. 244, 158 N. Y. Supp. 419, affirmed on reargument in (1916) 175 App. Div. 940, 161 N. Y. Supp. 1117, and affirming on this point (1915) 92 Misc. 390, 156 N. Y. Supp. 194, testator, after giving his daughters annuities charged upon his estate, and his property subject thereto in trust to apply the income to the education, support, and maintenance of his sons John and Samuel during their lives, went on to provide: "And on their death the same shall belong and descend (the real estate in fee) subject as aforesaid to their heirs and descendants—and if none, then to my heirs at law, and in case of the death of either said John A. G. or Samuel P., then his share (one half) of the income or profits shall be paid to the heirs of such decedent until the death of the survivor of my said two sons, it being my will that the same shall remain in trust as aforesaid until the death of both of my said sons." It was held that notwithstanding the provision that testator's heirs should take in default of "their heirs and descendants" raised the question whether the testator intended his heirs to take, if one beneficiary should die without leaving issue, yet the fact that John and Samuel could not have common descendants, and the declaration that each son took one half of the income, with the provision that, in case of the death of either, his heirs should take his share of the income until the death of the survivor, so that the descendants, however few, of one son, might take half of the income, while the children of the other son, however many, might take the other half, indicated the testator's intention to divide the estate into two shares, one for each line of descent, and that the heirs of each son should take correspondingly from the corpus.

In *Hill v. Spruill* (1846) 39 N. C. (4 Ired. Eq.) 244, where testatrix directed that all her property "be equally divided among my grand-

children that are living at the time of my death, and that their parents have the use of it as long as they live," it was held that as the gift was to the grandchildren under a common denomination, with a direction for "an equal division among them," they took per capita; and that this construction was not affected by the fact that there was a gift to the respective parents of the several families of grandchildren, the court saying, with regard to the latter circumstance: "It was indeed said at the bar that this case might be taken out of the rule, because there is a gift to the respective parents of the several families of grandchildren, which, though not coming first in the will, is really and necessarily prior to that to the grandchildren themselves, as it is to be first enjoyed; and it was insisted that this would enable the court to make the division among the grandchildren per stirpes. But the argument goes too far, so as to show it to be clearly wrong. For if the division be between the parents of the grandchildren, then each person within that description takes, and, consequently, where both of the parents are alive, the grandchildren of that family would have double as much as those who had but a single parent living; which would produce the very inequality between the families against which the argument is directed. The donation to the children of the testatrix and their husbands and wives is not, in truth, made to them as such, but as being 'the parents of the grandchildren, then living,' whose shares their respective parents are to enjoy during their lives. The division is, therefore, to be made immediately among the grandchildren per capita; but the enjoyment, during the lives of their respective parents or the survivor of them, is to belong to the respective parents, and then go into possession of the grandchildren themselves."

In *Duckett's Estate* (1906) 214 Pa. 362, 68 Atl. 880, where testator gave the residue of his estate in trust to pay one third of the income to his wife during life, and the remaining two thirds to his three children during

their lives, and after the death of all of them, upon trust for the use "of the lawful issue of my said children, . . . their heirs and assigns forever, share and share alike; and in case there shall not be any such lawful issue, then the same to be divided between my nearest of kin, their heirs and assigns, share and share alike," it was held, in view of the context, that the testator had used the word "issue" as meaning "children," and that, as he evidently purposed to give his entire residuary estate to his grandchildren as a class, the distribution should be per capita.

In *Crim v. Knotts* (1852) 25 S. C. Eq. (4 Rich.) 340, a will directing that the residue of testator's estate "be divided into equal shares among my brother, Jacob Patterson, and Anthony Patterson's lawful children, and that my brothers, Jacob and Anthony, have the use of their children's portion, or part, during their natural lives, and at their death to their children forever," it was held that the direction as to the division of the residue into equal parts is satisfied by understanding it as applicable to the brothers of the testator who were the immediate objects of his bounty, and that it was the testator's intention that, at the death of each, his children should take his moiety among them absolutely.

In *Lee v. Villines* (1914) 129 Tenn. 625, 167 S. W. 1117, where testator bequeathed certain property in trust to pay over the income to his children, providing that at the death of either of them the child or children of such one dying should receive the part or portion of such income that their father or mother was entitled to, and that should any of such children die without child or children, then, in that event, his or her share should be paid over to the survivors in equal portions and the children of such as might have died leaving issue, it was held to be clearly the purpose of the testator that the surviving grandchild or grandchildren should take per stirpes that part of the estate to which the deceased parent had been entitled for life, and that in the event any

child should die without child or children surviving the testator also intended stirpital vestiture of the fee to take place.

In *Austin v. Rutland R. Co.* (1872) 45 Vt. 215, where testator directed all his estate, except that given to his wife, to be equally divided, and the use, improvement, and occupancy of one moiety thereof to be enjoyed by his daughter Avis, and the other moiety by his daughter Nellie, during their natural lives, "remainder to their heirs forever," it was held that, as Avis and Nellie were each to have a life estate in the moiety, so the heirs of each one were to take a moiety in the remainder in fee.

In *Shepard v. Shepard* (1888) 60 Vt. 109, 14 Atl. 536, where testator devised the residue of his estate "in equal shares to my four sisters [naming them], to them and their children forever, with this condition, that if either of my said sisters should die leaving no children, then her share as aforesaid to the other sisters living, in equal shares," it was held that the shares of those of them who died leaving no children passed to the descendants of the others per stirpes.

In *Stephens v. Hide* (1784) Cas. t. Talb. 27, 25 Eng. Reprint, 641, where testator devised a share of his personal estate in trust for his two daughters during their natural lives, and afterwards to their or either of their child or children, it was remarked that it would not seem contrary to the testator's intent that his grandchildren should take per capita, they all being equally related to him; but, as one of the daughters left no issue, the point did not have to be decided.

In *Malcom v. Martin* (1790) 3 Bro. Ch. 50, 29 Eng. Reprint, 402, where testator gave to the children of A and the children of B the interest of a sum of money for life, to be equally divided between them, and at their decease the same to be divided betwixt the grandchildren of each, the opinion was expressed that the will contained no sufficient indication that the grandchildren were to take otherwise than after the death of all the life tenants, and hence per capita.

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In *Taniere v. Pearkes* (1825) 2 Sim. & Stu. 383, 57 Eng. Reprint, 392, 4 L. J. Ch. 81, 25 Revised Rep. 229, where testatrix gave a sum of money to a sister for life, and at her death to her two daughters in equal shares, "and at their death to their children," it was held that as the children of each daughter must plainly take their mother's share upon her death, neither the surviving daughter nor her children could claim the share of one dying without children.

In *Pearce v. Edmeades* (1838) 2 Younge & C. Exch. 246, 160 Eng. Reprint, 693, 3 Jur. 245, where testator devised property in trust to pay the income unto and between his grandchildren Elizabeth and George during their respective natural lives, and after the decease of both upon further trust to pay the principal "unto and between all and every the child or children of the said Elizabeth Goldsmith and George Goldsmith in equal shares, and if but one to that child only," it was held that, as the corpus of the residue was not to be divided until after the decease of both George and Elizabeth, the division must be per capita, and not per stirpes.

In *Flimm v. Jenkins* (1844) 1 Colly. Ch. Cas. 365, 63 Eng. Reprint, 457, 8 Jur. 661, where testator gave a house to his son Robert and another house to his son Henry for their lives, "and then to be equally divided among their children," and likewise gave his residuary estate "to be equally divided between my two sons for their lives only, and then to be equally divided among their children when of age," it was held that the children of the sons were entitled to the shares of their parents in the houses and in the residue per stirpes.

In *Arrow v. Mellish* (1847) 1 DeG. & S. 355, 63 Eng. Reprint, 1102, where testator gave his estate to four nieces "to be by them equally divided, share and share alike, and at their death to go equally, share and share alike, to their children," it was held that the words "their children" must mean "their respective children," and therefore that such children took their parent's share only.

In *Peacock v. Stockford* (1853) 3 DeG. M. & G. 73, 43 Eng. Reprint, 30, where testator bequeathed life interests in four distinct funds to four nieces respectively, and directed that upon the decease of any or either of them, the principal fund, the interest of which was to be received by her or them, should be held in trust for "the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of my other nieces hereinbefore named, in equal shares," it was held that, as the words of the will did not warrant the construction that the children of each niece were to take the capital in which their parent took a life interest, it followed that all must take together.

In *Willes v. Douglas* (1847) 10 Beav. 47, 50 Eng. Reprint, 499, 11 Jur. 702, a testatrix gave property in trust to be equally divided between her three cousins, the interest arising therefrom to be equally divided share and share alike among them, "separate and distinct from their said husbands and for their sole use; and at their decease to be equally divided amongst their said daughters," it was held that as the testator in speaking of "their said husbands" clearly meant their several and respective husbands, and in using the phrase, "for their sole use," meant "their respective use," and in using the phrase, "at their decease," meant the death of each respectively, the word "their" should not be given a different meaning in construing the phrase "their daughters," but that such phrase must be read as "their respective daughters," and hence that such daughters took per stirpes rather than per capita.

In *Doe ex dem. Patrick v. Royle* (1849) 13 Q. B. 100, 116 Eng. Reprint, 1201, where testator devised land in trust for his son Jarman and his daughter Elizabeth for their respective natural lives, equally to be divided between them, share and share alike, "and from and after the decease of them or either of them, to the use" "of all and every the children of" his "said son and daughter respectively,

both male and female, and their respective heirs and assigns; to be equally divided among them, share and share alike as tenants in common, and not as joint tenants; and if there shall be only one such child of" his "said son and daughter, Jarman and Elizabeth," to the use of such child in fee, with a further limitation over in default of such issue, it was held that as the moiety of the first of the life tenants to die went over upon his decease, and the remainder being given to the children of the son and daughter, "respectively," the children of each tenant for life took only upon the decease of their own parent, the word "respectively" having the effect of dividing between children of tenants for life in classes.

In *Abrey v. Newman* (1853) 16 Beav. 431, 51 Eng. Reprint, 845, 22 L. J. Ch. N. S. 617, 17 Jur. 143, 1 Week. Rep. 156, testator gave certain property to be equally divided between A and his wife, and B and his wife, for the period of their natural lives, "after which to be equally divided between their children; that is to say, the children of" A and B above mentioned. It was held that as the words "their children" could not, in view of the explanatory clause following, be read as "their respective children," upon the death of one of the life tenants and his wife their share was divisible per capita among all the children.

In *Bradshaw v. Melling* (1853) 23 L. J. Ch. N. S. (Eng.) 603, testator devised his real estate in trust during the lives of his eight nephews and nieces named and the survivor of them to pay over one eighth part of the rents and profits to each of his nephews and nieces. "during their respective natural life and lives," further providing that, in case any of the said eight legatees should die without leaving issue, the share of such one should go among the survivors in the same manner as their original shares, and that in case any of them should die leaving issue, the share of such one should go and be paid to such issue during the lifetime of the survivor of them, and from and after the

decease of the survivor devised the trust property "unto the lawful issue then living, of the said eight legatees, their heirs and assigns forever, as tenants in common, the share of such issue in the fee simple to be in the same proportion as the share of the rents and profits he, she, or they may then be in the receipt of; it not being my intention that the issue of my said legatees shall take in equal shares altogether, but only in equal proportions as respects their deceased parents' or parent's original and accruing shares." It was held that the trust property was divisible upon the death of the survivor of the eight legatees named, among and to the children then living of such of them as had left children, and that such children took per stirpes.

In *Laverick's Estate* (1854) 18 Jur. (Eng.) 304, 2 Week. Rep. 113, where testator bequeathed to his niece Catharine and nephew John, all his houses situate at W, "each to have one half, to be share and share alike," "each to enjoy one half during their lives and at their decease the said premises to go to their children," it was held that there was an absolute division of the property into two shares, one share to be devoted to each and his or her children.

In *Swan v. Holmes* (1854) 19 Beav. 471, 52 Eng. Reprint, 433, where testator gave the interest on a certain sum to be divided among his cousins, John, William, Henry, and Mary, for their lives, and directed that the principal should "devolve to the children of the said John, William, and Henry in equal proportions," it was held that there was nothing to indicate that the children of the four cousins were to take by representation their respective parent's share, and accordingly that the children of those named took per capita.

In *Hunt v. Dorsett* (1855) 5 DeG. M. & G. 570, 43 Eng. Reprint, 991, where testator gave his real and personal estate upon trust to pay the income therefrom to his ten nephews and nieces for their respective lives, and directed that after their respective deceases the share of such nephew or

niece so dying "to be held in trust for all and every the children or child of my said nephews and nieces" who should attain the age of twenty-one, and that should any one or more of such nephews or nieces not have any child who should attain the age of twenty-one, then the original share, as also the share or shares surviving or accruing to such nephew and niece and his or her child or children, or to such child or children only, should go to the survivors or survivor of such nephews and nieces "and their respective children at and in such and the same time, shares, proportions, and manner as are hereinbefore expressed of and concerning their respective original shares"—it was held that the intention of the testator that the children of his nephews and nieces were to take per stirpes was manifested not only by the language used, but by the circumstance that he provided that in case of the death of any child before attaining the age of twenty-one the share or shares to which such child was presumptively entitled should go to the nephews and nieces and their children, or the children only as the case might be, "at and in such manner as hereinbefore expressed of and concerning their respective original shares," etc., thus manifesting that what he had said before also carried the shares of nephews or nieces dying, to their respective children.

In *Waldron v. Boulter* (1856) 22 Beav. 284, 52 Eng. Reprint, 1117, where testator bequeathed a leasehold property upon trust to pay and divide the rents equally between and among his four grandchildren, "and from and after the decease of my said grandchildren in trust for such lawful issue as they or any or either of them shall leave, lawfully begotten, as tenants in common," it was held that the grandchildren took as tenants in common for life with remainder to such "issue" as each should leave; and therefore, on the death of each grandchild, such issue as survived him took his one-fourth share as tenants in common.

In *Turner v. Whittaker* (1856) 23

Beav. 196, 53 Eng. Reprint, 77, 2 Jur. N. S. 848, 4 Week. Rep. 689, where testator directed the income of a fund to be equally divided between his sons Edward and Alfred and bequeathed the principal "to their children, to be divided equally among them at the death of my sons Edward and Alfred," it was held that the children of each took a moiety per stirpes upon the death of their parents.

In *Nockolds v. Locke* (1856) 3 Kay. & J. 6, 69 Eng. Reprint, 999, 2 Jur. N. S. 1064, 5 Week. Rep. 3, where testator gave a third of his residuary estate in trust for each of his daughters for their life, and after the death upon trust to pay and apply such one third or so much thereof as his trustees should think necessary in such manner as they should think proper toward the maintenance, education, and advancement in life of the children of such daughter, until the decease of the survivor of his three daughters, and upon the decease of such survivor directed a division of the trust fund "unto and amongst all and every the child and children of them my said daughters in equal shares and proportions," it was held that the fact that the provision for the maintenance was per stirpes did not necessarily evince an intention that the distribution of the principal should be per stirpes also, especially as the testator did not give the whole of the income to the children, but only so much thereof as should be thought necessary by the trustees, and as, if the testator had intended a division per stirpes of the capital, there would have been no object in postponing the division of the fund till the death of his surviving daughter.

In *Coles v. Witt* (1856) 2 Jur. N. S. (Eng.) 1226, where testator devised property in trust for his four daughters during the terms of their natural lives, adding: "And in case either of my daughters should happen to die leaving issue lawfully begotten, then I will and direct that the share or shares of her or them so dying shall be paid to the child or children of each respective daughter so dying," with a further limitation over in default of

issue, the court said that the rule is that, where a parent has made a division between his children, the share of any child shall not, at an indefinite time after the testator's decease, be liable to be cut down by the accident of another child dying before complete distribution, and leaving issue, and therefore that the children of the daughters would take per stirpes.

In *Milnes v. Aked* (1858) 6 Week. Rep. (Eng.) 430, testator gave certain property to A and B "for and during the term of their respective natural lives as tenants in common and not as joint tenants, and from and immediately after the decease of them," the said A and B, he gave, devised, and bequeathed the same unto all, all and every the lawful child and children of the said A and B equally to be divided between and amongst them as tenants in common. It was held that the property was intended by the testator to go in equal shares between A and her children on the one hand, and B and her children on the other.

In *Archer v. Legg* (1862) 31 Beav. 187, 54 Eng. Reprint, 1109, 10 Week. Rep. 703, testator gave a fund in trust to pay the income in equal moieties to his son and daughter during their lives, adding, "and at their decease the said sum of £4,000 is to be for the benefit of my grandchildren agreeably to the instructions contained in my will." By such will he had made provision for his grandchildren and declared that if any of them should die before acquiring a vested interest in his or her share, then such share should go to and accrue "to the surviving brothers and sisters of such grandchild." It was held that in view of the division of the interest of the £4,000 between the son and daughter during their lives, and the direction that in case of the death of a grandchild before attaining a vested interest its share should go over not to the survivors of the grandchildren, but to the surviving brothers and sisters of the grandchild, it was clearly his intention that they should take the fund in question per stirpes.

In *Sutcliffe v. Howard* (1868) 38

L. J. Ch. N. S. (Eng.) 472, testator devised property upon trust for his brothers and sister "during their respective lives in such manner as the trustees should think fit, and subject thereto in trust for the respective children of his said brothers and sister as tenants in common." It was held that the word "respective" showed that at the death of each parent the children of each were to take the deceased parent's share.

In *England v. England* (1869) 20 L. T. N. S. (Eng.) 648, 17 Week. Rep. 719, where testator bequeathed property upon trust to pay a moiety of the income therefrom to his daughter A for life, and the other moiety to his daughter B for life, and after the death of "either" in trust for all the children of "each" who should be living at her decease in equal shares, it was held that upon the death of one of them her children took her share of the property to the exclusion of the children of the other.

In *Barnaby v. Tassell* (1871) L. R. 11 Eq. (Eng.) 363, 24 L. T. N. S. 221, 19 Week. Rep. 323, where testator gave his wife certain property for life and after her decease "one half to my brothers and sisters, for their life and then to come to their children, and in the same manner to my wife's brother and brothers' children and grandchildren," it was held that as between the families of his brothers and sisters and of his wife's brother, the moieties were divisible per stirpes, but that as between the members of each family the shares were divisible per capita.

In *Re Notts* (1872) 20 Week. Rep. (Eng.) 569, where testator gave the income from his residuary estate to his two nieces, Sarah Chatters and Elizabeth Freeborn, "during the term of their natural lives, share and share alike," adding: "And from and after their decease I give and bequeath the principal to the children of the said Sarah Chatters, and likewise to the children of the said Elizabeth Freeborn, to be divided between them, share and share alike," it was held that upon the death of one, her moiety became divisible among her

children, and consequently that distribution must be per stirpes, and not per capita.

In *Wills v. Wills* (1875) L. R. 20 Eq. (Eng.) 342, 44 L. J. Ch. N. S. 582, 23 Week. Rep. 784, where testator directed the interest of the residue of his estate to be paid half yearly to his sons Charles and John "equally for their natural lives, and at their death the principal to be divided equally between the children of the said Charles Thomas Wills and John Wills," it was held that as by the phrase "at their death" the testator could not have meant at the contemporaneous death of all, but "at their respective deaths," it was natural to suppose that by the phrase "the children" he meant "the respective children," and accordingly that at the death of each son, his moiety passed to his children.

In *Swabey v. Goldie* (1875) L. R. 1 Ch. Div. (Eng.) 380, 33 L. T. N. S. 306, where testatrix, after giving the income of one moiety of her residuary estate to her daughter Margaret for life and the income of the other moiety to her daughter Mary Ann for life, directed her trustees to stand possessed of one moiety from and after the death of Margaret and of the other moiety from and after the death of Mary Ann, in trust to pay, transfer, and assign the same unto and among all the children of Margaret living at her decease and the issue then living of any child who should have died in her lifetime, and all the children of Mary Ann who should be living at her decease and the issue then living of any child of hers who should have died in her lifetime, to be equally divided between or among them, if more than one, share and share alike, and if but one such child and no issue of any deceased child, or no such child, or only one grandchild, or such other issue, then the whole to such one child, grandchild, or other issue, the issue of any such deceased child to take its parent's share, it was held that the inconvenience in keeping a moiety of the fund, both principal and income, in suspense from the death of one tenant for life to that of the other, was not sufficient to

overcome the clear effect of the language used; and accordingly that the children of both daughters should share per capita.

In *Re Hutchinson* (1882) L. R. 21 Ch. Div. (Eng.) 811, where testator directed that certain stocks and securities should be given "to Francis Hutchinson Synge and the Rev. Robert Synge, sons of the late Sir Robert Synge, Bart., share and share alike, and after the decease of the said Francis Hutchinson Synge and his brother Robert Synge, I give and bequeath the above-mentioned money in different stocks to their children, share and share alike, and to their heirs forever," it was held by Kay, J., that although in the absence of authority he should have been inclined to think that the meaning of the above provision was that after the death of the survivor, the property should go to the children of both, share and share alike, he was constrained by the authorities and by the circumstance that the phrase "their children" must mean their respective children, because there could not possibly be any child who could say, "I am the child of both," he was bound to read "after the death" as meaning after the death of each, and "to their children" as "to their respective children," and accordingly that, upon the death of one, his moiety would go to his children only.

In *Re Campbell* (1886) L. R. 33 Ch. Div. (Eng.) 98, 55 L. J. Ch. N. S. 911, 55 L. T. N. S. 463, 34 Week. Rep. 629, affirming (1886) L. R. 31 Ch. Div. 685, testator devised to trustees five houses upon trust to pay the income in equal moieties to his son and daughter during their lives, and from and after the death of either of them without issue living, then upon trust to pay the whole thereof to the survivor during the life of such survivor, but if there should be issue living of the persons then so dying, then upon trust to pay one moiety to the survivor and to divide the remaining moiety between all and every of the child or children of the one so first dying, and from and after the decease of the survivor to make sale of the said trust premises and divide the

purchase money "equally among all and every the child or children of each of them, the said John Campbell and Ann Frances Campbell who should live to attain twenty-one years in equal shares and proportions." It was held that the testator in dealing with the income intended a stirpital division, and as this method of division was to continue after the death of one of the first takers, it was not to be presumed that he intended, when the property should be sold after the death of the survivor, to make the division different from that which he had previously made; and such construction was supported by the circumstance that otherwise the word "equally" would be superfluous. It was also held that it was not enough to alter this construction that in the event of the son or the daughter having no issue there would be an intestacy as to one moiety.

In *Re Stone* [1895] 2 Ch. (Eng.) 196, where testator gave his wife certain real and personal estate for her life and directed that after her death the income should be equally divided between his brother and sisters named, and "at the decease of either of my before-named brother or sisters, their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold, moneys called in," etc., etc., "and to be equally divided between the children of the aforesaid, share and share alike." It was held that the obvious meaning of the ultimate gift that the division was to be per capita was not overcome by the circumstance that the income up to the time of division was distributable per stirpes.

In *Re Millard v. Chabot* (1903) 33 Can. S. C. 328, testator gave his wife the use of his property during her life and provided that after her death, "until the death of each of my said children respectively, my said children should divide by equal shares between them the income of my said property," further providing that should any one of them die without issue the share of such one in the income should go to the other children

then living, and ultimately disposed of the property by bequeathing it "to the legitimate children of my children who shall be my grandchildren, for my said grandchildren to enjoy, possess and dispose of my said property, in full ownership and in equal shares between them from the day on which the said enjoyment and usufruct given to my children shall cease." It was held that the language of the will clearly expressed an intention that the grandchildren should take per capita rather than per stirpes.

In *Re Ianson* (1907) 14 Ont. L. Rep. 82, testator devised certain real estate to his two daughters "to receive the rents and profits of the same equally during the natural lives of my said daughters; and at the death of either before the other, the children of such deceased daughter to receive their proportion of said rents and profits of said lands during the life of my said surviving daughter as the case may be; and at the death of both my said daughters Mary and Sarah, that the land hereinbefore devised to them be sold and the price thereof equally divided between the children of my said daughters Mary and Sarah or their legal representatives." It was held that neither the stirpital disposition of the income, nor the testator's use of the phrase "hereinbefore devised to them" (from which it was argued that the testator's idea was, that by the preceding gift to his daughters he had, in effect, divided into moieties for the benefit of his two daughters and their respective families his entire interest in the property), nor the use of the word "between," was sufficient to take the case out of the operation of the rule that under a gift to the children of A and B such children take per capita; but that, upon the contrary, the fact that, following the provision in favor of the life tenant, the gift of the corpus was not made between "their children," but "between the children of A and B" nominatim, and the fact that the distribution of the entire corpus was deferred until the death of the survivor of the life ten-

ants, supported the view that distribution per capita was intended.

In *Re Armstrong* (1918) 15 Ont. Week. N. 271, where testator provided in relation to certain real estate: "I desire that my children [naming them] receive the above-named property in equal shares, and at their decease their grandchildren to receive the same in equal shares," it was held that the word "grandchildren" should read "children," and that both on principle and authority the children of each child took only the share enjoyed by their parent during his or her lifetime.

v. *Under a bequest to persons living and the "heirs," "issue," "children," or "descendants" of any deceased.*

For instances of bequests to the "heirs" of the testator or of some other person, see III. a, supra.

For instances of bequests to "descendants" simply, see III. f, supra.

For instances of bequests to "issue" simply, see annotation in 2 A.L.R. 963, and supplemental annotation in 5 A.L.R. 195.

For instances of bequests to the "children," "issue," or "descendants" of several persons, see III. l, supra.

For instances of bequests to persons standing in a certain relation and the children (or grandchildren) of others in the same relation, see III. q, 2, supra.

Where a bequest to the members of a class living and the "heirs," "issue," "children," or "descendants" of any deceased is, so far as the "heirs," "issue," "children," or "descendants" are concerned, purely substitutional in character, they will take per stirpes. See citation of authorities in subd. II. of this note.

Such a bequest, however, may operate as an original gift, and include the "children," etc., of persons dead at the time the will was made, who, had they survived the testator, would have been members of the class. As to when it so operates, see annotation in 8 B. R. C. 365.

Although, in some cases, it seems to have been supposed that when the gift is not substitutional, but original,

the children, etc., necessarily take per capita (see *Murphy v. Harvey* (1893) 4 Edw. Ch. (N. Y.) 131; *Barksdale v. Macbeth* (1854) 28 S. C. Eq. (7 Rich.) 125; *Hagan v. Hanks* (1907) 80 S. C. 94, 61 S. E. 245; *Abbey v. Howe* (1847) 1 DeG. & S. 470, 63 Eng. Reprint, 1153, 16 L. J. Ch. N. S. 437, 11 Jur. 765; *Atkinson v. Bartrum* (1860) 28 Beav. 219, 54 Eng. Reprint, 349, 9 Week. Rep. 885; *Hyde v. Cullen* (1837) 1 Jur. (Eng.) 100; *Crone v. O'Dell* (1811) 1 Ball & B. (Ir.) 449; *Houghton v. Bell* (1892) 23 Can. S. C. 498; *Re Bossi* (1897) 5 B. C. 446), in many instances, they have been held to take per stirpes (see *Bond's Appeal* (1862) 31 Conn. 183; *Kilgore v. Kilgore* (1890) 127 Ind. 276, 26 N. E. 56; *Coster v. Butler* (1882) 63 How. Pr. (N. Y.) 311; *Re Davenport* (1914) 85 Misc. 671, 148 N. Y. Supp. 1042; *Mount v. Harris* (1918) 172 App. Div. 256, 158 N. Y. Supp. 339; *Gring's Appeal* (1858) 31 Pa. 292; *Ortt's Appeal* (1860) 35 Pa. 267; *Britton v. Johnson* (1836) 11 S. C. Eq. (2 Hill) 430; *Dunihue v. Hurd* (1908) 50 Tex. Civ. App. 360, 109 S. W. 1145; *Taylor v. Fauver* (1897) 2 Va. Dec. 555, 28 S. E. 317; *Re Bauman* (1916) 11 Ont. Week. N. 55).

In *Re Farmers' Loan & T. Co.* (1914) 213 N. Y. 168, 2 A.L.R. 910, 107 N. E. 340, it is said that the rule that presumes a per capita division will give way where adherence to it would result in a stirpital division among the issue of children dying after the making of the will, and a per capita division among the issue of children dying before the making of the will.

The words "to be equally divided" do not require a per capita division, but such expression is satisfied by a division which is equal between living members of the class and the issue of deceased members taking per stirpes. *Hall v. Hall* (1885) 140 Mass. 267, 2 N. E. 700.

Review of the decisions.

In *Guesnard v. Guesnard* (1911) 173 Ala. 250, 55 So. 524, testator provided that should one of his daughters die without issue "then the property to revert back to my estate, and said income to be divided equally be-

tween my surviving heirs, and the children of such of my heirs who may have died leaving issue." It was held that in view of testator's use of the word "equally," and the fact that this was the only provision in the will which mentioned the children of a deceased child,—the testator evidently leaving it to the law to provide for the contingency of the death of a child in other cases,—the children of a deceased child took per capita, and not per stirpes, notwithstanding the use of the word "between."

In *Bond's Appeal* (1862) 31 Conn. 183, where testator, who had, at the time of the execution of the will and at his death four children living, only one of whom had children, and four children who had deceased before the making of the will, leaving children, devised to his wife all his real estate during life or widowhood, and upon her marriage or decease "to my children and their heirs respectively to be divided in equal shares between them," it was held that the words "and their heirs" had reference to the children of the deceased children, and that taking into consideration the condition of the testator's family, and with this aid interpreting the language of the will, it was evident that he intended to make the same provision for the representatives of his deceased children as for those who survived him.

In *Burch v. Burch* (1857) 23 Ga. 536, where testator directed that at his wife's death his estate should be converted into money and the proceeds divided into three equal shares, one of which he gave to his wife's relatives, one to his sister Betty Cook for life, and the other "to be equally divided betwixt the whole of my above-named brothers and sisters in manner as above mentioned," and also directed that the share of his sister Betty should at her death "be equally divided betwixt the whole of my above-named brothers and sisters," and other provisions of the will afforded evidence of an intention that the child or children of any brother or sister who should die in the lifetime of the widow should take, it was

held that the children of deceased brothers or sisters took the portion which their deceased father or mother would have taken had he or she survived.

In *Wood v. Robertson* (1887) 113 Ind. 323, 15 N. E. 457, where testator gave his wife the use of his property for life, directing that at her death it should "be equally divided among my children then living and the descendants of such as may be dead, share and share alike, taking into consideration all advancements which may have been made either by myself or my wife," it was held to be clearly the intention of the testator that the descendants of deceased children should take per stirpes, and not per capita.

In *Kilgore v. Kilgore* (1890) 127 Ind. 276, 26 N. E. 56, where testator, who had four sons, two of whom had died previous to the time of the making of the will, each leaving children, gave, after the death or marriage of his wife, one fourth part of his estate to the children of one of his deceased sons, one fourth part to the children of the other, one fourth part to his son Davis in trust for his children born and to be born, during his natural life, with the right to use the income thereof to aid in raising and educating such children, and one fourth part to his son Obed during his natural life, "and in case he should die leaving no child or children of his own, then said property to go to my surviving child or grandchildren in equal parts," it was held that the grandchildren were entitled to participate in the gift over of the share of Obed per stirpes, and not per capita, such construction being in harmony with the intent of the testator as expressed in the original division of his property, and being further supported by the circumstance that it casts the property where the law would cast it, did the beneficiaries inherit either from the testator or his devisee Obed.

In *Harris v. Berry* (1870) 7 Bush (Ky.) 113, where testator devised his estate equally to his fifteen children, all then living, and directed that

should any of them die before attaining lawful age, or without lawful issue, "the portion of my estate bequeathed to them to be equally divided between the survivors," it was held, in view of the evident purpose of the testator to equalize his estate among his children and secure it to his own descendants, that the term "survivors" included the children of deceased children, who took what their parents, if living, would have taken.

In *Crozier v. Cundall* (1896) 99 Ky. 212, 35 S. W. 546, where testator provided that, should either of his daughters die without issue, then the portion of his estate devised to them should "revert back to and be equally divided between the rest of my children and the children of those who are dead," it was held that the testator meant that his children and the descendants of his deceased children who were surviving at the death of such daughters should take per stirpes.

In *Slingluff v. Johns* (1898) 87 Md. 273, 39 Atl. 872, where testator provided that in the event of the death of his two daughters without child or children, the provision made for them should at their death "revert to my children who may survive or to the descendants of their children, and be equally divided between them," it was held that such provision should be construed as reading, "to my children who may survive and to the descendants of my children," and that, so read, it was plain that the descendants of testator's children represented the deceased parents, and necessarily took per stirpes, and that the words "to be equally divided between them" implied an equal division, not between the individuals who should take, but between the respective stocks.

In *McClench v. Waldron* (1910) 204 Mass. 554, 91 N. E. 126, where a testatrix who was her own draftsman devised her house "to my brother Oliver's children and heirs. When disposed of to be divided equally," and further provided: "After bequests are paid, all bank books and

stocks I give to living children or heirs of my brother Oliver, including Caroline, widow of Orrin B. Waldron, and Waldron Sharp, son of Mary Waldron Sharp, deceased, to be divided equally," it was held that division should be made among the heirs of Oliver, per stirpes.

In *Boston Safe Deposit & T. Co. v. Nevin* (1912) 212 Mass. 232, 98 N. E. 1051, where testatrix gave her residuary estate in trust for the equal benefit of her children during their respective lives, and further provided that in case a son or a daughter named "shall die before my decease, then his or her share shall go to and be divided among his or her respective children, free and discharged of all trust," and that, "in the case of the death of said Alfred, his share shall hold in trust for his wife during her life and upon her death to the survivors of my said children, or to those to whom their separate shares shall have passed or who have become entitled thereto. And in the case of the death of said Hannah or Tirzah W. before my decease, their respective shares to go to the survivors of my said children, or to those to whom their separate shares shall have passed or who have become entitled thereto, meaning and intending hereby that my estate shall be held in trust for the benefit of my children during their several lives, and upon the decease of any one of them having children of his or her body, such children to take his or her share free and discharged of any trust, but if he or she shall not have any children of his or her body, then such share to be added to the share of my surviving children, or to whom his or her share shall have passed, or who have become entitled thereto"—it was held that the testatrix evidently intended that upon the death of any one of her children, the children of any one of her own children who were then deceased should share per stirpes with the surviving children in the part of which the deceased child had enjoyed the income, and that such children of a deceased child should take the share that their parent would have taken had he or she been living.

In *McLane v. Crosby* (1914) 77 N. H. 596, 92 Atl. 333, it was held that, giving the language of a bequest by which testatrix directed a trust fund to be distributed in equal portions to her five brothers, naming them, "or their lawful heirs," its ordinary meaning, the trust fund should be divided into five "equal portions," and one of these portions distributed to the "lawful heirs" of each of her five brothers.

In *Van Houten v. Hall* (1907) 73 N. J. Eq. 384, 67 Atl. 1052, affirming (1906) 71 N. J. Eq. 626, 64 Atl. 460, where testatrix gave certain property "to be equally divided between" a daughter, "and if she be dead her children, and the child or children of George," a surviving son, it was held that, the gift to the children of the daughter being by way of substitution for their mother, they took one half, and the children of George the other.

In *Murphy v. Harvey* (1843) 4 Edw. Ch. (N. Y.) 131, testator gave "to my brothers James and Michael Murphy and sister Margaret and their children, all my estate, real and personal, . . . and in case of the death of either of them, to their heirs, to be equally divided among them who shall survive and the children and heirs of the deceased," and the brothers and sisters of the testator died before him, it was held that the words, "and in case of the death of either of them, to their heirs to be equally divided among them who shall survive," carried the gift of the whole estate over to the children who had survived their parents per capita, and not per stirpes, and the further words, "and the children and heirs of the deceased," forming the concluding part of the same sentence, included in the survivorship the children of any deceased child of the brother or sister, who, in view of the words "to be equally divided," were entitled to take per capita in their own right, and not, as representatives of their deceased parent, what would have been merely his share.

In *Barstow v. Goodwin* (1853) 2 Bradf. (N. Y.) 413, testator devised his estate in trust to pay certain annuities and the rest of the income to

his brothers and sisters "who shall be then surviving and the descendants of such as shall then be dead, and my brother-in-law [naming him], equally. That is to say, if any of my brothers and sisters shall be dead, leaving them surviving any descendant or descendants, then such descendant or descendants shall take the share or portion which would otherwise have belonged to such deceased parent." Upon the termination of the trust he directed the trust property to be "equally divided among my brothers and sisters and Lavinia Knapp . . . in the same manner as if the said Lavinia was my own sister and I had died intestate; and in case either of my brothers or sisters, or the said Lavinia Knapp, shall then be dead, leaving surviving any descendant or descendants, that then and in such case such descendant or descendants shall take the share or portion which would otherwise have belonged to such parent." He further provided: "The income alone of the said share of Lavinia Knapp shall be paid to her said husband during his natural life and after his death to the said Lavinia Knapp and after her death, her share to be divided among her heirs." It was held that, having reference to the substitution of the "descendants" to the share of the "parents" and to the gift of Lavinia's share over to her "heirs," and bearing in mind that equality is carefully prescribed among the brothers and sisters, and omitted when speaking of their descendants, it might reasonably be concluded that the testator intended to regard each deceased brother and sister as a stock of descent, and, though using the word "descendants" in the sense of children and the descendants of children, still had regard to representation; and accordingly that the persons entitled to take as "descendants" took as among themselves per stirpes, and not per capita.

In *Coster v. Butler* (1882) 63 How. Pr. (N. Y.) 311, testator gave a sum of money in trust for the use of his son Daniel during his life, and directed that after his death one half of said sum should be divided equally

among such of the testator's children as might then be alive and "the heirs or legal representatives of any children or child now or then deceased, except the heirs or representatives of said Daniel, share and share alike," and further directed that in case Daniel's wife should survive him the executor should hold the other half for her benefit, and upon her death or remarriage divide it equally among such of the testator's children as might be then alive, or heirs or legal representatives of any deceased child except the heirs or representatives of Daniel, share and share alike, "per stirpes and not per capita." It was held that, as if Daniel had survived his wife there could be no doubt but that the one half of the trust fund reserved for her benefit would have been distributable per stirpes, the inference was strong of a like interpretation as to the estate that vested upon her husband's death, and that, there being no obvious reason for making a different distribution of each half of the same fund, the phrase "share and share alike," must be construed with reference to this ultimate intention.

In *Bayley v. Beekman* (1909) 133 App. Div. 888, 118 N. Y. Supp. 286, affirmed without opinion in (1910) 197 N. Y. 593, 91 N. E. 1110, testatrix, whose next of kin at the time of the execution of her will were two sisters, a brother, and the children of deceased sisters, bequeathed all her estate to her two living sisters during their lives and the life of the survivor of them, and upon the death of such survivor "to the children who may then be living of my sisters, Josephine Bayley Lawrence, and Ellen Eliza Halsey, and of my brother Joseph Bayley [or to the heirs of either or any of them in case they or either or any of said children should die before such survivor], to have and to hold, to them, their heirs and assigns forever, and to be equally divided between them, share and share alike, per capita and not per stirpes." It was held that as there was nothing in the circumstances surrounding the testatrix at the time she made her will

to indicate any intention on her part to provide for her grandniece and grandnephews equally with her surviving nephews and nieces, but, on the contrary, no one of the grandnephews or grandnieces was in existence at the time of the execution of the will, and as it appeared that the words, "or to the heirs or either or any of them in case they or either of any of the said children should die before such survivor," had been added after the will was engrossed, it was evident that the direction for per capita division was intended to apply only to nephews and nieces.

In *Re Davenport* (1914) 85 Misc. 671, 148 N. Y. Supp. 1042, where testator, who left him surviving a brother, two sisters, the children of a deceased sister, and the children and grandchild of a deceased brother, gave his residuary estate in trust for his widow during her life, and after her death "in equal shares unto my brothers and sisters and their heirs, the children of my deceased brother, Uriah, to receive a share thereof," it was held that the intent of the testator, as evidenced by the gift to the children of his deceased brothers, appears to have been to give an equal share to each of his brothers and sisters, giving the children of any deceased the share their parents would have taken if living.

In *Baumann v. Boehm* (1917) 167 N. Y. Supp. 932, testator gave the residue of his property in trust to pay the income therefrom to his wife during her life, and upon her death to pay his son Jacob \$25,000, and his son Samuel \$25,000, and provided that in the event of the death of either before the widow such sum to be paid to their issue, or, in default of issue, then \$10,000 thereof should be paid to the widow of either of said sons, and the balance equally divided between the decedent's surviving children or their issue, per stirpes and not per capita. The balance of his estate he directed to be divided between his three daughters, share and share alike, providing that if any of them should predecease the widow, her share should go to her issue, if any;

if none, that it should be divided between the other children or their issue, per stirpes, and not per capita. It was held that a reading of the will evinced an intention that the children of a daughter dying in the lifetime of the widow were to take their mother's share.

In *Mount v. Harris* (1918) 172 App. Div. 256, 158 N. Y. Supp. 339, where testator gave equal shares of his estate, subject to provisions made for his widow, one of his daughters, and a brother, to the rest of his children, providing in the case of his daughter Fanny, that she should take her share for life, and after her death "such share, part, or portion is to be equally divided between her children," it was held, in view of the fact that a further limitation over was conditioned upon the death of his daughter without issue, that it was not his intention to exclude from participation in the remainder the children of a predeceased child of his daughter; but that it was natural to suppose that the grandchildren should take the parent's share, and no more, rather than that they should take equally with a surviving child.

Under a bequest to certain persons "and their heirs,—the children of any that may be dead, to have the shares of their deceased parents,"—the children take per stirpes, and not per capita. *Richey v. Johnson* (1876) 30 Ohio St. 288.

In *Gring's Appeal* (1858) 31 Pa. 292, where testator, who left two brothers and one sister and the children of three deceased sisters, devised his farm to his wife for life, and after her decease the proceeds thereof "unto my brothers and sisters or their children or heirs," and in giving a part of his residuary estate to his "brothers and sisters, or their heirs," went on to designate the children of his deceased sisters, it was held to be evident that the children of the deceased sisters were to take by classes.

In *Ortt's Appeal* (1860) 35 Pa. 267, where a testator, whose next of kin were nephews and nieces and the children of deceased nephews and nieces, directed that the residue of

his estate should "be divided amongst my next heirs in equal shares, or their children, if their parents should not be living," it was held that the nephews and nieces took per capita and not per stirpes, and that the children of deceased nephews and nieces took their parent's share.

In *Miller's Appeal* (1860) 35 Pa. 323, where testator gave a legacy "to my two brothers George and John, or their heirs or assigns, to share and share alike between said George or John, or their heirs or assigns," and the two brothers died in the testator's lifetime, it was held, as they could not have joint heirs, it must have been intended that the heirs of George and the heirs of John should take as several classes, as if the property bequeathed had descended to them through George and John respectively.

In *Rhode Island Hospital Trust Co. v. Harris* (1898) 20 R. I. 408, 39 Atl. 750, it was held that under a gift to the children of the testator's brother and the descendants of any of them who might then have deceased, in equal shares, the descendants taking the share the parent would have taken if living, such descendants took per stirpes, and not per capita.

In *Guild v. Allen* (1907) 28 R. I. 430, 67 Atl. 855, where testatrix gave a sum of money "to the four daughters of my dear friend Mrs. Augusta Brown of Baltimore, Md., to be equally divided among them or their children at the time of my death," it was held that, as the children of a daughter took by substitution, they took per stirpes.

In *Branch v. De Wolf* (1915) 38 R. I. 395, 95 Atl. 857, where testator directed the subject of a bequest "to be divided between my sisters if alive, or their heirs if dead, in equal proportions," it was held that the use of the word "heirs," which carries in itself the idea of succession to the right of ancestor, and the fact that if the two sisters had lived to take the gift, each would have taken one half thereof, it was the testator's intention that their "heirs" should take per stirpes rather than per capita, inasmuch as the phrase "in equal propor-

tions" might be taken merely as denoting equality between the two classes of heirs.

In *Britton v. Johnson* (1836) 11 S. C. Eq. (2 Hill) 430, where testator, whose family at the time of the execution of his will and at his death consisted of his wife, two living sons and their children, and two children of a deceased son, after certain bequests to his grandchildren, gave his wife the use of all the rest of his estate and directed that at her decease his executors should sell "and equally divide all my estate between my children or their heirs," it was held that the children of the deceased son were entitled to participate in the residuary gifts, and that, in referring to them as the "heirs" of children, testator intended that they should take what their parents would have taken had he survived, notwithstanding the direction that division should be made "equally."

In *Barksdale v. MacBeth* (1854) 28 S. C. Eq. (7 Rich.) 125, where testator gave property in trust for a daughter for life, with remainder to her children, and went on to provide that in case she should die without leaving any child or children, then the trust property should "be the absolute property of such of my children as may be then living, and the issue of such as may be dead, to be equally divided between them," it was held that, if the testator had intended that his living children and the children of those deceased should be placed upon an equal footing, he could scarcely have employed more appropriate words to manifest such intention than those he did use, and therefore that the court could not infer from it any intention that the distribution should be otherwise than per capita.

In *Hagan v. Hanks* (1908) 80 S. C. 94, 61 S. E. 245, where testator gave his estate to be divided upon a certain contingency, "equally, share and share alike, between all of my living sisters, or the lawful bodily heirs of any who may not be living," it was held that the gift to "lawful bodily heirs of any who may not be living" was an original and not a substitu-

tional gift, and therefore that the parties answering the description of lawful bodily heirs must take per capita, and not per stirpes.

In *Rogers v. Rogers* (1859) 2 Head (Tenn.) 660, where testator gave certain negroes to his wife during life or widowhood, with the privilege, in case she should not marry, of disposing of them as she pleased among his children or grandchildren, and provided that in case of her marriage they should be equally divided among his children if living, and that if any of them should be dead leaving issue that issue should receive the share of its parent, and the testator's widow died without having married again and without having exercised the power of appointment, it was held that there was a bequest by implication to testator's living children and the children of any deceased, and that they took per capita, the will not sufficiently expressing a contrary intention.

In *Dunihue v. Hurd* (1908) 50 Tex. Civ. App. 360, 109 S. W. 1145, where testator directed his residuary estate to be equally divided between a brother and sister "or their heirs, and the heirs of my deceased sisters," it was held that the devise to the brother and sister by name, "or their heirs," showed an intention to deal with the heirs of the brother and sister as a class, and not as individuals; and therefore that the heirs of the deceased sister also took as a class, per stirpes, and not per capita.

In *Ladd v. Whitledge* (1918) — Tex. Civ. App. —, 205 S. W. 463, it was held that under a bequest "to the living children of Daniel Avery, deceased, or their heirs," the "heirs" of deceased children took per stirpes.

In *Taylor v. Fauver* (1897) 2 Va. Dec. 555, 28 S. E. 317, where testator bequeathed the residue of his estate "to my sisters or their heirs equal to all," and it appeared that the testator had several sisters who survived him, and one sister who was dead at the time the will was written, leaving a number of children, it was held to be clear from the language used that the testator intended that each of his sis-

ters living at the time of his death should take an equal share of the property disposed of, and that the children or heirs of each who were dead at that time should take such a share as their mother would have taken if she had been living at the time the will took effect.

In *Tomlin v. Hatfield* (1841) 12 Sim. 167, 59 Eng. Reprint, 1095, where testator directed his residuary estate to be divided by his trustees in such shares as they should think proper, among his nephews and nieces living at his decease and the children of any who, having died in his lifetime, had left issue, and the trustees were not able to agree as to the distribution of the property, it was held that it should be divided among the nephews and nieces and the children of deceased nephews and nieces, per capita rather than per stirpes.

In *Armstrong v. Stockham* (1845) 7 Jur. (Eng.) 231, it was held that, under a gift to the child or children of a certain person living at the time of the decease of such person, "or the issue of any such child or children whose parents might be then dead," grandchildren took per stirpes.

In *Abbey v. Howe* (1847) 1 DeG. & S. 470, 63 Eng. Reprint, 1153, a testator gave a moiety of his residuary estate in trust for his daughter Sarah during her life, and after her decease "unto and equally amongst all and every the children of my said daughters, Sarah Wiseman and Susanna Kettlewell, which shall be living at the death of my said daughter Sarah Wiseman and the lawful issue of such of them as shall be then dead, share and share alike," and similarly disposed of the other moiety by giving his daughter Susanna the use of it for life and remainder to the children of his daughters living at Susanna's death and the lawful issue of such of them as should be then dead. He further provided that, in case any of the children of his said daughters or their issue should be under the age of twenty-one years at the death of either of his said daughters, his trustees should apply the interest of the share or shares of such child or

children, his, her, or their issue, in the maintenance and education of such child or children or their issue during their respective minorities. It was held that, notwithstanding the maintenance clause, the children of deceased children took per capita, and not per stirpes.

In *Shailer v. Groves* (1847) 11 Jur. (Eng.) 485, 16 L. J. Ch. N. S. 367, where testator bequeathed the income of certain property to his wife for life and directed that at her death one half of the proceeds should be received and divided among his surviving brothers and sisters or their issue, share and share alike, it was held that the issue took per stirpes, and not per capita.

In *Hawkins v. Hamerton* (1848) 16 Sim. 410, 60 Eng. Reprint, 933, testator gave certain leasehold property to his son Charles, and, in case he should die without issue, directed that the premises should be considered as part of his residuary estate and be divided among "the children of my three daughters as hereinafter named," and gave to each of his three daughters an annuity during the life of each, and from and after their respective decease directed that the principal moneys from which such annuity should arise should be paid and divided among her children. The residue of his estate he gave to his children during their lives, adding: "From and after the decease of my said son and daughters, then I will and direct that the whole of such residue and remainder of my estates, with all accumulations thereof, shall be paid and divided amongst all and every [of] the children of my said son and daughters in equal parts, shares, and proportions. And in case any of my said son and daughters shall happen to die without leaving issue, then I will and direct that the legacy, part, or share hereby given and bequeathed to him, her, or them so dying without issue, shall go and be divided amongst the survivor or survivors of my said children and their issue, in the like equal parts, shares, and proportions." His son Charles having died without issue, it was held that

his portion of the residue was intended to go to the other children and their issue, the issue of deceased parents taking per stirpes.

In *Congreve v. Palmer* (1853) 16 Beav. 435, 51 Eng. Reprint, 846, 23 L. J. Ch. N. S. 54, 1 Week. Rep. 156, it was held that under a bequest to one for life, remainder to "her sisters or their children living at her decease," it was held that the children of the sisters took by way of substitution, and hence per stirpes.

Under a gift to certain persons "or their children," the children take per stirpes. *Timins v. Stackhouse* (1858) 27 Beav. 434, 54 Eng. Reprint, 170.

In *Atkinson v. Bartrum* (1860) 28 Beav. 219, 54 Eng. Reprint, 849, 9 Week. Rep. 885, where a bequest was to testator's two sisters for their lives, and after the death of the survivor to be equally divided between testator's surviving brothers and sisters or their children, equally, share and share alike, and the brothers and sisters all died before the time of distribution, it was held that their children surviving took per capita.

In *Hyde v. Cullen* (1837) 1 Jur. (Eng.) 100, where testator bequeathed his residue "to my living brothers and sisters and the children of my brothers who are deceased or who may die before me, share and share alike," it was held that, notwithstanding the fact that the testator had previously given separate legacies to all his brothers and sisters and his nephews and nieces, the plain and ordinary meaning of the language of the residuary gift must prevail, and therefore that the brothers and sisters of the testator, and the children living at testator's death of such brothers and sisters as were then dead, took per capita as tenants in common.

In *Gowling v. Thompson* (1868) 19 L. T. N. S. (Eng.) 242, L. R. 11 Eq. 366, note, 16 Week. Rep. 1131, where testator gave his residuary estate "unto all and every my brothers and sisters or their issue, to be equally divided between or amongst them, share and share alike," it was held that he must have intended the property to

go to his brothers and sisters if living, but if they were dead, then to their issue who were substituted for them, per stirpes.

In *Powell v. Powell* (1873) 28 L. T. N. S. (Eng.) 730, where testator gave his residuary estate in trust for his wife for life, and after her decease for all his brothers and sisters then living, "and the children and issue of such of them as shall be then dead leaving children or issue," adding: "Nevertheless such children or issue of any of my deceased brothers and sisters to have and take among them in equal shares such proportions of my residuary real and personal estate as such deceased brother or sister would have taken and been entitled to had he or she been living at the death of my wife," it was held that no issue of the children of deceased brothers and sisters of the testator could take in competition with their parents.

In *Re Battersby* [1896] 1 Ir. R. 600, where testator bequeathed his property to his wife for life, and after her death unto his "brothers and sisters in equal shares and proportions, or unto the families of such of them as shall be then dead," it was held that, as the "families" took by way of substitution, they took per stirpes.

In *Re Hickey* [1917] 1 Ch. (Eng.) 601, 86 L. J. Ch. N. S. 385, 116 L. T. N. S. 556, 61 Sol. Jo. 368, construing a legacy "to the descendants of A or their descendants living at my death," it was held that the words "or their descendants" involved a stirpital gift.

In *Campbell v. Campbell* (1914) 52 Scot. L. R. 78, testatrix gave the use of her estate to her three unmarried daughters and the survivor of them, and on the death or marriage of such daughters directed her trustees "to divide the whole estate and effects hereby conveyed, and to pay the proceeds thereof among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death, to any child or children they may have respectively left, also in equal portions." It was argued in favor of a

per capita distribution that the grandchildren got as direct legatees, and not as substitutes, but the court held otherwise, Lord Mackenzie saying: "The wording of the clause, however, appears to me conclusive against distribution per capita. The direction is, first of all, that the division is to be 'share and share alike' as regards sons and daughters, and what their respective stirpes are to receive is to be given in equal portions. The double use of terms which import equality appears to me to indicate an intention that the division should be per stirpes. If the division was to be per capita, there would only be one period of division, and it would only have been necessary to use words indicating equality once. The use in the last branch of the third purpose of the word 'respectively' appears to give weight to the argument I am disposed to sustain."

In *Houghton v. Bell* (1892) 23 Can. S. C. 498, reversing (1890) 18 Ont. App. Rep. 25, testator left all his property to his widow for life for the support of herself and her unmarried daughters, further directing: "When my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors hereinafter named to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living and the children of those of my sons and daughters who may have departed this life previous thereto." There was nothing in the will outside of the passage itself to modify its meaning. It was held that the word "equally," used by the testator, applied to a class all the members of which were to be ascertained at one and the same time,—the period for distribution,—and imported that each member of the class should have the same share; and accordingly that the grandchildren of testator took per capita, and not per stirpes, and that no indication of a different intention could be found in the circumstance that the

period of distribution among the class so to be ascertained was not at the death of the testator, but at an indefinite time, which in the event proved to be half a century later.

In *Re Bossi* (1897) 5 B. C. 446, where testator gave all his personal property upon trust "for the children of my brothers [naming them], and of my late sister [naming her], who shall be living at the time of my decease and the issue of such of them as shall be then dead, to be equally divided between them share and share alike," it was held that as the issue took directly and not by way of substitution for their parents, and as the testator had directed the division to be made equally among them, share and share alike, they took per capita; and that the supposed hardship of a construction of the will which would permit each of the issue of a deceased nephew or niece to share equally with their uncle or aunt, and the presumption that such could not have been the testator's intention, did not warrant a contrary construction, the court saying: "To conjecture—if conjectures were permissible—that the testator's intention must have been that children should be limited to their parent's share seems to me to be certainly not more reasonable than to suppose that by declaring in the will the shares which he intended the beneficiaries to take, instead of leaving them to take by intestacy, or as upon intestacy, he designed a different method of distribution."

In *Re Gardner* (1902) 3 Ont. L. Rep. 343, where testator gave his widow the use of all his property for life, directing that after her death it "be equally divided between my brothers Luke Gardners, Joseph Gardners, Mrs. Catharine Watkins, and my deceased sister Mrs. Sarah A. Hutchinson's children or their heirs. Should no heirs of any of the above be alive that it go to the next in heirship," it was held to be plain that the children of the brothers and sisters living at the testator's death, or born afterward during the lifetime of the widow, were entitled per capita, and

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not per stirpes, and that the issue of any deceased should take by way of substitution the share which their parent would have taken.

In *Re Bauman* (1916) 11 Ont. Week. N. 55, where testator directed his residuary estate to be divided upon his wife's decease "equally, share and share alike, among all my brothers and sisters living, and also to the children of those who have died, when they attain the age of twenty-one years," it was held that two classes were indicated: First, the brothers and sisters living at the testator's death; second, the children of those who were then dead; and that the latter took collectively only what their deceased parents would have taken, but as between themselves, per capita.

In *Re Waugh* (1918) 42 Ont. L. Rep. 87, testator gave all his estate to his wife for life, and directed that at her death it should be disposed of "so that all my brothers and sisters, together with all my wife's brothers and sisters or their heirs, shall have personally an equal [share] in it, share and share alike," it was held that the "heirs" of any deceased brother or sister would take only the share the brother or sister would have taken had he or she survived, and that this share would be again distributed according to their number and their relationship to the person for whom they were substituted under the Statute of Distribution.

v. Under a bequest to the "relatives," "heirs," or "next of kin" of the testator and of the testator's wife or husband.

For instances of bequests to the "heirs," "next of kin," or "relatives" of a single individual, see III. a, b, and c, *supra*.

For instances of bequests to the "heirs" of two or more individuals generally, see III. n, *supra*.

Where a bequest is to the "relatives," "heirs," or "next of kin" of the testator and of the testator's husband or wife, the courts evidently prefer a construction which will make two classes of the beneficiaries rather than one. Such a construc-

tion, however, is not always possible.

In *Mosier v. Bowser* (1907) 226 Ill. 46, 80 N. E. 730, where testator directed that property not otherwise disposed of should "be equally divided between my, and my dear wife's, relations according to their heirship. The heirship not to descend further than to include grandnephews and grandnieces," it was held that such estate was to be divided, one half to the heirs at law of the testator and one half to the heirs at law of the widow, excluding all not blood relations; and not extending beyond grandnieces and grandnephews.

In *Laisure v. Richards* (1913) 56 Ind. App. 301, 103 N. E. 679, where testator directed that at the death of his wife all his real estate should be divided, "share and share alike, between the nearest blood relation I may have living at the time and the nearest blood relation of my beloved wife at the time of her death; provided that should my beloved wife remarry and bear a child or children, then in that case it is my will that the said child or children of my said wife shall have and hold the fee of all my said real estate," it was held that the provision quoted evinced an intention to make an equal division between the two classes, rather than a distribution among the individuals of such classes as though they were of one class.

In *Knutson v. Vidders* (1905) 126 Iowa, 511, 102 N. W. 433, a bequest "to be divided equally between our lawful heirs on both sides" was held to be to two classes rather than to a single class, and accordingly to be divisible per stirpes rather than per capita.

In *Fairbanks's Appeal* (1908) 104 Me. 333, 71 Atl. 933, where testatrix bequeathed the residue of her estate to her "heirs and the heirs of my late husband, Hiram Ruggles, those standing in the same degree of relationship either to myself of said Hiram to share alike according to the laws of descent in this state," it was held that the prima facie meaning of the devise as one in equal parts to two classes was not varied by the added

words, "those standing in the same degree of relationship either to myself of said Hiram to share alike according to the laws of descent in this state;" but that, on the contrary, those words made it manifest that the testatrix did not intend that her heirs and the heirs of her husband should take equally as individuals, since she expressly provides that they are to share "according to the laws of descent of this state"—a provision that could not be complied with if they were to share equally per capita. It was further pointed out that if her heirs and Hiram's heirs should be considered as a class, the effect would be to prefer her husband's relatives, and to prevent the realization of the result suggested by the literal meaning of the words "to share alike."

In *Tucker v. Nugent* (1917) 117 Me. 10, 102 Atl. 307, testatrix, who was apparently childless and whose husband she did not consider mentally capable of caring for property and looking after himself, devised to him during his life her homestead, and directed that after her decease it should "be divided equally between my heirs and the heirs of" her husband, and further directed that the rest of her estate should be held in trust to apply the income, and if necessary a part of the principal, for the care and support of her husband during his life, and after his decease gave her residuary estate "to my legal heirs, and the legal heirs of my said husband, the said Mathew Dagnan, share and share alike." It was held that in view of the use by the testatrix of the word "between" in the first clause, together with the circumstances surrounding her and known to her at the time the will was made, that it was her intention to divide such of her estate as should remain at the death of her husband into two equal parts, one part to go to her heirs and the other part to go to her husband's heirs; and that such heirs were to take as among themselves per stirpes, notwithstanding the employment in the second clause of the words "share and share alike," as such words may be satisfied by be-

ing applied to the division between the classes.

In *Dunn v. Elliott* (1917) 101 Neb. 411, 163 N. W. 833, where testator devised all his personal property and certain land to his wife during her natural life, "and at her death to be distributed between our heirs according to law," and it appeared that there were no children, the issue of the marriage of the testator and wife, to whom the words "our heirs" could refer, that the land was the joint accumulation of husband and wife, who had lived together for thirty years, and that testator had expressed himself to the effect that the will was one likely to displease one of his daughters, it was held that, construing the will in the light of such extrinsic evidence, the "heirs" referred to were two sets of heirs, those of the husband and those of the wife, as indicated by the use of the word "between."

In *Smith v. Curtis* (1862) 29 N. J. L. 345, where testator gave his residuary estate "to be equally divided between my brother Jacob, my sister Hannah, . . . and the brothers and sisters of my beloved wife," it was held that the brothers and sisters took not as a class, but as individuals, per capita.

In *Bisson v. West Shore R. Co.* (1894) 143 N. Y. 125, 38 N. E. 104, where testator gave all his real estate to his wife during life or widowhood, and from and after her decease or marriage "unto my heirs and my said wife Maria Bernhardina's heirs, their heirs and assigns forever, share and share alike," and there was no indication as to the intention of the testator other than in the particular clause of the will itself, it was held that such clause, from its peculiar arrangement, resolved all who would be heirs of the testator or of his widow at her death into one class, to each individual of which was given an equal interest, notwithstanding it would seem more natural to attribute to the testator an intention to give one half of the estate to his own heirs, and one half to those of his wife, the court saying: "In affixing

to the gift of his estate to his heirs and his wife's heirs the words 'their heirs and assigns forever, share and share alike,' the testator may be said by his language to have grouped all of the heirs in one class, the individuals of which are indistinguishable, one from the other, as objects of his bounty."

In *Godfrey v. Epple* (1919) 100 Ohio St. 447, 11 A.L.R. 317, 126 N. E. 886, where testator provided that on his wife's death his estate should be "equally divided between my and my wife's nearest kin, they sharing like and like," it was held that the expression, "they sharing like and like," had reference to the proportionate share that each one of the two classes should take, and did not operate to alter the plain meaning of the word "between," and was not intended to provide that each individual devisee, without reference to his classification, should share alike with his fellows.

In *Roelfs v. White* (1915) 75 Or. 549, 147 Pac. 753, where a testatrix, not knowing how many cousins she had nor where they resided, and who knew the names of the sisters of her deceased husband and also the name of the daughter of her deceased brother, gave the residue of her estate "unto my cousins, the names of whom may be learned by writing to . . . [the person named], and the sisters of my second husband Thomas Jackson, who are living somewhere in Brooklyn, state of New York, and the names of whom are Mary Ann White, Jane Chambers, Ellen Jackson, and May Ellen Jackson, the daughter of David Jackson a brother of my deceased husband, to be divided share and share alike between my said cousins and the sisters of my deceased husband and the said May Ellen Jackson," it was held that the intention of the testatrix was to divide the residue between the two classes rather than to give it to them as individuals.

In *McNeilledge v. Galbraith* (1822) 8 Serg. & R. (Pa.) 43, 11 Am. Dec. 572, it was held that under a will by which testator directed his residuary

estate, upon the decease of his wife, "to be divided between her and my poor relations equally," it was held that the bequest was to be construed as if the words "poor" were not in it; that as the testator had made one class of his and his wife's relations, and had declared that they should take equally, distribution of the personal property should be per capita.

And in *McNeilledge v. Barclay* (1824) 11 Serg. & R. (Pa.) 103, it was held that the real estate was to be divided in the same proportions.

In *Young's Appeal* (1876) 83 Pa. 59, where testator directed that, at the expiration of the life estate of his wife, his property should "be equally divided between her relations and mine," it was held that his relations and those of his wife constituted two separate classes, and not one single class; and accordingly that it was error to direct a distribution per capita.

In *Rook v. Atty. Gen.* (1862) 31 Beav. 313, 54 Eng. Reprint, 1159, 31 L. J. Ch. N. S. 791, 9 Jur. N. S. 9, 10 Week. Rep. 745, where testator bequeathed all his estate to his wife for life "and after her death, as to the principal, upon trust for his and her next of kin in equal shares," it was held that the legatees took as a single class, and not per stirpes.

x. Miscellaneous cases.

Where a gift is made to a named individual or individuals and to a group, or where it is to more than one group, the question is apt to arise as to whether they take as a single class, and hence, as among themselves, per capita. This subdivision contains cases of this kind not falling within any of the foregoing subdivisions.

In *Duffie v. Buchanan* (1845) 8 Ala. 27, construing a nuncupative will reduced to writing after the testator's death, in which the testator directed the proceeds of a certain note to "be equally divided between my mother [name] and my two sisters," it was held that the word "equally" negatived any implication that it was the testator's intention to

create two classes of beneficiaries, especially as in the subsequent clause of the will the intention plainly appeared that the mother and sisters were to be equally interested in his estate.

In *Talcott v. Talcott* (1872) 39 Conn. 186, where a testator having two daughters, one of whom, Harriet, had two children, and the other of whom, Ella, had no children, gave to Harriet and her two children, naming them, and all the children born of said Harriet's body, and also to Ella and all children born of her body, and also to all the children of a daughter of his wife by a former husband, naming them, all the income of all his real estate, "to be equally divided among the above-mentioned heirs described in this article," and also provided that after the decease of his wife all his real estate might be sold and equally divided "between all the aforesaid mentioned heirs, to wit," Harriet and all her children, Ella and all her children, and all the children of the deceased stepdaughter, it was held that the devisees took as classes rather than individuals, the court saying that though the language used by the testator was not sufficiently explicit to remove all doubt, yet if they should take as individuals his own daughter would take but one ninth, and the children of the stepdaughter, strangers in blood, five ninths of the property—a result not consonant with the testator's probable intention, which was to recognize the stepdaughter as his own daughter, and to give to her children, she being deceased, one third of his estate.

In *Perry v. Bulkley* (1909) 82 Conn. 158, 72 Atl. 1014, it was held that the intention of the following testamentary direction: "I wish the homestead where I live, including house and 6 acres of land, to go to the children of my uncle, George Bulkley, in equal shares; and they are to participate equally with my legal heirs in whatever balance there may be over and above the homestead according to my will," was that the children of George Bulkley, as one

group, should take one half between them, and the heirs between them the other half.

In *Kling v. Schnellbecker* (1899) 107 Iowa, 686, 78 N. W. 673, where testator directed that the remainder of his estate should "be equally divided between my sister and my wife's sisters and brothers," it was held that notwithstanding the use of the word "between" and the fact that the devisees were not named individually, any inference of an intention to divide the residue by classes was merely conjectural and quite too uncertain to prevent the application of the well-settled general rule that, when an estate is devised to be equally divided, the language imports the taking of an equal share by each legatee in the absence of other provisions showing a contrary intention.

In *Carter v. Lowell* (1884) 76 Me. 342, testatrix gave all her property to twenty-five of her relatives—a sister, two brothers, and twenty-two nieces—by name, "to be divided equally between all said persons, brothers, sisters, nephews, and nieces," adding: "Excepting also it is my will that the several shares of my property to my nephews and nieces named shall be in the same proportion by right of representation as if all my brothers and sisters were living at my decease and I had given my property to all my brothers and sisters and nephews and nieces named, each one to have the same share as the other." The testatrix had seven brothers and sisters in all, three living and four dead. It was held that the effect of the last clause above quoted was to create four additional shares and to give them to the children of the four deceased brothers and sisters by right of representation, the court saying: "We cannot resist the conviction that the latter was the intention of the testatrix. It seems to have occurred to her that under the first provision of the will the children whose parents were living were likely to fare better than the children whose parents were dead; that they were getting an equal share at the beginning,

and might by inheritance get their parents' share also; and that it was to avoid this apparent inequality that the second clause was added. It seems to have been her desire that, to this extent, the seven branches of her family should all fare alike."

In *Re Myhill* (1912) 149 App. Div. 404, 134 N. Y. Supp. 467, testator, after giving his wife the use of his property for life, directed that at her death it "be equally divided between Mrs. Ida Myhill and Mrs. Addie Parker, both of Millville, N. Y., Mrs. Jessie Smith who is the daughter of my wife, Mrs. Mary Tills of Gaines, N. Y., and my niece Mrs. Mary Jane Kittlethorp and her six children now living and who reside in Southampton, England," and in the subsequent clause referred to them as the "above-named" legatees. Ida Myhill and Addie Parker were nieces of the testator's widow; Jessie Smith, a daughter of testator's widow. Mary Tills was apparently not related to the testator in any way. Testator had other blood relations besides Mrs. Kittlethorp and her children, of whom there were eight, instead of six as stated in the will. It was held that as apparently the relations between the testator and Mrs. Kittlethorp and her children could not have been very close or intimate, and as the testator, by the use of the conjunction "and" before the words "my niece Mrs. Mary Jane Kittlethorp and her six children," had grouped the niece and her children together, it was probable that he intended that she and her children should take one share collectively.

In *Harrell v. Davenport* (1859) 58 N. C. (5 Jones, Eq.) 4, where testator gave his residuary estate as follows: "My wife, Polly Davenport, and my children Chloe Davenport, Catherine Harrell, and Alfred Davenport, each to take one share; to the children of Samuel W. Davenport, one share between them; to Mary Amanda Spruill and Mary Ann Ward, to share equally with each of the children of W. H. Davenport," it was held that as the will said expressly that Mary Amanda Spruill and Mary Ann Ward were

to share equally with "each" of the children of William H. Davenport, the division among them must be per capita.

In *Bender's Appeal* (1856) 3 Grant, Cas. (Pa.) 210, where testatrix, who, by her will gave to "each of the brothers of my cousin Rachel Lewis, deceased, of the name of Thomas, \$100 apiece," in a subsequent clause made the following provision as a substitute for the foregoing: "And the remaining equal fourth part of my said residuary estate, I give, devise, and bequeath to the brothers of my late cousin, Rachel Lewis, of the name of Thomas, and to Dr. Benjamin Howell, of New Jersey, husband of my cousin Rachel (late Lewis), share and share alike, that they take and divide this fourth remaining part of my residuary estate, making null and void the \$100 bequeathed to each of the Thomas's brothers of my cousin Rachel Lewis deceased, in pages three and four of these sheets which I now revoke, substituting in lieu thereof the fourth part of my residuary estate to the said Thomas's, their heirs and their nephew, Dr. Benjamin Howell, who is to receive an equal share with them," it was held that the testatrix had very clearly indicated an intention that the persons entitled should take per capita.

In *Brackbill's Estate* (1912) 22 Pa. Dist. R. 123, affirmed in (1914) 56 Pa. Super. Ct. 71, where testator, who by his will had directed his personal property and proceeds of his real estate to be distributed among all his nephews and nieces per capita, with the exception of the children of his brother Benjamin, made a codicil by which he directed that the distribution of his estate should be governed by the intestate laws, "excepting and excluding, however, from any participation therein, the following named persons," naming the children of his surviving brother Amos, and the children of his deceased brother John, it was held that as a per stirpes distribution would render the exclusion of the children of Amos unnecessary, and might result in their ultimately receiving the greater part of the

estate, the distribution must be per capita.

In *Amson v. Harris* (1854) 19 Beav. 210, 52 Eng. Reprint, 330, where testator gave his residuary estate in trust to sell and to divide the proceeds "amongst the brothers and sister of my late wife, Sarah Harding, and the nephews and nieces by blood of my late mother, Catherine Bower, and my housekeeper, Harriet Amson," with a provision for the substitution of issue of any deceased brothers and sisters of his wife or nephews and nieces of his mother, it was held that the legatees took as a single class, and hence per capita.

In *Cobban v. Cobban* [1915] S. C. 82, 52 Scot. L. R. 89, where testator bequeathed his residuary estate "to be divided equally between my brother Peter and his children and my brother George Cobban and his children, my nephews John Cobban and Alexander Cobban, sons of my brother Peter Cobban, not to participate in this last bequest," it was held that, notwithstanding the use of the word "between," the devisees took as a single class per capita.

In *Hutchinson v. La Fortune* (1897) 28 Ont. Rep. 329, where testator directed the proceeds of sale of his real estate to be "equally divided between my wife and my brother and sister," it was held that the intention to be gathered from such provision was that the wife was to have the one-half share and the brother and sister the other, the court saying: "I lay great stress on the use of the word 'and.' The use of it, coupled with the word 'between,' shows that there was to be one equal division between the wife on the one hand and the brother and sister on the other."

IV. *Applicability of direction for division per stirpes.*

Although an express direction for division per stirpes is conclusive against a taking per capita, there may be a question as to who is to be taken as the stirps, the parent or the children. This question was involved in the following cases:

In *Re Title Guarantee & T. Co.* (1913) 159 App. Div. 803, 144 N. Y.

Supp. 889, which reverses (1913) 81 Misc. 106, 142 N. Y. Supp. 1070, and which is affirmed in (1914) 212 N. Y. 551, 106 N. E. 1043, where testator bequeathed a sum of money in trust for a certain person for life and at his death "unto the children then living of my sons, Charles P. Buchanan and William C. Buchanan, and the issue of such as may have died leaving issue then surviving, per stirpes and not per capita," it was held that although the grammatical construction of this paragraph, according to the manner in which it is punctuated, is that both the grandchildren and the issue of any deceased grandchild shall take per stirpes, and not per capita, the context shows that there could have been no intention to have the clause "per stirpes and not per capita" apply to the bequest to the children of either son, but that it was intended only to apply to the issue of deceased grandchildren; and accordingly that the grandchildren took as a single class.

In *Robinson v. Shepherd* (1863) 4 DeG. J. & S. 129, 46 Eng. Reprint, 865, reversing (1863) 32 Beav. 665, 55 Eng. Reprint, 261, where testator directed his property to be divided and paid "to the persons being such descendants as next hereinafter mentioned in equal shares among and to the lawful descendants living at the time of my death of such of the brothers and sisters of my late grandfather as have died leaving lawful descendants; such descendants respectively to be entitled to share the same moneys in a course of distribution per stirpes and not per capita," it was held that the words "per stirpes" were not applicable to the brothers and sisters of the grandfather who had left issue living at the testator's death, but to the descendants who were to be classified secundum stirpes, or according to their families, and that the property in question was to be divided into as many shares as there were families, each family taking an equal share.

In *Gibson v. Fisher* (1867) L. R. 5 Eq. (Eng.) 51, 37 L. J. Ch. N. S. 67, 16 Week. Rep. 115, where testator gave his residuary estate "equally amongst the descendants of the

brothers and sisters of the whole and half blood of my late father, John Fisher, who may be living at the time of my decease; such descendants of the brothers and sisters of my father to take severally as tenants in common per stirpes, and not per capita," it was held by Lord Romilly that the brothers and sisters having descendants living at the time of the testator's decease were to be taken as the stirpes, and the whole fund divided into as many portions as there were such families, and that, the aliquot portion of each family being thus ascertained, the division must be carried on exactly in the same way as if that portion had been given to the descendants of that person per stirpes, and not per capita, and so throughout the whole. Lord Romilly expressed the opinion that the case of *Robinson v. Shepherd*, previously decided by him and affirmed by the lord chancellor upon appeal, was erroneously decided.

In *Re Wilson* (1883) L. R. 24 Ch. Div. (Eng.) 664, 53 L. J. Ch. N. S. 130, where testator gave property upon certain trusts, and thereafter in trust for such of his cousins, the children of his deceased aunts (naming them), and of his late uncles (naming them), living at the termination of the preceding trust, and such issue then living, if any, of his said cousins then dead, to take, if more than one, in a course of distribution according to the stocks, and not according to the number of individuals, it was held that the cousins, and not the uncles and aunts, were to be looked to as the crigin of the stock. The court in this case considered *Robinson v. Shepherd* (Eng.) supra, as preferable to *Gibson v. Fisher* (Eng.) supra.

In *Re Dering* [1911] 105 L. T. N. S. (Eng.) 404, [1911] W. N. 187, where testator gave property in trust for such of the issue of his two deceased aunts "who shall be living at the time of my decease, such issue to take per stirpes and not per capita," it was held, following *Robinson v. Shepherd* (Eng.) supra, in preference to *Gibson v. Fisher* (Eng.) supra, that the issue and not the parents were the

stirps, and that the estate must be divided into as many shares as there were families of issue, each share going to the issue per stirpes.

In *Re Alchorne* (1911) 130 L. T. Jo. (Eng.) 528, testator gave a life interest in his residue to his wife, and the remainder "unto and equally between and amongst the following relatives of my said wife, namely, R. B., her brother, C. F., her sister, or their children, if dead, and the lawful issue of any child who shall have died, and such of the children of E. E. and

G. S. B., deceased, or their issue as shall be living at the death of my said wife, such children or issue nevertheless to take amongst them only the share to which their deceased parent would have been entitled if living." It was held that the residue must be taken to be divided into four parts, and that the shares of those of the persons named who had deceased must be distributed amongst their respective children or grandchildren, the distribution being per stirpes in each generation. E. S. O.

PEOPLE OF THE STATE OF NEW YORK EX REL. DURHAM
REALTY CORPORATION, Appt.,

v.

EDWARD B. LA FETRA, Justice of the City Court of New York, Respt.

PEOPLE EX REL. BRIXTON OPERATING CORPORATION, Appt.,

v.

SAME, Respt.

New York Court of Appeals — March 8, 1921.

(230 N. Y. 429, 130 N. E. 601.)

Constitutional law — forbidding exaction of unreasonable rent — police power.

1. Forbidding a landlord to take more than a reasonable rent for use of his property in case of a housing shortage is merely a taking of his right to use his property oppressively, and is within the police power of the state.

[See note on this question beginning on page 178.]

—who may question constitutionality of statute.

2. One has no standing to raise constitutional questions which do not directly affect him.

[See 6 R. C. L. 89.]

— repeal of statutory remedy — obligation of contract.

3. The legislature may repeal at will statutory provisions for summary dispossession of tenants, without impairing the obligation of the contract.

— denying contract rights.

4. Any law which in its operation amounts to a denial or obstruction of rights accorded by a contract, though professing to act only on the remedy, unconstitutionally impairs the rights granted by the Federal Constitution.

[See 6 R. C. L. 358, 359.]

— right of legislature to declare public character of business.

5. Private business may not be regulated or converted into public business by legislative fiat.

— destruction of rights by police power.

6. The state may establish regulations reasonably necessary to secure the general welfare of the community, by the exercise of its police power, although the rights of private property are thereby curtailed and freedom of contract abrogated.

[See 6 R. C. L. 193-195, 273, 274.]

— destruction of property rights.

7. The police power is a dynamic agency, vague and indefinite in its scope, which takes private property or limits its use when great public needs

require, uncontrolled by constitutional requirements of due process of law.

[See 6 R. C. L. 197, 198.]

— effect of emergency on legislative rights.

8. An emergency may afford a reason for putting forth a latent governmental power already enjoyed, but not previously exercised.

— power over private property.

9. The state may pass wholesome and proper laws to regulate the use of private property.

[See 6 R. C. L. 194, 195.]

— equal protection of laws — discrimination in favor of tenants in possession.

10. Landlords exacting exorbitant rents, and persons out of possession willing to pay them, are not denied the equal protection of the laws by a statute forbidding eviction of persons willing to pay reasonable rentals.

[See note in 11 A.L.R. 1252.]

— impairing obligation of contract — forbidding dispossession of tenants.

11. Forbidding the eviction of tenants willing to pay a reasonable rent does not unconstitutionally interfere with contract obligations to surrender possession at the expiration of the term, or consent on the part of the

tenant that dispossess warrants should issue at that time.

[See note in 11 A.L.R. 1252.]

Statute — uncertainty — forbidding exaction of unreasonable rent.

12. A statute forbidding a landlord to exact more than a reasonable rent is not void for uncertainty.

[See note in 11 A.L.R. 1252.]

Courts — constitutional jurisdiction — impairment.

13. The constitutional jurisdiction of courts is not impaired by the suspension by the legislature of possessory remedies in landlord and tenant cases.

Landlord and tenant — forbidding eviction — constitutionality.

14. The legislature may, in case of emergency created by a housing shortage, forbid landlords to evict tenants willing to pay a reasonable rent without impairing any constitutional rights.

[See note in 11 A.L.R. 1252.]

Constitutional law — power to regulate private business.

15. The state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression.

[See 6 R. C. L. 217-219; see also note in 11 A. L. R. 1252.]

(McLaughlin, J., dissents.)

APPEAL by relator from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term for New York County in each case, denying a motion for a peremptory writ of mandamus to compel the issuance by defendant of a precept for the eviction from relator's premises of a hold-over tenant. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Messrs. George L. Ingraham, John M. Stoddard, and Alexander C. McNulty, for appellants:

Chapters 942 and 947 of the Laws of 1920 so far as they affect leases made before the act took effect, under which the tenant is in possession of the demised premises, are void as violating § 10 of article 1 of the Federal Constitution, as it impairs the obligation of a contract valid and in force at the time of the passage of the act.

Reich v. Cochran, 201 N. Y. 450, 94 N. E. 1080; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834,

21 Sup. Ct. Rep. 597; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Effinger v. Kenney, 115 U. S. 566, 29 L. ed. 495, 6 Sup. Ct. Rep. 179; Wilmington & W. R. Co. v. King, 91 U. S. 3, 23 L. ed. 186; Danolds v. State, 89 N. Y. 36, 42 Am. Rep. 277.

The legislation is also prohibited by the 14th Amendment to the Federal Constitution, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of United States citizens, nor deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep.

427; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 87, 46 L. ed. 100, 22 Sup. Ct. Rep. 30; *Vanant v. Waddel*, 2 Yerg. 260.

It is also void under the state Constitution, § 6 of article 1, which provides that no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Wynehamer v. People, 13 N. Y. 378; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *People v. New York Carbonic Acid Gas Co.* 196 N. Y. 421; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; *Forster v. Scott*, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; *Hopper v. Britt*, 203 N. Y. 144, 37 L.R.A. (N.S.) 825, 96 N. E. 371, Ann. Cas. 1913B, 172.

The exercise by the state of the police power does not justify the legislature in expressly violating the Constitution of the United States and the state Constitution.

Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Vanant v. Waddel*, 2 Yerg. 260.

Mr. Leonard Klaber, for intervenor *Battery Realty Company*:

The equal protection of the laws guaranteed by the 14th Amendment is to be liberally construed to afford equal remedies to all similarly situated, and classification when attempted must be reasonable and not arbitrary.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Phipps v. Wisconsin C. R.*

Co. 133 Wis. 153, 113 N. W. 456; *South & North Ala. R. Co. v. Morris*, 65 Ala. 193; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641; *Re Grice*, 79 Fed. 627; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805.

The classifications attempted are purely arbitrary.

Reich v. Cochran, 201 N. Y. 450, 94 N. E. 1080.

The equal protection of the laws is a right, not a favor.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Re Grice*, 79 Fed. 627; *South & North Ala. R. Co. v. Morris*, 65 Ala. 193; *Reich v. Cochran*, 201 N. Y. 450, 94 N. E. 1080.

Mr. Alexander C. MacNulty for Real Estate Board of New York, *amicus curiæ*.

Messrs. John F. O'Brien and Russell Lord Tarbox, with *Mr. John P. O'Brien*, for respondent:

So much of chapter 942, of the Laws of 1920, as suspends for two years the jurisdiction of the city court of New York in respect to applying the remedy of summary proceeding, is constitutional.

Van Rensselaer v. Snyder, 13 N. Y. 299; *MacMullen v. Middletown*, 187 N. Y. 37, 11 L.R.A. (N.S.) 391, 79 N. E. 863; *Re Montgomery*, 126 App. Div. 72, 110 N. Y. Supp. 793; *Lazarus v. Metropolitan Elev. R. Co.* 145 N. Y. 581, 40 N. E. 240; *Laird v. Carton*, 196 N. Y. 169, 25 L.R.A. (N.S.) 189, 89 N. E. 822; *O'Connor v. New York*, 191 N. Y. 238, 83 N. E. 979; *Gaines v. New York*, 215 N. Y. 533, L.R.A. 1917C, 203, 109 N. E. 594, Ann. Cas. 1916A, 259; *Self-Insurer's Asso. v. State Industrial Commission*, 224 N. Y. 13, 119 N. E. 1027.

Mr. Robert P. Beyer, with *Mr. Charles D. Newton*, Attorney General, for the State:

The legislature may restrict or repeal statutory remedies.

MacMullen v. Middletown, 187 N. Y. 37, 11 L.R.A. (N.S.) 391, 79 N. E. 863; *Re Montgomery*, 126 App. Div. 72, 110 N. Y. Supp. 793.

Chapter 942 of the Laws of 1920 is a lawful exercise of the police power of the state and constitutional.

People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *Rochester v. Gutberlett*, 211 N. Y. 309, L.R.A. 1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483; *Hod-*

ges v. Perine, 24 Hun, 516; People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862; Tenement House Dept. v. Moesch, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439, 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

Messrs. William D. Guthrie, Julius Henry Cohen, Elmer G. Sammis, and Bernard Herschkoff, for Joint Legislative Committee:

The two-year period of suspension was reasonable.

Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 423, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; Hebe Co. v. Shaw, 248 U. S. 297, 63 L. ed. 255, 39 Sup. Ct. Rep. 125; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. Rep. 892; Stubbe v. Adamson, 220 N. Y. 459, 116 N. E. 372; Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, P.U.R. 1919C, 364, 121 N. E. 772; Castle v. Mason, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164; Sullivan v. Shreveport, 251 U. S. 169, 64 L. ed. 205, 40 Sup. Ct. Rep. 102; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106; Johnson v. Gearalds, 234 U. S. 422, 58 L. ed. 1383, 34 Sup. Ct. Rep. 794; Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; People v. Charles Schweinler Press, 214 N. Y. 395, L.R.A.1918A, 1124, 108 N. E. 639, Ann. Cas. 1916D, 1059; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

Neither the due process clause of the Federal Constitution nor the contract clause abridges the power or duty of the legislature to enact appropriate and necessary laws to protect and safeguard the health, safety, order, morals, or general welfare of the public.

Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 347, 36 Sup. Ct. Rep. 143,

Ann. Cas. 1917B, 927; People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Producers Transp. Co. v. Railroad Commission, 251 U. S. 228, 64 L. ed. 239, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 309, 9 A.L.R. 1420, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Chicago, B & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

Chapter 944 is not invalid because it does not specifically define what shall constitute an unreasonable rent and an oppressive agreement therefor.

Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 Sup. Ct. Rep. 147; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Omaechevarria v. Idaho, 246 U. S. 343, 62 L. ed. 763, 38 Sup. Ct. Rep. 323; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553; C. A. Weed & Co. v. Lockwood, 266 Fed. 785; United States v. Rosenblum, 264 Fed. 578; United States v. Oglesby Grocery Co. 264 Fed. 691; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853.

Chapter 947 is not an unconstitutional interference with the jurisdiction of the supreme court, and is applicable to leases entered into prior to its enactment.

Re Stilwell, 139 N. Y. 337, 34 N. E. 777; Stern v. Metropolitan L. Ins. Co. 169 App. Div. 217, 154 N. Y. Supp. 472, 217 N. Y. 626, 111 N. E. 1101; Reining v. Buffalo, 102 N. Y. 308, 6 N. E. 792; Payne v. New York, S. & W. R. Co. 157 App. Div. 302, 142 N. Y. Supp. 241; People ex rel. Crane v. Hahlo, 228 N. Y. 309, 127 N. E. 402; People ex rel. Hill v. Wayne County, 49 Hun, 476, 2 N. Y. Supp. 555; People ex.

rel. *Ryan v. Green*, 58 N. Y. 295; *Wilson v. New*, 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Billings v. United States*, 232 U. S. 261, 58 L. ed. 596, 34 Sup. Ct. Rep. 421; *People ex rel. Central Trust Co. v. Prendergast*, 202 N. Y. 188, 95 N. E. 715; *People ex rel. Collins v. Spicer*, 99 N. Y. 225, 1 N. E. 680; *People ex rel. Witherbee v. Essex County*, 70 N. Y. 228; *Larkin v. Saffarans*, 15 Fed. 147; *Johnston v. United States*, 17 Ct. Cl. 157.

Pound, J., delivered the opinion of the court:

The relator in each case, except for the laws enacted at the extraordinary session of the legislature convened in September, 1920, to deal with an emergency in the housing situation in Greater New York, was, under subdivision 1 of § 2231 of the Code of Civil Procedure, entitled to institute summary proceedings for the removal of its tenant upon the expiration of his term. The leased premises were used for dwelling purposes. The tenant had, by written lease executed before the passage of the September laws, contracted to surrender the premises at the expiration of the term, and the term had expired on the 30th day of September, 1920. The defendant, when applied to by the landlord to issue a precept under § 2238 of the Code of Civil Procedure, refused to entertain the application on the ground that by the provisions of chapter 942 of the Laws of 1920 the proceeding could not be instituted before the 1st day of November, 1922. The landlord thereupon applied for a writ of mandamus requiring the defendant to issue such precept, asserting that chapter 942 was unconstitutional as impairing the obligation of the contract of lease (U. S. Const. art. 1, § 10), depriving the landlord of its property without due process of law, denying to it the equal protection of the laws (U. S. Const. Amend. 14), and taking private property not only for private use, but without compensation (N.

Y. Const. art. 1, § 6); in brief, that its private property was taken and turned over to another without its consent. The courts have thus far upheld the constitutionality of the law in question on the ground that summary proceedings are a creature of the statute and may be abolished at the legislative will. But the official explanation of the law appended to and submitted with the bill states its purpose and effect to be "to do away with the anxiety of the many people in New York who have been served with notices to move on October 1st." This declared purpose draws with it the consideration of a group of statutes enacted at the same session to meet a supposed crisis, which are closely related to each other; are a part of the same plan of remedial protection to the tenants in possession on October 1st; and can be fairly understood only when considered as parts of one comprehensive design.

These statutes, commonly and collectively known as the September Housing Laws, include chapters 942-953, inclusive, but chapters 943, 945, 946, 948-953, inclusive, are not directly before the court on this appeal. The reason stated for their enactment is that within New York city and contiguous counties an emergency in the housing situation had arisen as a sequence of the activities of the World War and the astonishing growth of large cities, whereby at the same time building had stopped and the home-seeking population of the city had vastly increased; dispossession proceedings, more than had ever been known before, were pending to the number of upwards of 100,000; each proceeding practically involved a family averaging four or five persons; the demand for homes thus became in excess of the supply; the landlords took advantage of the situation to exact, under threats of eviction, whatever exorbitant rents the necessities of the occasion would bring forth; tenants offered themselves who would submit to such demands rather than take the

chance of finding other places of abode. The legislature had investigated the situation through the agency of its joint committee; the governor had called the legislature in special session to deal with the subject, although at its regular session in April it had passed what are known as the April Housing Laws, dealing with the same subject, which had failed substantially to relieve the existing conditions. While the inadequacy of housing facilities in cities had become a matter of world-wide concern, in the closely settled metropolis it was a problem of the utmost gravity, calamitous in its possibilities. The legislature, unequal to the task of caring for all, decided to make the tenants in possession a preferred class by staying until November 1, 1922, all proceedings to dispossess them, except for reasons hereinafter stated, so long as they paid a "reasonable rent," which is the term used for a statutory charge for use and occupation, to be ascertained judicially through a method provided by the statutes.

The owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September last, lodging houses for transients, and the larger hotels), were therefore wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect, except where the person holding over is shown to be objectionable, or the landlord seeks to occupy the premises as a dwelling for himself and family, or intends to demolish the building and construct a new building, or has sold to a co-operative ownership plan corporation, providing such tenants or occupants are ready, able, and willing to pay a reasonable rent or price for their use and occupation. The presumption is created that any demand for rent greater than that in any year prior to such de-

mand is unreasonable and oppressive. The landlord may not evict the statutory tenants, although they remain as free to depart as they were prior to the enactment of the Housing Laws. To accomplish this purpose the legislature first enacted chapter 942, to amend the Code of Civil Procedure in relation to summary proceedings, which recited that, a public emergency existing, no summary proceedings should be maintained until the 1st day of November, 1922, to recover possession of real property, except for one of the four reasons indicated above. It also provided that in pending hold-over proceedings, where no warrant had been issued, the warrant should not be issued unless the proceeding came under one of the exceptions above quoted. This chapter is supplemented by chapter 947, which amends the Code of Civil Procedure in relation to actions to recover possession of real property, and prohibits the landlord for the same period from maintaining an action to recover possession of real property, with the same exceptions previously indicated; and by chapter 944, which recites that unjust, unreasonable, and oppressive agreements for the payment of rent have been made and exacted from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired, and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health, and morals in certain cities of the state, preserves the action for rent, provides that the plaintiff may recover a fair and reasonable rent for the premises, and further provides that on default of payment of the fair rental value the landlord may obtain possession of his premises by dispossess warrant. The provision in chapter 944, above quoted, was first incorporated in chapter 136, Laws of 1920, and applies at least to leases made after April 1, 1920. Its retroactive effect is not at present before the

court for consideration. Chapters 942 and 947 apply only to "cities of a population of 1,000,000 or more and in cities in a county adjoining such a city." Chapter 944 applies to cities of the first class and cities in a county adjoining such city.

Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the legislature. That it existed, promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the lawmaking power on such evidence has determined the existence of the emergency, and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld. How it may operate on other classes or individuals not before the court is

Constitutional law—who may question constitutionality of statute.

not our present concern. The relator comes indisputably within the main purpose of the statutes, but it has no standing to raise questions which do not directly affect it. *Arizona Employers' Liability Cases* (*Arizona Copper Co. v. Hammer*) 250 U. S. 400, 409, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553. When the emergency ceases to exist (*Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, 95, 97, P.U.R.1919C, 364, 121 N. E. 772), when ejectment is sought for other purposes than to dispossess hold-over tenants, under the protection of the laws, when a landlord desires to withdraw from the business of renting his premises for dwelling purposes, or when other material questions arise, the parties aggrieved will then be heard in their own right.

If chapter 942 alone were to be considered, we would not hesitate to say that the legislature might repeal or suspend, in whole or in part, the

remedy of summary proceedings for the possession of real property provided by the Code of Civil Procedure. —repeal of statutory remedy—obligation of contract.

The landlord has no vested or contractual property right in any particular form of remedy so long as he is permitted effectively to recover possession of his real property, and the only effect of the law in question is temporarily to deprive the landlord of the summary remedy given by statute, except in certain cases. A general act abolishing such remedy would not impair the obligation of the contract. *Conkey v. Hart*, 14 N. Y. 22. But chapter 947 also prohibits the landlord for two years from maintaining an action to recover possession of his real property at the expiration of the term, and any law which in its operation amounts to a denial or obstruction of rights accruing by —denying contract rights. a contract, though

professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. *McCracken v. Hayward*, 2 How. 608, 612, 11 L. ed. 397, 398; *Barnitz v. Beverly*, 163 U. S. 118, 125, 41 L. ed. 93, 99, 16 Sup. Ct. Rep. 1042. A reasonable alteration of the remedy which does not materially impair it is constitutional. *Penniman's Case*, 103 U. S. 714, 26 L. ed. 602. The state has, however, made no contract to continue in force the existing possessory remedies in their entirety, nor have the parties so stipulated in their contract. Possessory actions having been for the time done away with, to the extent indicated, the action for rent is preserved by chapter 944, but "it shall be a defense to an action for such rent that the rent is unjust and unreasonable." No tenant is forced out of his home so long as he pays the fair monthly rent, but a dispossession warrant may be issued if he fails to pay. A comprehensive substitute for the possessory remedies thus becomes the keystone of the arch.

To uphold the right of the landlord to maintain ejectment would be to crack the legislative design into fragments, which would afford little protection to the tenants in possession. The explanation accompanying the bill (chap. 947), which withdraws the remedy of ejectment until November 1, 1922, says: "The summary proceeding of hold-over being taken away, the landlord can bring an action in the supreme court and recover judgment against the tenant by default in twenty days, and thus defeat the purpose of the legislation abolishing hold-overs except in three instances. To obviate this difficulty, chapter 947 is enacted."

Although the separation of the component parts of the general plan into independently numbered statutes signifies the legislative design to save each part that is in itself good on constitutional grounds, chapters 942, 944, and 947 will, if possible, be construed together and given a congruous effect before the court goes to the easier task of considering chapter 942 alone. So taken, the arguments against their constitutionality as a whole are in form the familiar objections which are addressed to the court whenever the exercise of legislative power on private rights is in question. Their force depends upon their application to the particular case.

The proposition is fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat.

—right of legislature to declare public character of business.

Producers Transp. Co. v. Railroad Commission, 251 U. S. 228, 64 L. ed. 239, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131. By the application of this principle the act of Congress known as the Ball Rent Law, for the relief of tenants in the District of Columbia, applicable to all rental property, was said to be unconstitutional by the court of appeals of the District. *Hirsh v. Block*, — App. D. C. —, 11 A.L.R. 1238, 267 Fed. 614, certiorari denied in 254

U. S. 640, 65 L. ed. —, 41 Sup. Ct. Rep. 13. The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power, although the rights of private property are thereby curtailed and freedom of contract is abridged. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Rast v. Van Deman & L. Co.* 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; *American Coal Min. Co. v. Special Coal & Food Commission* (D. C.) 268 Fed. 563. The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must, when necessary, yield to the public convenience, advantage, and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded, and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare.

—destruction of rights by police power.

—destruction of property rights.

The first question to be considered arises under chapter 944, which provides that it shall be a defense to an action for rent accruing under an agreement therefor that such rent is unjust and unreasonable and the agreement to pay is oppressive. May the legislative power, in a season of exigency, consistently with the due process clauses of the state and Federal Constitutions designed to protect property rights, so invade the domain of private contract as to interfere with and regulate the right of a landlord to exact what he will for his own in the way of rent for private property?

The landlord is a purveyor of a commodity,—the vendor of space in which to shelter one's self and family. He has heretofore been permitted to make his own terms with his tenants, but that consideration is not conclusive. Unquestionably some taking of private property for the benefit of a class of individuals is the result of the Housing Laws. The free choice of tenants, the unlimited right to bargain,—these are property rights which may not be affected unless a public advantage over and beyond such rights justifies legislative interference, but "an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, 187, Ann. Cas. 1912A, 487. While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and the market value is the reasonable value; that people often move from one city to another to secure better advantages; that no one is compelled to have a home in New York; that no crisis exists; that to call the legislation an exercise of the police power, when it is plainly a taking of private property for private use and without compensation, is a mere transfer of labels, which does not affect the nature of the legislation,—yet the legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds, because it is unprofitable to build; that those who own seek the uttermost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become general. It is with this condition, and not with economic theory, that the state has to deal in the ex-

isting emergency. The distinction between the power of eminent domain and the police power is often fine. In the main it depends on whether the thing is destroyed or is taken over for the public use. If property rights are here invaded, in a degree, compensation therefor has been provided, and possession is to be regained when such compensation remains unpaid. What is taken is the right to use one's property oppressively, and it is the destruction of that right that is contemplated, and not the transfer thereof to the public use.

The taking is therefore analogous to the abatement of a nuisance or to the establishment of building restrictions, and it is within the police power.

—forbidding
exaction of un-
reasonable rent
—police power.

Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war (*Hamilton v. Kentucky Distilleries & Warehouse Co.* 251 U. S. 146, 161, 64 L. ed. 194, 201, 40 Sup. Ct. Rep. 106), earthquake, pestilence, famine, and fire, a combination of men or the force of circumstances, may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions (*Bowditch v. Boston*, 101 U. S. 16, 18, 19, 25 L. ed. 980, 981; *American Land Co. v. Zeiss*, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200). Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war (*Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281), an emergency may afford a reason for putting

—effect of
emergency on
legislative
rights.

forth a latent governmental power already enjoyed but not previously exercised. Thus it has been held that, although the relation between employer and employee is essentially private so far as the right to fix a standard of wages by agreement is concerned, Congress may establish a standard

of wages for railroad employees to be in force for a reasonable time in an emergency to avert the calamity of a nation-wide strike. *Wilson v. New*, 243 U. S. 332, 348, 61 L. ed. 755, 773, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; *Ft. Smith & W. R. Co. v. Mills*, 253 U. S. 206, 64 L. ed. 862, 40 Sup. Ct. Rep. 526.

Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate

—power over
private prop-
erty.

the use of private property. *Lincoln*

Trust Co. v. Williams Bldg. Corp. 229 N. Y. 313, 128 N. E. 209; *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269, 63 L. ed. 599, 39 Sup. Ct. Rep. 274. Laws restricting the uses of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses, or to property where the right to demand and receive service exists, or to monopolies, or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 64 L. ed. 596, 40 Sup. Ct. Rep. 338; *Holter Hardware Co. v. Boyle* (D. C.) 263 Fed. 134; *American Coal Min. Co. v. Special Coal & Food Commission* (D. C.) 268 Fed. 563.

16 A.L.R.—11.

The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. As no similar legislation has been construed by the courts, precedent is of little value and may prove misleading. Formulas and phrases in earlier decisions are not controlling. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560. English laws and decisions based on the long-established practice of considering those in possession of agricultural and pastoral lands and small holdings under lease as having a kind of imperfect moral interest beyond their subsisting term recognize the tenant right of renewal. But such laws do not control us. They are the offspring of ancient and alien customs which were not transplanted to our soil with the common law. The supposed right of the tenant to remain on the land is not, in this state, recognized as a basis of property right. It is nothing but a chance. The crudest equities may, however, become powerful enough to make such tenant the subject of protection by the law.

Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612. Housing in normal times may be and often is a competitive business; landlords may, in the lean years and in periods of oversupply, be unable to secure a fair return on their investments. Competition will then regulate rents more effectively than legislation can. An historical justification of liberty of contract between landlord and tenant is not a demonstration that the system must survive every exigency. When it temporarily ceases to be adapted to the demands of the present it may be modified, if the best interests of society are thereby served. "An earnest conflict of serious opinion" may arise as to

whether such interests have been wisely served, or whether the legislation is anything more than another example of misdirected zeal in dealing with a crisis. But that argument does not address itself to the court. "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy." *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259, 263; *German Alliance Ins. Co. v. Lewis*, *supra*. The objection to chapter 944, that when it temporarily fixes reasonableness as the standard of rent in order to prevent oppression it deprives the landlords of property without due process of law, seems untenable, when tested by the principles above stated.

The next question is whether the landlords who rent dwellings are denied the equal protection of the law. Legitimate governmental authority ought to be able to protect unobjectionable tenants, ready and willing to pay reasonable rents, from wholesale evictions for the further enrichment of profiteers who have brought themselves to the notice of the legislature by their greed and extortion, without subjecting landlords who have not offended and tenants who have no substantial grievance to a restraint that a class has invited by its conduct. One class of landlords is selected for regulation because one class conspicuously offends; one class of tenants has protection because all who seek homes cannot be provided with places to sleep and eat. Those who are out of possession, willing to pay exorbitant rentals, or unable to pay any rentals whatever, have been left to shift for themselves. But such classifications

—equal protection of laws—discrimination in favor of tenants in possession.

deny to no one the equal protection of the laws. The distinction between the groups is real and rests on a substantial basis. *People v. Beakes Dairy Co.* 222 N.

Y. 416, 3 A.L.R. 1260, 119 N. E. 115.

The next question is whether such laws impair the obligation of contracts, as applied to existing leases and tenancies which contain an express or implied obligation to surrender possession at the expiration of the term, or as applied to a case where it is claimed that the parties had contracted or stipulated between themselves in dispossession proceedings that the warrant should be issued on October 1st. The provision of the Federal Constitution, that no state shall pass any law impairing the obligation of contracts, puts no limit on any lawful exercise of legitimate governmental power. *Legal Tender Cases*, 12 Wall. 457, 551, 20 L. ed. 287, 312. The rule alike for state and nation is that private contract rights must yield to the public welfare, when the latter is appropriately declared and defined and the two conflict. *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 277, 26 Sup. Ct. Rep. 127; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 486, 55 L. ed. 297, 304, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; *Producers Transp. Co. v. Railroad Commission*, 251 U. S. 228, 64 L. ed. 239, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364; *Union Dry Goods Co. v. Georgia Public Service Corp.* 248 U. S. 372, 375, 63 L. ed. 309, 311, 9 A.L.R. 1420, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117. But if the law is "arbitrary, unreasonable, and not designed to accomplish a legitimate public purpose" (*Mutual Loan Co. v. Martell*, 222 U. S. 225, 234, 56 L. ed. 175, 179, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529), the courts will declare it invalid.

It is contended, however, that the only laws which may be said to impair the obligation of contracts which have been upheld are those in which the United States, which is not included within the constitutional prohibition, has acted (*Sinking Fund Cases*, 99 U. S. 700, 718,

25 L. ed. 496, 501), to assert its limited but unquestioned sovereignty; as in the Legal Tender Cases, to regulate the currency, and in the Mottley Case, 219 U. S. 467, 486, 55 L. ed. 297, 304, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, to make illegal all discriminatory rates of interstate carriers; or where the state has acted to regulate public utilities, as in the Producers Case, 251 U. S. 228, 64 L. ed. 239, P.U.R. 1920C, 574, 40 Sup. Ct. Rep. 131, to subject contracts for future transportation by common carriers to regulation; or in cases where the effect of laws prohibiting the sale of liquor or narcotics or the conducting of lotteries and the like, for the public good, was indirectly to affect the contract (Boston Beer Co. v. Massachusetts, 97 U. S. 25, 32, 24 L. ed. 989, 991), or in which the state had exercised the power of eminent domain to extinguish a contract right; that the obligation of no ordinary private contract could, without violence to the plain words of the Constitution, be impaired by the exercise of the police power. As the purpose of these laws is temporarily to deprive landlords of all power to enforce covenants to quit in leases, although made prior to the enactment of the laws, it is urged that if such legislation is upheld the contract clause of the Constitution gives little protection to private contractual rights.

Laws directly nullifying some essential part of private contracts are rare, and are not lightly to be upheld by hasty and sweeping generalizations on the common good (Barnitz v. Beverly, 163 U. S. 118, 125, 41 L. ed. 93, 99, 16 Sup. Ct. Rep. 1042; Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748), but no decision upholds the extreme view that the obligation of private contracts may never be directly impaired in the exercise of the legislative power. No vital distinction may be drawn between the exercise, in times of emergency, of the police power upon the proper-

ty right and upon the contract obligations for the promotion of the public weal. The state in an emergency caused by flood or fire, when multitudes are homeless, might concededly compel owners of houses to take in undesired occupants in order to shelter them from exposure to storm and cold.

Why, then, would the state have no power reasonably to regulate for a time the terms upon which a landlord, under such conditions, might put his tenants out when they promptly pay a reasonable compensation for the use of the property? The distinction thus proposed becomes illusive when practically applied.

No constitutional difficulty presents itself in the way of enforcing the laws on the ground of uncertainty as to what constitutes a reasonable rent or an oppressive agreement. Courts and juries are in civil cases constantly dealing with questions of proper care, just compensation, reasonable conduct, fair market value, and the like. It is quite a different thing to say that Congress may not punish the act of making "any unjust or unreasonable rate or charge" in dealing with necessities, because the language is too indefinite and uncertain upon which to fasten criminal liability. United States v. L. Cohen Grocery Co. 255 U. S. 81, 65 L. ed. —, 14 A.L.R. 1405, 41 Sup. Ct. Rep. 298. The test is not what the jury may say, but what the jury may reasonably infer from the evidence. Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780. The exaction of an unjust and unreasonable rent makes oppressive the agreement under which the same is sought to be recovered.

The suspension of possessory remedies does not impair the juris-

—impairing
obligation of
contract—
forbidding
dispossession of
tenants.

Statute—uncertainty—forbidding exaction of unreasonable rent.

diction of the supreme court in law and equity. N. Y. Const. art. 6, § 1. The legislature has power "to alter and regulate the jurisdiction" and to change the common law. N. Y. Const. art. 6, § 3; *Re Stillwell*, 139 N. Y. 337, 342, 34 N. E. 777.

The question comes back to what the state may do for the benefit of the community at large. Here the legislation rests on a secure foundation. *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 77, 59 L. ed. 1204, 1210, 1211, 35 Sup. Ct. Rep. 678. The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law. Decisions of the courts in conflict with legislative policy, when such decisions have been thought to be unwisely hard and stiff, have been met by constitutional amendments, as in the case of the decision of the Supreme Court of the United States in the Income Tax Cases (*Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912), which led to the adoption of the 16th Amendment; and of this court on the statute which fixed an eight-hour day and the prevailing rate of wages for employees of municipal contractors, and on the Workmen's Compensation Law (*People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; N. Y. Const. art. 12, § 1; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; N. Y. Const. art. 1, § 19). Each of the latter laws was also approved by the Supreme Court of the United States. *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943. The reaction on

the courts is that the existence of a strong opinion in any real or fancied public need has been suggested as the sufficient test. *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. But constitutional limitations on the power of government are self-imposed restrictions upon the will of the people, and qualify the despotism of the majority. Such limitations do not yield to strong opinions merely. They are incorporated in the fundamental law to restrict arbitrary legislative power. They forbid government to take from the owner without compensation whatever private right to control the use of his property the many may earnestly desire to deprive him of. Isolated expressions of the courts may suggest that whatever the legislature enacts on grounds of public policy should be sustained, but the courts may not uphold the exercise of arbitrary power. What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts. To uphold private contracts and to enforce their obligations is a matter of high public consequence, but the legislature has a wide latitude in doing what seems in accordance with sound judgment and reasonableness in order to bring about a great good to a large class of citizens, even at some sacrifice of private rights.

Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and advantage, in the face of the extraordinary and unforeseen public exigency, which the legislature has, on sufficient evidence, found to exist.

The conclusion is, in the light of

Courts—
constitutional
jurisdiction—
impairment.

Landlord and
tenant—
forbidding
eviction—con-
stitutionality.

present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression (People v. Beakes Dairy Co. 222 N. Y. 416, 3 A.L.R. 1260, 119 N. E. 115, and cases cited; Payne v. Kansas, 248 U. S. 112, 63 L. ed. 153, 39 Sup. Ct. Rep. 32), that the business of renting homes in the city of New York is now such an instrument and has therefore become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us (Marcus Brown Holding Co. v. Feldman (D. C.) 269 Fed. 306).

The order appealed from should be affirmed, with costs.

Hiscock, Ch. J., and Hogan, Cardozo, and Andrews, JJ., concur.

Crane, J., concurs in result on opinion in Gutttag v. Shatzkin, 230 N. Y. 647, 130 N. E. 929, decided herewith.

McLaughlin, J., dissents on dissenting opinion in Edgar A. Levy Leasing Co. v. Siegel, 230 N. Y. 634, 130 N. E. 923, decided herewith.

Writ of error dismissed by the Supreme Court of United States, October 10, 1921 (U. S. Adv. Ops. 1921-22, p. 10) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. —.

NOTE.

The constitutionality of rent laws is the subject of the annotation in 11 A.L.R. 1252, which is supplemented by the annotation following BLOCK v. HIRSH, post, 178.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Plff. in Err.,

v.

LOUIS HIRSH.

United States Supreme Court — April 18, 1921.

(— U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 458.)

Constitutional law — emergency legislation — rent laws — public interest.

1. The emergency growing out of the World War clothed the letting of buildings in the District of Columbia with a public interest so great as to justify, despite U. S. Const., 5th Amend., such temporary regulation as is made by the Act of October 22, 1919, tit. 2, § 109 (to remain in force two years unless sooner repealed), giving a tenant the privilege of holding over after the expiration of the lease, subject to regulation by the commission appointed by that act, so long as he pays the rent and performs the conditions as fixed by the lease, or as modified by the commission.

[See note on this question beginning on page 178.]

Courts — relation to other department of government — legislative declaration.

2. A legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may

not be held conclusive by the courts, but a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect.

[See 6 R. C. L. 111, 161.]

Constitutional law — police power — public interest.

3. Circumstances may so change in time or so differ in space as to clothe with a public interest so great as to justify regulation by law an interest which at other times or in other places would be a matter of purely private concern.

[See 6 R. C. L. 227, 228.]

— emergency — temporary regulation.

4. A limit in time to tide over a passing trouble may justify a law that could not be upheld as a permanent change.

Jury — infringement of right — emergency legislation — rent laws.

5. Temporary emergency legislation, like the Act of October 22, 1919, tit. 2, § 109, giving a tenant in the District of Columbia the privilege of holding over after the expiration of the lease, subject to regulation by the commission appointed by that act, so long as he pays the rent and performs the conditions as fixed by the lease or as modified by the commission, is not invalid merely because the landlords and tenants are deprived by it of a trial by jury on the right to possession of the land.

[See note in 11 A.L.R. 1252.]

(Mr. Chief Justice White, Mr. Justice Van Devanter, Mr. Justice McReynolds, and Mr. Justice McKenna dissent.)

ERROR to the Court of Appeals for the District of Columbia to review a judgment which, on a second appeal, affirmed a judgment of the Supreme Court in favor of plaintiff in a proceeding brought to recover possession of certain premises from defendant, holding over after expiration of a lease to him. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Jesse C. Adkins, Julius I. Peyser, George E. Edelin, and Theodore D. Peyser, for plaintiff in error:

The requirement that during the emergency period created by the war the owner of any rental property in the District of Columbia desiring possession must give thirty days' notice to the tenant is a mere change in remedy, and does not deprive the owner of property.

Thomas v. Black, 8 Houst. (Del.) 507; Bonsall v. McKay, 1 Houst. (Del.) 520; Roberts v. Grubb, 5 Houst. (Del.) 461; Rich v. Keyser, 54 Pa. 86; Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; League v. Texas, 184 U. S. 158, 46 L. ed. 480, 22 Sup. Ct. Rep. 475; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943.

Having failed to give the thirty-day notice, defendant in error cannot question the constitutionality of the regulatory provisions of the statute.

Arkadelphia Mill. Co. v. St. Louis Southwestern R. Co. 249 U. S. 134, 63 L. ed. 517, P.U.R.1919C, 710, 39 Sup. Ct. Rep. 237; Jeffrey Mfg. Co. v. Blagg,

235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; Southern R. Co. v. King, 217 U. S. 534, 54 L. ed. 871, 30 Sup. Ct. Rep. 594; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Tyler v. Judges of Court of Registration, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286.

The regulatory provisions of the act constitute a valid exercise of the war powers of Congress.

Stewart v. Kahn (Stewart v. Bloom) 11 Wall. 507, 20 L. ed. 176; Northern P. R. Co. v. North Dakota, 250 U. S. 135, 63 L. ed. 897, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502, 18 N. C. C. A. 878; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 156, 64 L. ed. 199, 40 Sup. Ct. Rep. 106; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 352, L.R.A.1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas. 1918B, 856.

If during the emergency the business of renting real property in the District

of Columbia holds such a peculiar relation to the public interest as to justify it, there will be superinduced upon that business the right of public regulation.

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612; People v. Budd, 117 N. Y. 27, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Beale & W. Railroad Rate Regulation, §§ 2, 7; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State Public Utilities Commission v. Monarch Refrigerating Co. 267 Ill. 534, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; State ex rel. Martin v. Howard, 96 Neb. 293, 147 Pac. 689; Nash v. Page, 80 Ky. 547, 44 Am. Rep. 490; Com. v. Hodges, 137 Ky. 244, 125 S. W. 689; Douglas Park Jockey Club v. Talbott, 173 Ky. 685, 191 S. W. 474; Davis v. State, 68 Ala. 63, 44 Am. Rep. 128; State v. Mullins, 87 S. C. 510, 70 S. E. 9; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Walls v. Midland Carbon Co. (U. S. Adv. Ops. 1920-21, p. 133) 254 U. S. 300, 65 L. ed. —, 41 Sup. Ct. Rep. 118; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, L.R.A. 1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660; Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062,

31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Perley v. North Carolina, 249 U. S. 510, 63 L. ed. 735, 39 Sup. Ct. Rep. 357; American Coal Min. Co. v. Special Coal & Food Commission, 268 Fed. 563; Oklahoma Operating Co. v. Love, 252 U. S. 331, 64 L. ed. 596, 40 Sup. Ct. Rep. 338; Marcus Brown Holding Co. v. Feldman (U. S. Adv. Ops. 1920-21, p. 539) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 465.

Messrs. William G. Johnson, Myer Cohen, and Richard D. Daniels, for defendant in error:

The legislation of Congress relied upon by plaintiff in error is unconstitutional and void.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 Sup. Ct. Rep. 1033; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240.

The existence of a state of war gives no validity to the statute.

Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106; Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75.

The legislative declaration that this property is affected with a public interest is itself invalid.

Producers Transp. Co. v. Railroad Commission, 251 U. S. 228, 64 L. ed. 239, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131.

Messrs. Henry H. Glassie, Special Assistant to the Attorney General, and William L. Frierson, Solicitor General, as amici curiæ:

In the emergency declared by Congress, regulation of rents is a valid exercise of the police power.

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612; Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561, Ann.

Cas. 1917C, 522; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Price v. Illinois*, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. Rep. 892; *Rast v. Van Deman & L. Co.* 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Turner v. Nye*, 154 Mass. 579, 14 L.R.A. 487, 28 N. E. 1048; *Murdock v. Stickney*, 8 Cush. 113; *Jordan v. Woodward*, 40 Me. 317; *Vetter v. Broadhurst*, 100 Neb. 356, 9 A.L.R. 578, 160 N. W. 109; *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Van Dyke v. Geary*, 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. Rep. 483; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *American Coal Min. Co. v. Special Coal & Food Commission*, 268 Fed. 563; *1 Wyman, Pub. Serv. Corp.* ¶ 106; *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441; *United States v. Standard Brewery*, 251 U. S. 210, 64 L. ed. 229, 40 Sup. Ct. Rep. 139; *Wilson v. New*, 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; *Edgar A. Levy Leasing Co. v. Siegel*, 194 App. Div. 482, 186 N. Y. Supp. 5; *People ex rel. Rayland Realty Co. v. Fagan*, 194 App. Div. 185, 186 N. Y. Supp. 23; *Hoffman v. Charlestown Five Cents Sav. Bank*, 231 Mass. 324, 121 N. E. 15; *Atlantic Coast Line*

R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; *Freund, Pol. Power*, § 308; *Marcus Brown Holding Co. v. Feldman* (U. S. Adv. Ops. 1920-21, p. 539) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 465.

The procedural provisions are not lacking in due process.

Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Missouri Rate Cases* (*Knott v. Chicago, B. & Q. R. Co.*) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 458, 33 L. ed. 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Detroit & M. R. Co. v. Michigan R. Commission*, 235 U. S. 402, 59 L. ed. 288, 35 Sup. Ct. Rep. 126; *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 59 L. ed. 405, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214; *Union Dry Goods Co. v. Georgia Pub. Service Corp.* 248 U. S. 373, 63 L. ed. 309, 9 A.L.R. 1420, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117; *Miller v. Wilson*, 206 U. S. 373, 59 L. ed. 628, L.R.A. 1915F, 829, 35 Sup. Ct. Rep. 342; *Keokee Consol. Coke Co. v. Taylor*, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; *Siler v. Louisville & N. R. Co.* 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Quong Wing v. Kirkendall*, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; *Bosley v. McLaughlin*, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. Rep. 345; *Miller v. Strahl*, 239 U. S. 426, 60 L. ed. 364, 36 Sup. Ct. Rep. 147; *Penniman's Case*, 103 U. S. 714, 26 L. ed. 602; *Reagan v. Farmers Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54

(— U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 458.)

L. ed. 106, 30 Sup. Ct. Rep. 21; Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, L.R.A.1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

Temporary continuance of occupancy is an appropriate means of making rent regulation effective

Munday v. Wisconsin Trust Co. 252 U. S. 499, 64 L. ed. 684, 40 Sup. Ct. Rep. 365; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Cheney v. Libby, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. Rep. 498; Stewart v. Gorter, 70 Md. 242, 2 L.R.A. 711, 16 Atl. 644; Swan v. Kemp, 97 Md. 686, 55 Atl. 441; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553; United States v. Ferger, 250 U. S. 199, 63 L. ed. 936, 39 Sup. Ct. Rep. 445; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1283, 34 Sup. Ct. Rep. 856; Rast v. Van De-man & L. Co. 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; Thornton v. Duffy (U. S. Adv. Ops. 1920-21, p. 164) 254 U. S. 361, 65 L. ed. —, 41 Sup. Ct. Rep. 137; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Boyle v. Lysaght, Vern. & S. 135; Banks v. Haskie, 45 Md. 207; Bateman v. Murray, 1 Ridgew. P. C. (Ir.) 187; Neville v. Hardy, 37 Times L. R. 129.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding brought by the defendant in error, Hirsh, to recover possession of the cellar and first floor of a building on F street in Washington, which the plaintiff

in error, Block, holds over after the expiration of a lease to him. Hirsh bought the building while the lease was running, and on December 15, 1919, notified Block that he should require possession on December 31, when the lease expired. Block declined to surrender the premises, relying upon the Act of October 22, 1919, chap. 80, title 2, "District of Columbia Rents," especially § 109 (41 Stat. at L. 297, 298, 301). That is also the ground of his defense in this court, and the question is whether the statute is constitutional, or, as held by the court of appeals, an attempt to authorize the taking of property not for public use, and without due process of law, and for this and other reasons void.

By § 109 of the act the right of a tenant to occupy any hotel, apartment, or "rental property," i. e., any building or part thereof, other than hotel or apartment (§ 101), is to continue notwithstanding the expiration of his term, at the option of the tenant, subject to regulation by the commission appointed by the act, so long as he pays the rent and performs the conditions as fixed by the lease, or as modified by the commission. It is provided in the same section that the owner shall have the right to possession "for actual and bona fide occupancy by himself, or his wife, children, or dependents . . . upon giving thirty days' notice in writing." According to his affidavit Hirsh wanted the premises for his own use, but he did not see fit to give the thirty days' notice because he denied the validity of the act. The statute embodies a scheme or code which it is needless to set forth, but it should be stated that it ends with the declaration in § 122 that the provisions of title 2 are made necessary by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees, and accessories, and thereby embarrassing the Federal government in the transaction of the public business. As emergency leg-

islation the title is to end in two years unless sooner repealed.

No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts. *Shoemaker v. United States*, 147 U. S. 282, 298, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361; *Hairston v. Danville & W. R. Co.* 208 U. S. 598, 606, 52 L. ed. 637, 640, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 219, 227, 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67; *Producers Transp. Co. v. Railroad Commission*, 251 U. S. 228, 230, 64 L. ed. 239, 241, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131. But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.

The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; irrigation, in *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1083, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; and mining, in *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50

L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest (*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.* 240 U. S. 30, 32, 60 L. ed. 507, 511, 36 Sup. Ct. Rep. 234), and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See also *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 111, 55 L. ed. 112, 116, 117, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from 80 to 100 feet. *Welch v. Swasey*, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567. Safe pillars may be required in coal mines. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359. Billboards in cities may be regulated. *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269, 63 L. ed. 599, 39 Sup. Ct. Rep. 274. Watersheds in the country may be kept clear. *Perley v. North Carolina*, 249 U. S. 511, 63 L. ed. 735, 39 Sup. Ct. Rep. 357. These cases are enough to establish that a public exigency will justify the legislature in restricting property rights

Courts—relation to other department of government—legislative declaration.

Constitutional law—police power—public interest.

(— U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 468.)

in land to a certain extent without compensation. But if, to answer one need, the legislature may limit height, to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature, but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort, pressed to a certain height, might amount to a taking without due process of law. *Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440.

Perhaps it would be too strict to deal with this case as concerning only the requirement of thirty days' notice. For although the plaintiff alleged that he wanted the premises for his own use, the defendant denied it, and might have prevailed upon that issue under the act. The general question to which we have adverted must be decided, if not in this, then in the next case, and it should be disposed of now. The main point against the law is that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the commission established by the act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases

are cut down. But if the public interest be established, the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. It is said that a grain elevator may go out of business, whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. The regulation is put and justified only as a temporary measure. See *Wilson v. New*, 243 U. S. 332, 345, 346, 61 L. ed. 753, 772, 773, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; *Ft. Smith & W. R. Co. v. Mills*, 253 U. S. 206, 64 L. ed. 862, 40 Sup. Ct. Rep. 526. A limit in <sup>—emergency—
temporary
regulation.</sup> time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.

Machinery is provided to secure to the landlord a reasonable rent. § 106. It may be assumed that the interpretation of "reasonable" will deprive him, in part, at least, of the power of profiting by the sudden influx of people to Washington, caused by the needs of government and the war, and thus of a right usually incident to fortunately situated property,—of a part of the value of his property as defined in *International Harvester Co. v. Kentucky*, 234 U. S. 222, 58 L. ed. 1287, 34 Sup. Ct. Rep. 853; *Southern R. Co. v. Greene*, 216 U. S. 400, 414, 54 L. ed. 536, 540, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247. But while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little, if at all, farther than the restriction put upon the rights of the owner of money by the more debatable usury laws. The preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in

English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern, of course, with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that

—emergency
legislation—
rent laws—
public interest.

we are not warranted in saying that legislation that has been resorted to

for the same purpose all over the world is futile, or has no reasonable relation to the relief sought. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259.

The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the commission established by the statute to regulate the relation is established, as we think it is, by what

Jury—infringe-
ment of right—
emergency
legislation—
rent laws.

we have said, this objection amounts to little. To regulate the relation and to decide the facts

affecting it are hardly separable. While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law, and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent. The plaintiff obtained a judgment on the ground that the statute was void, root and branch. That judgment must be reversed.

Judgment reversed.

Mr. Justice McKenna, dissenting:
The CHIEF JUSTICE, Mr. Justice Van Devanter, Mr. Justice McReynolds, and I dissent from the opinion and judgment of the court. The

grounds of dissent are the explicit provisions of the Constitution of the United States; the specifications of the grounds are the irresistible deductions from those provisions, and, we think, would require no expression but for the opposition of those whose judgments challenge attention.

The national government, by the 5th Amendment to the Constitution, and the states, by the 14th Amendment, are forbidden to deprive any person of "life, liberty, or property without due process of law." A further provision of the 5th Amendment is that private property cannot be taken for public use, without just compensation. And there is a special security to contracts in § 10 of article 1 in the provision that "no State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." These provisions are limitations upon the national legislation, with which this case is concerned, and limitations upon state legislation, with which *Marcus Brown Holding Co. v. Feldman* (U. S. Adv. Ops. 1920-21, p. 539) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 465, is concerned. We shall more or less consider the cases together, as they were argued and submitted on the same day and practically depend upon the same principles; and what we say about one applies to the other.

The statute in the present case is denominated "The Rent Law," and its purpose is to permit a lessee to continue in possession of leased premises after the expiration of his term, against the demand of his landlord, and in direct opposition to the covenants of the lease, so long as he pays the rent and performs the conditions as fixed by the lease, or as modified by a commission created by the statute. This is contrary to every conception of leases that the world has ever entertained, and of the reciprocal rights and obligations of lessor and lessee.

As already declared, the provisions of the Constitution seem so direct and definite as to need no

reinforcing words, and to leave no other inquiry than does the statute under review come within their prohibition. It is asserted that the statute has been made necessary by the conditions resulting from the "Imperial German war." The thought instantly comes that the country has had other wars with resulting embarrassments, yet they did not induce the relaxation of constitutional requirements nor the exercise of arbitrary power. Constitutional restraints were increased, not diminished. However, it may be admitted that the conditions presented a problem and induced an appeal for government remedy. But we must bear in mind that the Constitution is, as we have shown, a restraint upon government, purposely provided and declared upon consideration of all the consequences of what it prohibits and permits, making the restraints upon government the rights of the governed. And this careful adjustment of power and right makes the Constitution what it was intended to be and is, a real charter of liberty, receiving and deserving the praise that has been given it as "the most wonderful work ever struck off at any given time by the brain and purpose of man." And we add that more than a century of trial "has certainly proven the sagacity of the constructors, and the stubborn strength of the fabric."

The "strength of the fabric" cannot be assigned to any one provision; it is the contribution of all; and therefore, it is not the expression of too much anxiety to declare that a violation of any of its prohibitions is an evil,—an evil in the circumstance of violation, of greater evil because of its example and malign instruction. And against the first step to it this court has warned, expressing a maxim of experience,—"*Withstand beginnings.*" *Boyd v. United States*, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524. Who can know to what end they will conduct?

The facts of this litigation point the warning. Recurring to them,

we may ask,—Of what concern is it to the public health or the operations of the Federal government as to who shall occupy a cellar and a room above it for business purposes in the city of Washington?—(the question in this case); and Why is it the solicitude of the police power of the state of New York to keep from competition an apartment in the city of New York?—(the question in the other case). The answer is, to supply homes to the homeless. It does not satisfy. If the statute keeps a tenant in, it keeps a tenant out; indeed, this is its assumption. Its only basis is that tenants are more numerous than landlords, and that, in some way, this disproportion, it is assumed, makes a tyranny in the landlord and an oppression to the tenant, notwithstanding the tenant is only required to perform a contract entered into, not under the statute, but before the statute, and that the condition is remedied by rent fixing—value adjustment—by the power of the government. And this, it is the view of the opinion, has justification because "space in Washington is limited" and "housing is a necessary of life." A causative and remedial relation in the circumstances we are unable to see. We do see that the effect and evil of the statute is that it withdraws the dominion of property from its owner, superseding the contracts that he confidently made under the law then existing, and subjecting them to the fiat of a subsequent law.

If such exercise of government be legal, what exercise of government is illegal? Houses are a necessary of life, but other things are as necessary. May they, too, be taken from the direction of their owners and disposed of by the government? Who supplies them, and upon what inducement? And, when supplied, may those who get them under promise of return, and who had no hand or expense in their supply, dictate the terms of retention or use, and be bound by no agreement concerning them?

An affirmative answer seems to

be the requirement of the decision. If the public interest may be concerned, as in the statute under review, with the control of any form of property, it can be concerned with the control of all forms of property. And, certainly, in the first instance, the necessity of expediency of control must be a matter of legislative judgment. But, however, not to go beyond the case, if the public interest can extend a lease, it can compel a lease; the difference is only in degree and boldness. In one as much as in the other, there is a violation of the positive and absolute right of the owner of the property. And it would seem, necessarily, if either can be done, unoccupied houses or unoccupied space in occupied houses can be appropriated. The efficacy of either to afford homes for the homeless cannot be disputed. In response to an inquiry from the bench, counsel replied that the experiment had been tried or was being tried in a European country. It is to be remembered that the legality of power must be estimated not by what it will do, but by what it can do.

The prospect expands and dismays when we pass outside of considerations applicable to the local and narrow conditions in the District of Columbia. It is the assertion of the statute that the Federal government is embarrassed in the transaction of its business; but, as we have said, a New York statute is submitted to us, and counsel have referred to the legislation of six other states. And there is intimation in the opinion that Congress, in its enactment, has imitated the laws of other countries. The facts are significant and suggest the inquiry, Have conditions come not only to the District of Columbia, embarrassing the Federal government, but to the world as well, that are not amenable to passing palliatives, and that socialism, or some form of socialism, is the only permanent corrective or accommodation? It is indeed strange that this

court, in effect, is called upon to make way for it, and, through an instrument of a constitution based on personal rights, and the purposeful encouragement of individual incentive and energy, to declare legal a power exerted for their destruction. The inquiry occurs, Have we come to the realization of the observation that "war, unless it be fought for liberty, is the most deadly enemy of liberty?"

But, passing that, and returning to the Constitution, it will be observed, as we have said, that its words are a restraint upon power, intended as such in deliberate persuasion of its wisdom as against unrestrained freedom.

And it is significant that it is not restraint upon a "governing one," but restraint upon the people themselves; and in the persuasion, to use the words of one of the supporters of the Constitution, "the natural order of things is for liberty to yield and for government to gain ground." Sinister interests, its conception is, may move government to exercise; one class may become dominant over another; and against the tyranny and injustice that will result, the framers of the Constitution believed precautions were as necessary as against any other abuse of power. And so careful is it of liberty that it protects in many provisions the individual against the magistrate.

Has it suddenly become weak—become not a restraint upon evil government, but an impediment to good government? Has it become an anachronism, and is it to become "an archæological relic," no longer to be an efficient factor in affairs, but something only to engage and entertain the studies of antiquarians? Is not this to be dreaded—indeed, will it not be the inevitable consequence of the decision just rendered? Let us see what it justifies, and upon what principle. But first and preliminary to that inquiry are the provisions it strikes down. We have given them, but we repeat them. By article 1 of § 10 it is

provided: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ." By the 5th Amendment no person can be deprived of property without due process of law. The prohibitions need no strengthening comment. They are as absolute as axioms. A contract existing, its obligation is impregnable. The elements that make a contract or its obligation we need not consider. The present case is concerned with a lease, and that a lease is a contract we do not pause to demonstrate either to lawyers or to laymen; nor that the rights of the lessor are the obligations of the lessee, and, of course, the rights of the lessee are the obligations of the lessor,—the mutuality constituting the consideration of the contract,—the inducement to it and its value, no less to the lessee than to the lessor.

What were the rights and obligations in the present case, and what was the right of Hirsh to control his property? Hirsh is the purchaser of a lot in the city of Washington; Block is the lessee of the lot, and he agreed that, at the end of his tenancy, he would surrender the premises, and this and "each and every one of the covenants, conditions, and agreements," he promised "to keep and perform." Hirsh, at the end of the term, demanded possession. It was refused, and against this suit to recover possession there was pleaded the statute. The defense prevailed in the trial court; the statute was declared unconstitutional in the court of appeals. It is sustained by the decision just announced.

It is manifest, therefore, that by the statute the government interposes with its power to annul the covenants of a contract between two of its citizens, and to transfer the uses of the property of one and vest them in the other. The interposition of a commission is but a detail in the power exerted,—not extenuating it in any legal sense. Indeed, intensifies its illegality,—takes away

the right to a jury trial from any dispute of fact.

If such power exist, what is its limit and what its consequences? And by consequences we do not mean who shall have a cellar in the city of Washington, or who shall have an apartment in a million-dollar apartment house in the city of New York, but the broader consequences of unrestrained power and its exertion against property, having example in the present case, and likely to be applied in other cases. This is of grave concern. The security of property, next to personal security against the exertions of government, is of the essence of liberty. They are joined in protection, as we have shown, and both the national government (5th Amendment) and the states (14th Amendment) are forbidden to deprive any person "of life, liberty, or property, without due process of law;" and the emphasis of the 5th Amendment is that private property cannot be "taken for public use without just compensation." And in recognition of the purpose to protect property and the rights of its owner from governmental aggression, the 3d Amendment provides: "No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

There can be no conception of property aside from its control and use, and upon its use depends its value. *Branson v. Bush*, 251 U. S. 182, 187, 64 L. ed. 215, 219, 40 Sup. Ct. Rep. 113. Protection to it has been regarded as a vital principle of republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. Our social system rests largely upon its sanctity, "and that state or community which seeks to invade it will soon discover the error in the disaster which fol-

lows." *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 18, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148.

There is not a contention made in this case that this court has not pronounced untenable. An emergency is asserted as a justification of the statute and the impairment of the contract of the lease. A like contention was rejected in *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281. It is there declared (page 120) "that the principles of constitutional liberty would be in peril unless established by unrepealable law." And it was said that "the Constitution of the United States is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

But what is the power that is put in opposition to the Constitution and supersedes its prohibitions? It is not clear from the opinion what it is. The opinion gives to the police power a certain force, but its range is not defined. Circumstances, it is said, "have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law," though at other times and places such letting may be only of private concern; and the deduction is justified, it is said, by analogy to the business of insurance, the business of irrigation, and the business of mining. *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, 19 L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612; *Clark v. Nash*, 198 U. S. 261, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. It is difficult to handle the cases or the assertion of what they decide. An opposing denial is only available.

To us the difference is palpable between life insurance and the regulation of its rates by the state, and the exemption of a lessee from the covenants of his lease with the approval of the state, in defiance of the rights of the lessor. And as palpably different is the use of water for mining or irrigation or manufacturing, and eminent domain exercised for the procurement of its means, with the requirement of compensation, and as palpably different is eminent domain, with attendant compensation, exercised for railways and other means for the working of mines.

And there is less analogy in laws regulating the height of buildings in business sections of a city; or the requirement of boundary pillars in coal mines to safeguard the employees of one in case the other should be abandoned and allowed to fill with water; or the regulation of billboards in cities on account of their menace to morality, health, and decency (in what way it is not necessary to specify); or the keeping clear of watersheds to protect the water reservoirs of cities from damage or devastating fires or the peril of them, from accumulation of "tree tops, boughs, and lops" left upon the ground.¹

The cases and their incidents hardly need explanatory comment. They justify the prohibition of the use of property to the injury of others,—a prohibition that is expressed in one of the maxims of our jurisprudence. Such use of property is, of course, within the regulating power of government. It is one of the objects of government to prevent harm by one person to another by any conduct.

The police power has some pretense for its invocation. Regarding

¹ *Welch v. Swasey*, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359; *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269, 63 L. ed. 599, 39 Sup. Ct. Rep. 274; *Perley v. North Carolina*, 249 U. S. 510, 63 L. ed. 735, 39 Sup. Ct. Rep. 357.

alone the words of its definition, it embraces power over everything under the sun, and the line that separates its legal from its illegal operation cannot be easily drawn. But it must be drawn. To borrow the illustration of another, the line that separates day from night cannot be easily discerned or traced, yet the light of day and the darkness of night are very distinct things. And as distinct in our judgment is the puissance of the Constitution over all other ordinances of power, and as distinct are the cited cases from this case; and if they can bear the extent put upon them, what extent can be put upon the case at bar or upon the limit of the principle it declares? It is based upon the inconsistency of the public interest and its power. As we understand, the assertion is, that legislation can regard a private transaction as a matter of public interest. It is not possible to express the possession or exercise of more unbounded or irresponsible power. It is true, in mitigation of this declaration and of the alarm that it causes, it is said that the regard is not necessarily conclusive on the courts, but "is entitled, at least, to great respect." This is intangible to measurement or brief answer. But we need not beat about in generalities, or grope in their indetermination in subtle search for a test of a legal judgment upon the conditions, or the power exerted for their relief. "The Rent Law" is brought to particularity by the condemnation of the Constitution of the United States. Call it what you will,—an exertion of police or other power,—nothing can absolve it from illegality. Limiting its duration to two years certainly cannot. It is what it does that is of concern. Besides, it is not sustained as the expedient of an occasion, the insistence of an emergency, but as a power in government over property, based on the decisions of this court, whose extent and efficacy the opinion takes pains to set forth and illustrate. And as a power in government, if it exist at all, it is

perennial and universal, and can give what duration it pleases to its exercise, whether for two years or for more than two years. If it can be made to endure for two years, it can be made to endure for more. There is no other power that can pronounce the limit of its duration against the time expressed in it, and its justification practically marks the doom of the judicial judgment on legislative action.

The wonder comes to us, what will the country do with its new freedom? Contracts and the obligation of contracts are the basis of life and of all its business, and the Constitution, fortifying the conventions of honor, is their conserving power. Who can foretell the consequences of its destruction, or even question of it? The case is concerned with the results of the German war, and we are reminded thereby that there were contracts made by the national government in the necessity or solicitude of the conduct of the war,—contracts into which patriotism eagerly entered, but, it may be, that interest was enticed by the promise of exemption from a burden of government. Burdens of government are of the highest public interest, and their discharge is of imperious necessity. Therefore, the provocation or temptation may come to those who feel them that the property of others (estimated in the millions, perhaps) should not have asylum from a share of the load. And what answer can be made to such demand within the principle of the case now decided? Their promises are as much within the principle as the lease of Hirsh is; for necessarily, if one contract can be disregarded in the public interest, every contract can be; patriotic honor may be involved in one more than in another, but degrees of honor may not be attended to,—the public interest regarded as paramount. At any rate, does not the decision just delivered cause a dread of such result, and take away assurance of security and value from the contracts and their

evidences? And it is well to remember that other exigencies may come to the government, making necessary other appeals. The government can only offer the inducement and security of its bonds, but who will take them if doubt can be thrown upon the integrity of their promises under the conception of a public interest that is superior to the Constitution of the United States?

It comes to our recollection also that some states of the Union, in consummation of what is conceived to be a present necessity, have also entered into contracts of like kind. They, too, may come under a subsequent declaration of an imperious public interest, and their promises be made subject to it.

The prophecy is not unjustified. This court has at times been forced

to declare particular state laws void for their attempted impairment of the obligation of contracts. To accusations hereafter of such an effect of a state law this decision will be opposed, and the conception of the public interest.

Indeed, we ask, may not the state have other interests besides the nullification of contracts, and may its police power be exerted for their consummation? If not, why not? Under the decision just announced, if one provision of the Constitution may be subordinated to that power, may not other provisions be? At any rate, the case commits the country to controversies, and their decision, whether for the supremacy of the Constitution or the supremacy of the power of the states, will depend upon the uncertainty of judicial judgment.

ANNOTATION.

Constitutionality of rent laws.

This note is a continuation of the one upon the same subject appended to a decision on first appeal, by the District of Columbia court of appeals in *Hirsh v. Block* in 11 A.L.R. 1238, the decision of that court to the same effect on a second appeal being reversed by the United States Supreme Court by the decision in *BLOCK v. HIRSH* (reported herewith) ante, 165. The decision as a precedent seems to be limited somewhat by the fact that the act in question was temporary emergency legislation, and by its terms was to remain in force only two years unless sooner repealed, and by the statement in the majority opinion that "the regulation is put and justified only as a temporary measure. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." It will be noted that there was, however, a division of opinion in this case, the Chief Justice and three associate justices dissenting upon the ground that the act clearly violated the constitutional provisions against the taking of property

without due process of law, the taking of private property for public use without just compensation, and the impairing of the obligation of contracts, and that a temporary emergency cannot justify their violation.

The constitutionality of the provisions of the "Ball Rent Law," making the determination of the rent commission final and conclusive unless an appeal therefrom was taken within a specified time, was upheld in *Killgore v. Zinkham* (1921) — App. D. C. —, 274 Fed. 140, as against the contentions that the parties were deprived thereby of a trial by jury on the right to possession of the land, and that the constitutional guaranty of the 5th Amendment against deprivation of property without due process was violated.

The recent New York Rent Laws were upheld by the highest court of the state in *PEOPLE EX REL. DURHAM REALTY CORP. v. LA FETRA* (reported herewith) ante, 152. In this case there is a vigorous dissenting opinion, in harmony with the dissenting opinion of the preceding case.

The New York court of appeals, in *Clemilt Realty Co. v. Wood* (1921) 230 N. Y. 646, 130 N. E. 928, upon the authority of the LA FETRA CASE, upheld chapter 944 of the Laws of 1920, making the unreasonableness of the rate a defense to an action for rent, and answered in the negative the following certified questions: "Does chapter 944 of the Laws of 1920 deprive the plaintiff of his liberty or property without due process of law, in violation of article 1, § 6, of the New York Constitution, and § 1 of the 14th Amendment of the Constitution of the United States? . . . Does chapter 944 of the Laws of 1920 constitute the taking of private property belonging to the plaintiff for private use without just compensation, in violation of article 1, § 6, of the New York Constitution? . . . Does chapter 944 of the Laws of 1920 deny to the plaintiff the equal protection of the law, in violation of the 14th Amendment of the Constitution of the United States? . . . Does chapter 944 of the Laws of 1920 impair the obligation of the contract between the plaintiff and the defendant, in violation of article 1, § 10, of the Constitution of the United States?"

The same holding, upon the same authority, and the same answer to the same questions, were made by the same court, in respect to chapter 947 of the Laws of 1920, suspending temporarily the remedy of ejectment to recover real property from tenants, in *810 West End Ave. v. Stern* (1921) 230 N. Y. 652, 130 N. E. 931.

The cases of *People ex rel. Rayland Realty Co. v. Fagan* (1920) 194 App. Div. 185, 186 N. Y. Supp. 23, and *People ex rel. H. D. H. Realty Corp. v. Murphy* (1920) 194 App. Div. 530, 186 N. Y. Supp. 38, set out in the earlier note, which upheld chapter 942 of the New York Laws of 1920, which suspends temporarily the remedy of summary proceedings, have been, since the publication of such note, affirmed, without opinion, upon the authority of *PEOPLE EX REL. DURHAM REALTY CORP. v. LA FETRA* (reported herewith) ante, 152, in (1921) — N. Y. —, 130 N. E. 931, and in (1921) — N. Y.

—, 130 N. E. 932, respectively. And the opinion of the latter case in the appellate division was followed in *People ex rel. Ballin v. O'Connell* (1920) 194 App. Div. 540, 186 N. Y. Supp. 46, which was likewise, upon the authority of the LA FETRA CASE, affirmed, without opinion, in (1921) — N. Y. —, 130 N. E. 932.

Prior to the decision of the court of appeals in the LE FETRA CASE, the New York Rent Laws were upheld in an elaborate opinion at special term in *Ullmann Realty Co. v. Tamur* (1920) 113 Misc. 538, 185 N. Y. Supp. 612.

Marcus Brown Holding Co. v. Feldman (1920) 269 Fed. 306, cited at page 1258 in the earlier note as upholding generally the New York Rent Laws as a valid exercise of the police power, has since been affirmed by the Supreme Court of the United States (U. S. Adv. Ops. 1920-1921, p. 539, — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 465), upon the principles laid down in *BLOCK v. HIRSH* (reported herewith) ante, 165.

It is specifically held by the Supreme Court in the *Feldman* Case that the suspension until November 1, 1922, in cities having a population of 1,000,000 or more; and in cities in a county adjoining such city, of the right to recover possession of real property occupied for dwelling purposes, except where the person holding over is objectionable, or where the landlord seeks to occupy the premises as a dwelling for himself and his family, or intends to demolish the building and construct a new one (providing the tenant or occupant is ready, willing, and able to pay a reasonable rent), as was done by two of such laws, viz., Laws 1920, chaps. 942 and 947, is not repugnant to the contract or due process of law clauses of the Federal Constitution, even as applied to a case where, before the passage of such statute, another lease of the premises had been made, to go into effect on the day following that when the existing lease by its terms expired, and when the lessees had contracted to surrender the premises. It was further held by the Supreme Court in this case that there is no unconstitutional discrimination in respect of the

cities affected or the character of the buildings, in Laws 1920, chaps. 942 and 944, which suspended until November 1, 1922, the right to recover possession of real property occupied for dwelling purposes, although such laws are operative only in a city having a population of 1,000,000 or more, and in cities in a county adjoining such a city, and do not extend to buildings occupied for business purposes, hotel property, or buildings in course of erection. And it was still further held by such court in this case that an involuntary servitude forbidden by U. S. Const., 13th Amend., is not created by the provisions of N. Y. Laws 1920, chaps. 131 and 951, which make it a misdemeanor for a lessor, or any agent or janitor, intentionally to fail to furnish such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease, and necessary to the proper and customary use of the building.

This case was submitted with *BLOCK v. HIRSH* (reported herewith) ante, 165, and the same justices who disagreed with the holding in that case dissented in this, and filed a dissenting opinion to the following effect: "Like that case (*BLOCK v. HIRSH*), it involves the right of a lessee of property—in this case an apartment in an apartment house in New York city—to retain possession of it under a law of New York, after the expiration of the lease. This case is an emphasis of the other, and the argument in that applies to this. It may be more directly applicable, for in this case the police power of the state is the especial invocation, and the court's judgment is a concession to it. And, as we understand the opinion, in broader and less hesitating declaration of the extent and potency of that power. 'More emphasis,' it is said, 'is laid upon the impairment of the obligation of the contract' than in the *HIRSH* CASE. In measurement of this as a reliance, it is said: 'But contracts are

made subject to this exercise of the power of the state *when otherwise justified, as we have held this to be.*' The italics are ours, and we estimate them by the cases that are cited in their explanation and support. We are not disposed to a review of the cases. We leave them in reference, as the opinion does, with the comment that our deduction from them is not that of the opinion. There is not a line in any of them that declares that the explicit and definite covenants of private individuals engaged in a private and personal matter are subject to impairment by a state law, and we submit, as we argued in the *HIRSH* CASE, that if the state have such power—if its power is superior to article 1, § 10, and the 14th Amendment—it is superior to every other limitation upon every power expressed in the Constitution of the United States, commits rights of property to a state's unrestrained conceptions of its interests, and any question of them—remedy against them—is left in such obscurity as to be a denial of both. There is a concession of limitation, but no definition of it; and the reasoning of the opinion, as we understand it, and its implications and its incident, establish practically unlimited power. We are not disposed to further enlarge upon the case, or attempt to reconcile the explicit declaration of the Constitution against the power of the state to impair the obligations of a contract, or, under any pretense, to disregard the declaration. It is safer, saner, and more consonant with constitutional pre-eminence and its purposes, to regard the declaration of the Constitution as paramount, and not to weaken it by refined dialectics, or bend it to some impulse or emergency 'because of some accident of immediate overwhelming interest which appeals to the feelings, and distorts judgment.' *Northern Securities Co. v. United States* (1904) 193 U. S. 197, 400, 48 L. ed. 679, 726, 24 Sup. Ct. Rep. 436." G. V. I.

DEM. SPIROPLOS, Appt.,

v.

SCANDINAVIAN AMERICAN BANK OF TACOMA et al., Respts.

KONSTANTINOS N. DIMOS, Appt.,

v.

SAME et al., Respts.

Washington Supreme Court (Dept. No. 2) — August 4, 1921.

(— Wash. —, 199 Pac. 997.)

Bank — insolvent — money paid for draft as preferred claim.

1. No preferred claim can be established for money paid to a bank for a foreign draft and placed in its general fund, if the bank is taken over by a receiver before the draft is paid.

[See note on this question beginning on page 190.]

— special deposit — what constitutes.

2. To establish a special deposit, in case of an insolvent bank, of money paid to the bank for a foreign draft, it is necessary to show that the money went into the receiver's hands and swelled the net assets of the bank.

[See 3 R. C. L. 557.]

— obligation on draft equal to deposit.

3. The obligation incurred by a bank upon receiving money paid for a foreign draft equals the money received,

so that the money does not create a special deposit if the bank goes into the hands of a receiver before the draft is accepted or paid.

— fraud in accepting money for draft when insolvent.

4. Acceptance by a bank of money for a draft when it is insolvent does not constitute a fraud if it had funds on deposit to meet the draft when it was drawn.

[See 3 R. C. L. 557.]

APPEAL by plaintiffs from a judgment of the Superior Court for Pierce County (Card, J.) dismissing consolidated actions brought to establish and recover as preferred claims the amounts respectively paid by them for drafts issued by the defendant bank. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Govnor Teats, Leo Teats, and Ralph Teats, for appellants:

The money which the bank recovered from plaintiffs constituted a special deposit.

Carlson v. Kies, 75 Wash. 171, 47 L.R.A. (N.S.) 317, 134 Pac. 808; Kies v. Wilkinson, 101 Wash. 340, 172 Pac. 351; Hitt Fireworks Co. v. Scandinavian-American Bank, — Wash. —, 195 Pac. 13, 196 Pac. 629; Anderson v. Pacific Bank, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063; Montagu v. Pacific Bank, 81 Fed. 603; Titlow v. Sundquist, 148 C. C. A. 379, 234 Fed. 613; Covey v. Cannon, 104 Ark. 550, 149 S. W. 515; Shopert v. Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 514; Fogg v. Tyler, 109 Me. 109, 39 L.R.A. (N.S.) 847, 82 Atl. 1008, Ann. Cas. 1913E, 41; State v. Grills,

35 R. I. 70, 85 Atl. 281; Sawyers v. Conner, 114 Miss. 363, L.R.A. 1918A, 61, 75 So. 131, Ann. Cas. 1918A, 388; 3 R. C. L. § 145.

Receiving money by a bank when insolvent is a fraud, and therefore a trust.

Widman v. Kellogg, 22 N. D. 396, 39 L.R.A. (N.S.) 563, 133 N. W. 1020; 7 R. C. L. ¶ 484, p. 730; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390; Van Weel v. Winston, 115 U. S. 228, 29 L. ed. 384, 6 Sup. Ct. Rep. 22; Ambler v. Choteau, 107 U. S. 586, 27 L. ed. 322, 1 Sup. Ct. Rep. 556; Re Silver, 208 Fed. 799; Philadelphia v. Aldrich, 98 Fed. 487; Beal v. Somerville, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; Wasson v. Hawkins, 59 Fed. 233; Massey v. Fisher, 62 Fed.

958; *Richardson v. New Orleans De-benture Redemption Co.* 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780; *Orme v. Baker*, 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439; *Blake v. State Sav. Bank*, 12 Wash. 619, 41 Pac. 909.

The bank received plaintiffs' money without consideration.

Widman v. Kellogg, 22 N. D. 396, 39 L.R.A.(N.S.) 563, 133 N. W. 1021; *Whitcomb v. Carpenter*, 134 Iowa, 227, 10 L.R.A.(N.S.) 928, 111 N. W. 825; *Peak v. Elliott*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; *Dolph v. Cross*, 153 Iowa, 289, 133 N. W. 169; *People v. City Bank*, 96 N. Y. 32; *Massey v. Fisher*, 62 Fed. 958; *Chase & B. Co. v. Olmsted*, 93 Wash. 306, 160 Pac. 952; *Cutler v. American Exch. Nat. Bank*, 113 N. Y. 593, 4 L.R.A. 328, 21 N. E. 710; *Montagu v. Pacific Bank*, 81 Fed. 602; *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 289; *Nurse v. Satterlee*, 81 Iowa, 491, 46 N. W. 1102.

Messrs. Guy E. Kelly, Thomas MacMahon, and F. D. Oakley, for respondents:

Upon the insolvency of the drawer of a draft which is not paid because of such insolvency, the payee or holder of the draft is not entitled to a preference over the other creditors, even though the fund out of which the draft was to have been paid has come into the hands of the receiver.

Grammel v. Carmer, 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418; *People v. Merchants & M. Bank*, 78 N. Y. 269, 34 Am. Rep. 532; *Clark v. Toronto Bank*, 72 Kan. 1, 2 L.R.A.(N.S.) 83, 115 Am. St. Rep. 173, 82 Pac. 582; *Jewett v. Yardley*, 81 Fed. 920; *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407.

There was no deposit in this case at all, either general or special.

Bowman v. First Nat. Bank, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211; *Hallam v. Tillinghast*, 19 Wash. 20, 52 Pac. 329; *Jewett v. Yardley*, 81 Fed. 920.

The question of insolvency was immaterial.

Blake v. State Sav. Bank, 12 Wash. 619, 41 Pac. 909; 1 *Michie*, Banking, p. 402; *Stapelton v. Odell*, 21 Misc. 94, 47 N. Y. Supp. 13; *Rochester Printing Co. v. Loomis*, 45 Hun, 93; *Williams v. Van Norden Trust Co.* 104 App. Div. 251, 93 N. Y. Supp. 821; *Orme v. Baker*, 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33

L. ed. 683, 10 Sup. Ct. Rep. 390; *Terhune v. Bank of Bergen County*, 34 N. J. Eq. 367; *Williams v. Cox*, 97 Tenn. 555, 37 S. W. 282; *Showalter v. Cox*, 97 Tenn. 547, 37 S. W. 286.

Assuming that either the transaction itself created the relationship of trustee and cestui que trust, or that a trust ex maleficio arose because the bank was insolvent when the transaction took place, the facts absolutely preclude a recovery.

1 *Bolles*, Banking, 494; *Lanternman v. Travous*, 174 Ill. 459, 51 N. E. 805; *Re Seven Corners Bank*, 58 Minn. 5, 59 N. W. 633; *St. Paul v. Seymour*, 71 Minn. 303, 74 N. W. 136; *Perth Amb-boy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Wilson v. Coburn*, 35 Neb. 530, 53 N. W. 466; *Rugger v. Hammond*, 95 Wash. 85, 163 Pac. 408; *Heidelberg v. Campbell*, 95 Wash. 661, 164 Pac. 247; *Zimmerli v. Northern Bank & T. Co.* 111 Wash. 624, — A.L.R. —, 191 Pac. 788; *Empire State Surety Co. v. Carroll County*, 114 C. C. A. 435, 194 Fed. 593; *Beard v. Independent Dist.* 31 C. C. A. 562, 60 U. S. App. 372, 88 Fed. 375.

Main, J., delivered the opinion of the court:

These two cases in the superior court were consolidated for the purpose of trial, and are presented here upon the record there made. The plaintiffs, by their actions, sought to establish and recover as preferred claims the sums which they had respectively paid for drafts issued by the bank, which a few days later was closed by the bank commissioner and placed in the hands of a receiver. At the conclusion of the trial the court dismissed the actions, and the plaintiffs appealed.

The case of *Dem. Spiroplos* will be considered first, and the facts of that case essentially to be stated are these: On the 11th day of January, 1921, *Spiroplos*, a Greek resident of Tacoma, went to various banks in that city for the purpose of ascertaining where he could get the best rate of exchange for the purchase of a \$10,000 draft on the National Bank of Greece. On the following day he purchased the draft from the Scandinavian American Bank of that city, and in payment thereof indorsed to the bank

a cashier's check drawn by another bank in the same city. The Scandinavian American Bank in the customary form drew a draft on the National Bank of Greece at Athens for 132,460 drachmas (Greek money). At the same time the Scandinavian American Bank drew a draft in favor of the Guaranty Trust Company of New York upon the National Park Bank of the same city to meet the draft which it had drawn upon the Greek bank. The National Park Bank was the Scandinavian Bank's New York correspondent, but that bank was not a correspondent of the Bank of Greece. The Guaranty Trust Company was such a correspondent. The money represented by the cashier's check which the Scandinavian Bank received for the draft on Greece went into its general funds. On January 15, 1921, the bank commissioner, finding that the Scandinavian American Bank was insolvent, took charge of its affairs for the purpose of liquidation. The National Park Bank of New York was notified of this fact, and it declined to pay the draft drawn upon it.

Had the bank examiner not taken over the affairs of the Scandinavian Bank, Spiroplos would have received credit in the Greek bank for the number of drachmas represented by the draft, because the draft drawn in favor of the Guaranty Trust Company upon the National Park Bank would have been paid in due course, there being funds in that bank sufficient to meet it. On January 17, 1921, the National Park Bank charged off the deposit which the Scandinavian Bank had with it against certain liabilities. Between the time when the draft was purchased and the time when the bank examiner took over the affairs of the Scandinavian Bank there was in the vaults of that bank more than sufficient money to cover it. Spiroplos presented a claim to the receiver of the Scandinavian Bank, seeking to have a preferred claim in the money that he had paid for the draft. The receiver disallowed the claim as a

preferred claim, and allowed it as a general claim. The present action was brought to establish and recover the money paid over to the bank, as a preferred claim.

The principal question in the case is whether, when Spiroplos purchased the draft and paid for it with a cashier's check, which we will treat as equivalent to cash, the transaction was one whereby the money going into the Scandinavian Bank became a special deposit. If it were a special deposit, the right to recover would exist. Where it is thought to establish that the deposit was special, the theory of the action necessarily is the same as though the action were to recover property, and the fact that it is sought to recover property in a changed or substituted form does not change the ground of recovery.

In order to establish a special deposit, upon which the action is predicated, it was necessary for Spiroplos to show that the money which he paid into the bank Banka—special deposit—what constitutes. at least came into the hands of a receiver in a substituted form, and that it swelled the net assets thereof. *Rugger v. Hammond*, 95 Wash. 85, 163 Pac. 408; *Zimmerli v. Northern Bank & Trust Co.* 111 Wash. 624, — A.L.R. —, 191 Pac. 788. It may be assumed that Spiroplos's money passed into the hands of a receiver in a substituted form, but the more serious question is whether it increased the net assets of the bank.

The receiving of money on deposit by a bank does not ordinarily swell its assets, because it creates a debt of the bank to the depositor equal to the amount of the money so received. In the *Rugger Case* it was said, speaking of the money there involved: "True, this money in a sense went into the assets of the trust company, but so does all money which is deposited in a bank, since title thereto passes to the bank. It is not enough, however, for our present purpose that the money physically became a part of the trust company's assets; it must have

actually swelled the net assets of the trust company and passed in some form to the hands of the receiver. Manifestly the receiving of money on deposit by a bank does not ordinarily swell its assets, for it creates a debt of the bank equal to the amount so received."

The question, then, arises whether, when the bank received Spiroplos's money and issued the draft, it created an obligation on the bank

equal to the amount of money so received. If it did, the rule of the cases

just cited would control. The bank, by drawing and delivering the draft, thereby agreed that if it be duly presented it would be accepted and paid by the drawee, and in case of default, if notified of the dishonor, would pay it. The drawee entered into no contract relations until the draft had been accepted by it. Up to that time the payee looked exclusively to the drawer for his protection. In *Grammel v. Carmer*, 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418, in the opinion written by the late Judge Cooley, it was said: "The drawer, by drawing and delivering the paper to the payee, agrees that if duly presented it shall be accepted and paid by the drawee, and that in default thereof he will, if duly notified of the dishonor, pay it himself. The drawee enters into no contract relations with the payee in respect to it until it is presented to him, nor then, unless he does so by acceptance. If he accepts, he undertakes to pay according to the terms of the bill or of the acceptance; but up to the time of that act the payee looks exclusively to the drawer for his protection."

In *Clark v. Toronto Bank*, 72 Kan. 1, 2 L.R.A.(N.S.) 83, 115 Am. St. Rep. 173, 82 Pac. 582, a resident of the state of Iowa sold some cattle in Woodson county, Kansas, through an agent there, who accepted in payment a check drawn on the Bank of Toronto, in that county. The agent presented the check at the bank, and upon his request was given in pay-

ment a draft payable to the order of his principal drawn by the Toronto Bank upon a Kansas City bank against a fund on deposit there to its credit. Shortly afterwards the Toronto Bank was closed by the bank commissioner, and in due course of time a receiver was appointed. A draft was presented for payment to the Kansas City bank, which, having notice of the failure of the issuing bank, refused, for that reason, to pay it. The holder of the draft brought an action against the receiver, and sought to recover from him the full amount of the draft upon the theory that he was entitled to a preference. It was said: "In the petition an attempt was made to give the transaction described the color of a special deposit, or a contract for the transferring of a fund in specie from Toronto to the plaintiff's home in Iowa. As clearly appears from the statement made, however, the facts will not bear that construction. The transaction was the ordinary one of the purchase of a draft for convenience in the remitting of money, and the giving to it of a different name cannot alter its essential character."

In *Jewett v. Yardley* (C. C.) 81 Fed. 920, it was held that the relation between the bank and the holder of drafts issued by it was that of debtor and creditor, and that the holder of the draft upon the bank that had become insolvent was not entitled to a preference. It follows, therefore, that the relation between Spiroplos and the Scandinavian Bank after the transaction of the purchase of the drafts was that of debtor and creditor, and therefore the deposit was not special, because the net assets of the

—obligation on draft equal to deposit.

bank were not augmented by the transaction. The case of *Carlson v. Kies*, 75 Wash. 171, 47 L.R.A.(N.S.) 317, 134 Pac. 808, is distinguishable. There the money was placed in the bank to be held until the return of proper vouchers from heirs of an estate, who lived in Sweden, and a receipt issued for the money. It

was held that it was the obvious intent of both parties to the transaction to make a special, and not a general, deposit.

In the present case the facts will not bear the inference that it was the intention of the parties to make the deposit special. In the briefs and in the argument the transaction was referred to as a purchase of Greek money; but it was an ordinary transaction, by which Spiroplos desired to have money placed to his credit in Greece, and the fact that the appellant may have thought he was purchasing Greek money does not change its essential nature. Upon the trial the appellant offered to prove that the bank was insolvent on the day the deposit was received, and for this reason a fraud was worked upon him. Error is assigned upon this ruling, but it does not seem to be specially relied upon, though argued to some extent, both orally and in the briefs. There was

—fraud in accepting money for draft when insolvent.

no error in this ruling. Of the cases cited by the appellant the one most nearly in point is that of *Widman v. Kellogg*, 22 N. D. 396, 39 L.R.A. (N.S.) 563, 133 N. W. 1020, but that case is different in its facts.

There the bank had, at the time it drew the draft, no money on deposit with the drawee; and it was there said that, under the facts of that case, the cash assets of the insolvent bank were enhanced by the receipt of the money. As above pointed out, under the doctrine of this court as stated in the case of *Rugger v. Hammond*, supra, the net cash assets of the Scandinavian Bank were not enhanced.

The case of *Dimos* is in all essential particulars the same as that of *Spiroplos*, and it is not necessary to discuss this case in detail, as the result in both cases must be the same.

The judgment in each case will be affirmed.

Parker, Ch. J., and Mackintosh, Mitchell, and Tolman, JJ., concur.

Petition for rehearing denied.

NOTE.

The question involved in the reported case (*SPIROPLOS v. SCANDINAVIAN AMERICAN BANK*, ante, 181), as to trust or preference in respect of money used to purchase exchange, is discussed in the note, to *LEGNITE v. MECHANICS & M. NAT. BANK*, post, 190.

ANGELO LEGNITI, Respt.,
v.

MECHANICS & METALS NATIONAL BANK OF NEW YORK, Impleaded, etc., Appt.

New York Court of Appeals — March 1, 1921.

(230 N. Y. 415, 130 N. E. 597.)

Bank — telegraph transmission of credit — trust.

1. The payment of money to a bank for transmission to a foreign country by telegraphic draft on a foreign credit is a mere purchase and sale, creating no trust relation between buyer and seller.

[See note on this question beginning on page 190.]

— sale of foreign exchange — trust.

2. The sale by a bank of a draft on a foreign correspondent creates no trust relationship between it and the purchaser.

— undertaking to transmit money — trust.

3. A bank undertaking to transmit a specified sum of money to a person abroad is the agent of the sender, and

until the money is sent the bank holds it as agent or trustee for the sender.

— transfer of credit — insolvency — right to follow fund.

4. One who, after bargaining for transmission of money to a foreign country by cable, accepts and pays a bill reciting, Bought cable transfer to

pay the money to a specified bank, advice to be forwarded by cable, thereby merely purchases the credit transfer, and the money paid by him passes to the other person, free from any trust in case the transferrer becomes insolvent without transferring the credit.

APPEAL by the defendant bank from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County in favor of defendants in an action brought to impress a trust upon the proceeds of a check deposited in the defendant bank and to compel payment thereof, with interest. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Mr. Frank M. Patterson, for appellant:

There was no relation of trust or quasi trust or agency between plaintiff and Bolognesi & Company; the purchase price of the cable transfer became their property against which plaintiff received their obligation that the transfer would be made at Naples. The transaction created the relation of debtor and creditor.

Strohmeyer & A. Co. v. Guaranty Trust Co. 172 App. Div. 16, 157 N. Y. Supp. 955; *People ex rel. Zotti v. Flynn*, 135 App. Div. 276, 120 N. Y. Supp. 511; *Taussig v. Carnegie Trust Co.* 213 N. Y. 627, 107 N. E. 1086; *Equitable Trust Co. v. Keene*, 111 Misc. 546, 183 N. Y. Supp. 699; *Oshinsky v. Taylor*, 172 N. Y. Supp. 231.

Even if the purchase price of the cable transfer could be treated as a trust fund belonging to the plaintiff, he has failed to trace and identify the fund in the hands of the bank.

Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; *Re Hicks*, 170 N. Y. 195, 63 N. E. 276; *Cole v. Cole*, 54 App. Div. 37, 66 N. Y. Supp. 314; *Madison Trust Co. v. Carnegie Trust Co.* 167 App. Div. 4, 152 N. Y. Supp. 517, 215 N. Y. 475, 109 N. E. 580; *Lebaudy v. Carnegie Trust Co.* 90 Misc. 490, 154 N. Y. Supp. 900; *Schuyler v. Littlefield*, 232 U. S. 707, 58 L. ed. 806, 34 Sup. Ct. Rep. 466.

The title of the bank to the money in question, arising from the assertion of its lien and right of offset, is superior to the title of the plaintiff, even if the money be treated as a trust fund, fully traced and identified.

Newhall v. Wyatt, 139 N. Y. 452, 36 Am. St. Rep. 712, 34 N. E. 1045; *Dike v. Drexel*, 11 App. Div. 77, 42 N.

Y. Supp. 979, affirmed on opinion below in 155 N. Y. 637, 49 N. E. 1096; *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184, 41 N. E. 403; *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. St. Rep. 511; *Carlisle v. Norris*, 215 N. Y. 400, 109 N. E. 564, Ann. Cas. 1917A, 429; *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316.

Messrs. Ralph S. Rounds, Eugene Congelton, and Adolf A. Berle, Jr., with Messrs. Rounds, Hatch, Dillingham, & Debevoise, amici curiæ, for William Schall & Company:

No express or constructive trust is raised by payment of money for a cable transfer.

Atlantic Communication Co. v. Zimmermann, 182 App. Div. 862, 170 N. Y. Supp. 275; *Strohmeyer & A. Co. v. Guaranty Trust Co.* 172 App. Div. 16, 157 N. Y. Supp. 955; *Equitable Trust Co. v. Keene*, 111 Misc. 544, 183 N. Y. Supp. 699; *Musco v. United Surety Co.* 132 App. Div. 300, 117 N. Y. Supp. 21; *Gelfand v. State Bank*, 172 N. Y. Supp. 99; *People ex rel. Zotti v. Flynn*, 135 App. Div. 276, 120 N. Y. Supp. 511; *Oshinsky v. Taylor*, 172 N. Y. Supp. 231.

The ordinary transaction by which a cable transfer is secured creates a mere executory contract, subject to the ordinary rules applying to such contracts.

Atlantic Communication Co. v. Zimmermann, supra; *Bank of China, Japan and the Straits v. American Trading Co.* [1894] A. C. 266, 63 L. J. P. C. N. S. 92, 6 Reports, 494, 70 L. T. N. S. 849; *Bank of British N. A. v. Cooper*, 137 U. S. 473, 34 L. ed. 759, 11 Sup. Ct. Rep. 160; *Jos. Leete & Sons v. Direction der Disconto Gesellschaft*, 85 L. J. K. B. N. S. 281, [1916] W. N. 13, 114 L. T. N. S. 332, 32 Times L. R. 153;

(230 N. Y. 415, 130 N. E. 597.)

Katcher v. American Exp. Co. — N. J. —, 109 Atl. 741; Husted v. Craig, 36 N. Y. 221; Higgins v. Delaware & L. & W. R. Co. 60 N. Y. 553; Taylor v. Saxe, 134 N. Y. 67, 81 N. E. 258; Graham v. Graham, 134 App. Div. 777, 119 N. Y. Supp. 1013; Browne v. Patterson, 36 App. Div. 167, 55 N. Y. Supp. 404; Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. 428.

If it is preferred to consider cable transfer transactions as sales, they are executory sales even though the full purchase price is paid in advance, since an important act is to be performed as a condition precedent to vesting of title. In any case the purchase price vests absolutely in the banker, subject to rights of the customer upon default in delivery.

Equitable Trust Co. v. Keene, 111 Misc. 544, 183 N. Y. Supp. 679; Bank of China, Japan and the Straits v. American Trading Co. [1894] A. C. 266, 63 L. J. P. C. N. S. 92, 6 Reports, 494, 70 L. T. N. S. 849; Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69; Meader v. Cornell, 58 N. J. L. 375, 33 Atl. 960; Freer v. Denton, 61 N. Y. 492; Flandrow v. Hammond, 148 N. Y. 129, 42 N. E. 511; Chapman v. Brooklyn, 40 N. Y. 372.

Messrs. Murray, Prentice & Aldrich for intervener Equitable Trust Company.

Messrs. Weschler & Kohn for respondent.

Crane, J., delivered the opinion of the court:

It has long been an established custom among banks and financial institutions to sell credit usually represented by draft or check. Thus a bank having a credit with a correspondent in a foreign country will sell its draft or check, drawn upon such correspondent, to a purchaser who desires to make a foreign payment. The draft is not the credit, but represents the credit, or, in other words, it is a notification to the correspondent or foreign representative to pay the money as directed. The draft is a direction to pay. It is not, itself, money or credit. It is simply used as such. The money

Bank-sale of foreign exchange-trust.

paid the bank by the purchaser of the draft becomes the bank's money. The transaction is that of purchase and

sale. No trust relationship is established. Taussig v. Carnegie Trust Co. 213 N. Y. 627, 107 N. E. 1086.

• This practice of selling credit by means of drafts or checks grew up among merchants and bankers with the expansion of trade and the necessities of commerce. With the increase of foreign trade and the development of international relationships, communication by cable and wireless met the insistent demands for haste and despatch. Thus the custom has developed of selling credit to be established by cable or wireless. A purchaser does not receive a draft or check which is to be transmitted by mail, but pays for a credit, which will be given him in the foreign country by an immediate cable or wireless from the seller to his correspondent at the foreign point. The thing sold is the same in the case of the cable or wireless transaction as in the case of the draft or check. It is the credit of the bank or seller. The means of establishing or transmitting the credit is simply an incident of the transaction. In the one case, it is a formal paper drawn up and signed by the seller, directing his foreign correspondent to make payment of the amount and to the person therein stated. In the other case, it is a similar direction transmitted by cable or wireless. Cable transfers, therefore, mean a method of transmitting money by cable wherein the seller engages that he has the balance at the point on which the payment is ordered, and that on receipt of the cable directing the transfer his correspondent at such point will make payment to the beneficiary described in the cable.

—telegraph transmission of credit—trust.
All these transactions are matters of purchase and sale, and create no trust relationships. Strohmeyer & A. Co. v. Guaranty Trust Co. 172 App. Div. 16, 157 N. Y. Supp. 955; Katcher v. American Exp. Co. — N. J. —, 109 Atl. 741; Whitaker, Foreign Exch. § 26, p. 89.

In some of the cases this purchase of a cable transfer is referred to as

a contract. *Bank of British N. A. v. Cooper*, 137 U. S. 473, 34 L. ed. 759, 11 Sup. Ct. Rep. 160; *Bank of China, Japan, and the Straits v. American Trading Co.* [1894] A. C. 266, 63 L. J. P. C. N. S. 92, 6 Reports, 494, 70 L. T. N. S. 849; *Atlantic Communication Co. v. Zimmermann*, 182 App. Div. 862, 170 N. Y. Supp. 275. The terms of the contract are in such a case that the banker agrees to send a cablegram establishing a credit with his foreign correspondent. The contract, it is said, is executory until the credit has been established, and that upon failure to send the message the customer may rescind the contract and sue to get back his money or else sue for breach of contract. Whether the transaction be considered a purchase or an executory contract, we need not now determine. So far as this case is concerned, it is a mere matter of nomenclature. In either case, the money paid by the customer to the banker becomes the latter's property, and does not establish a trust relationship; the banker does not hold the money as agent or trustee until the foreign credit is established.

There is a marked distinction between these transactions which I have just described and a direction to a bank or other person to transmit a certain specific sum of money to a person abroad. In such cases the bank or transmitter is the agent of the person paying the money, and until the money is sent holds it as agent or trustee for the owner. Such were the cases of *Musco v. United Surety Co.* 132 App. Div. 300, 117 N. Y. Supp. 21, and *People ex rel. Zotti v. Flynn*, 135 App. Div. 276, 120 N. Y. Supp. 511. In these latter transactions the intention of the payer is that the money he gives to his agent shall be sent abroad. It is the amount which he gives that is to be transmitted. How it is sent may be immaterial to him. If there be time, currency might be purchased

and sent. If not, it may be transmitted in any form recognized in financial circles. It is not at all necessary that the sender or agent have credit in the place to which the money is to be sent. On the other hand, in the contract for credit it is not a specific sum which is to be sent, but rather a specific credit which is to be purchased. The amount paid varies with the market. The actual thing that is done by the sender in both of these cases may or may not be the same, but the practice of the merchants and banks has recognized a difference; so have the courts. In the case now before us, was the transaction between *Angelo Legniti and A. Bolognesi & Company* a purchase of credit or the direction to transmit, as the plaintiff's agent, a specific sum of money? It is frankly conceded by the attorney for the respondent that if it be the former, the plaintiff has no right of recovery. The facts, therefore, must be briefly stated to determine this question.

In February of 1914 *Alessandro Bolognesi and Aldo Bolognesi* were copartners doing business in the city of New York under the firm name of *A. Bolognesi & Company*. The plaintiff was a banker at 64 Mulberry street in the city of New York, who was in arrears in Naples on account of the failure of one *Cæsari Conti*, and needed to transfer some money to that place at once. He applied to several banking houses in New York to obtain the best rate for the transfer of 18,000 lire to Naples, Italy. On the afternoon of February 10, 1914, he made his arrangements for this purpose with *A. Bolognesi & Company*. He said to their representatives:

"I give you the order to cable this money for me to Italy, on condition that you send the cable immediately, to-night, because, as you know, on account of the failure of *Cæsari Conti*, I am overdrawn. I need this money to reach Naples to-morrow."

A few minutes before 6 o'clock on that day a boy from *Bolognesi & Company* brought to the plaintiff's

—undertaking to
transmit money
—trust.

office a bill, which reads as follows:

"New York, February 10, 1914.

"Mr. Angelo Legniti,

"Bought of A. Bognesi & Co., 52 Wall Street.

"Cable transfer to Italy to pay by cable to Banca Commerciale Italiana, Napoli, advice to be forwarded by cable from New York.

"Lire 18,000 at 5:19 7-8....\$3,462.37

"Cabling 1.24

"Paid ck 3450 (cash 13.61) \$3,463.61

"Bognesi & Co.

"Maselli

"Payments required in cash or certified checks, otherwise order if accepted, will be executed after collection of check.

"It is fully understood and agreed that no liability shall attach to us nor to our correspondent for any loss or damage in consequence of any delay or mistake in transmitting this message or for any other cause beyond our control."

Thereupon the plaintiff delivered to the messenger a certified check for \$3,450 indorsed to A. Bognesi & Company, and \$13.61 in cash. This check was deposited the next day by A. Bognesi & Company in its account in the Mechanics & Metals National Bank of New York, collected and credited to the account of the depositor. The cable credit was never transmitted, as on the 11th day of February A. Bognesi & Company made a general assignment for the benefit of creditors. Later, in March of 1914, a petition in bankruptcy was filed against them, resulting in the election on the 14th day of August, 1915, of the trustees, parties to this litigation. On the 10th day of February, 1914, the firm of A. Bognesi & Company was indebted to the defendant the Mechanics & Metals National Bank of New York, in the sum of \$51,329.90 for moneys advanced, secured by discounts, acceptances, and notes. There was a balance on deposit with the defendant the Mechanics & Metals National Bank of New York, to the credit

of A. Bognesi & Company of \$18,985.05, which was increased by the deposit of the check delivered by the plaintiff to A. Bognesi & Company and \$6,241.65 in addition thereto. This amount was reduced by three checks aggregating \$732.94. As against this balance due to its depositor, the defendant bank claims the right to offset under the Bankruptcy Law the indebtedness of A. Bognesi & Company as above stated.

This action has been brought by Angelo Legniti upon the theory that A. Bognesi & Company became his agents for the sending of 18,000 lire to Naples, Italy; and that as the money was not sent, he may recover it from the bank, into whose possession it can be traced. The bank, he claims, holds it, charged with a trust to pay it to him; it is his money, he says, as he never lost title to it. We do not think there is evidence here of any trust.

It was stated by Alessandro Bognesi in his examination as follows:

Q. As I understand it, you sold for a given number of American dollars a certain number of lire to be delivered in Italy to somebody else?

A. To be transferred from my account.

Q. That was the transaction in this particular matter?

A. That was the regular transaction.

Q. What is the difference between that and the sale of a draft for so many lire credit in Italy?

A. Only that the draft is advised by mail and this is advised by cable.

It will be noted that the bill presented to the plaintiff late in the afternoon of February 10th, above quoted, upon which the plaintiff parted with his money, stated that he, Mr. Angelo Legniti, bought of A. Bognesi & Company cable transfer to Italy,—to pay by cable to Banca Commerciale Italiana. This was not the case of a

—transfer of
credit—
insolvency—
right to follow
fund.

specific sum of American money being sent to Naples after being exchanged for lire. It was a case of 18,000 lire being needed in Naples and the purchase of A. Bolognesi & Company's credit with the Banca Commerciale Italiana for this amount, which credit was to be used by and for the benefit of Legniti. The money was not to be sent to the Banca Commerciale Italiana for Legniti. It was A. Bolognesi & Company, who on February 10, 1914, had either money or credit at the Banca Commerciale Italiana of Naples, the use of which for compensation was sold and transferred to the plaintiff.

We are naturally impressed, as anyone must be, with the fact that the plaintiff gave his money to establish a relative value or worth in Naples, and that the receiver kept the money and did not deliver the value, and that this money the bank now holds. Why should not the plaintiff get it back? Upon the failure of A. Bolognesi & Company many claims sprang into existence beside this of the plaintiff, and it is the duty of the courts as far as pos-

sible to adjust these relationships according to well-established principles, usages, and customs.

The Mechanics & Metals National Bank of New York also had given money or money value to A. Bolognesi & Company and has a claim for \$51,329.90. There were also many other claimants to the assets. To establish a rule that in a case like this the plaintiff becomes a preferred creditor, that the transaction is in the nature of a trust, and that checks deposited with banks upon the purchase of credit are trust funds held for certain and specified purposes, is apt to lead to much confusion, especially when those who have developed this method of doing business into a well-established custom have never treated them as such.

The judgment of the Appellate Division must therefore be reversed, and that of the trial court affirmed, with costs in this court and in the Appellate Division.

Hiscock, Ch. J., and Hogan, Cardozo, Pound, McLaughlin, and Andrews, JJ., concur.

ANNOTATION.

Trust or preference in respect of money used to purchase exchange or to be transmitted.

- I. In general, 190.
- II. Fraud in selling draft, 194.
- III. Transmission of money, 195.

I. In general.

So far as practicable the present note has been confined to the ordinary case of the purchase of a draft for the purpose of remitting money, and the payments therefor either in cash or by the purchaser's check. In accord with this limitation, cases in which collections have been made by banks and a draft drawn to remit for the collection have in general been excluded. The right to collateral or to a lien thereon in the hands of the drawee bank has also been excluded.

The cases adhere generally to the principle that in the absence of fraud

the purchaser of a draft of an insolvent bank, for which he pays cash, is not entitled to a preference over general creditors in the insolvency proceeding. *Rosenthal v. Mastin Bank* (1879) 17 Blatchf. 318, Fed. Cas. No. 12,063; *Harrison v. Wright* (1885) 100 Ind. 515, 50 Am. Rep. 805; *Grammel v. Carmer* (1884) 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418; *SPIROPLOS v. SCANDINAVIAN AMERICAN BANK* (reported herewith) ante, 181. See *LEGNITI v. MECHANICS & METALS NAT. BANK* (reported herewith) ante, 185.

This is held to be the rule also where the draft is paid for by a check on the insolvent bank. *Jewett v. Yardley* (1897) 81 Fed. 920; *Harrison v. Wright* (1885) 100 Ind. 515, 50 Am.:

Rep. 805; *Clark v. Toronto Bank* (1905) 72 Kan. 1, 2 L.R.A.(N.S.) 83, 115 Am. St. Rep. 173, 82 Pac. 582.

In *American Exp. Co. v. Cosmopolitan Trust Co.* (1921) — Mass. —, 132 N. E. 26, an action by the purchaser of a draft from a bank which subsequent to the purchase had been taken possession of by the commissioner of banks, against the bank upon the dishonor of the draft, it is said that the transaction was one of purchase and sale, that it was not executory, and "did not establish a trust or an agency." A similar holding on similar facts appears in *Beecher v. Cosmopolitan Trust Co.* (1921) — Mass. —, 131 N. E. 338.

The holder of checks on the insolvent bank who has accepted New York drafts therefor is not entitled to have the amount thereof impressed with a trust in his favor upon the subsequent insolvency of the bank. *Citizens' Nat. Bank v. Dowd* (1888) 35 Fed. 340; *People v. Merchants & M. Bank* (1879) 78 N. Y. 269, 34 Am. Rep. 532; *Lamro State Bank v. Farmers' State Bank* (1914) 84 S. D. 417, 148 N. W. 851.

And see *Clark v. Toronto Bank* (Kan.) *infra*.

In *Lamro State Bank v. Farmers' State Bank* (S. D.) *supra*, the holder of certain checks upon an insolvent bank presented the checks to the bank and received in lieu thereof a draft for an equal amount on a correspondent bank. Each of the drafts was immediately forwarded to the drawee bank for payment, and payment was refused because the drawer had no funds on deposit with which to pay the same. Subsequently upon the insolvency of the drawer bank, the payee of the draft sought a preference. In holding that the payee of the draft was not entitled to impress the funds with a trust, and therefore not entitled to a preference, the court says that upon acquiring the ownership of the check the payee of the draft became a creditor of the insolvent bank upon the theory that the check amounted to an assignment, and the court continues: "When appellant exchanged the checks for the drafts, it in nowise

changed its relationship to the respondent. It was a creditor of the respondent bank before the issuance of the drafts, and it was a creditor after they had been issued. . . . It is argued by appellant that had it drawn the amount of the checks in cash, as it could have done, and then used the cash to purchase the drafts, it then would have been entitled to a preference. But the weakness of this argument is that appellant was not entitled to the amount of the checks in cash. Under appellant's theory of the case, it must be assumed that respondent bank was insolvent at the time the checks were presented, and, this being the case, appellant was entitled to only its pro rata share with the other creditors in the assets of the respondent bank. For this reason appellant cannot maintain that the purchase of the drafts with the checks was equivalent to cashing the checks, and then using such cash to purchase the drafts, as it will be presumed that, had this been attempted, the respondent would have refused to pay the amount of the checks in cash." A similar case in which the check, instead of being presented in person to the insolvent bank, was sent by mail with a request for a remittance, was presented in *People v. Merchants' & M. Bank* (N. Y.), *supra*, and a similar conclusion was reached. The court says that if, instead of demanding immediate payment, the holder of the check trusted to the bank to remit, the result was simply to give credit to the bank, not to constitute an agency; and it is impossible to construct an appropriation or trust which would attach to the general assets of the bank afterwards passing to a receiver, and require their application to the payment of the check in preference to all other indebtedness of the bank.

That one bank which holds checks of another, and which has accepted the other's draft for the amount thereof, is not entitled to a preference, was held in *Citizens' Nat. Bank v. Dowd* (1888) 35 Fed. 340, although the draft was issued at a time when the officers knew their bank was hopelessly in-

solvent and were preparing to abscond.

There was held to be no trust in *Louisville Bkg. Co. v. Paine* (1890) 67 Miss. 678, 7 So. 462, where the customer of a bank directed it to apply a portion of his deposit to the payment of specified claims thereafter to mature, among which was that of the party claiming a preference. The bankers assented to this, and provision for it was made by the customer drawing his check for the required sum; upon the maturity of complainant's debt the bank, in execution of its agreement, forwarded to complainant its New York draft, which was dishonored upon the failure of the bank. The court says that this arrangement was a mere direction by the customer to his bankers to carry out his wishes with his funds, that he had the legal right to revoke the arrangement, and this is destructive of all idea of a trust in favor of the complainant.

The holder of checks upon a bank and of certain due bills of the bank, who accepted the bank's draft for the amount thereof, is not entitled to impress the bank's funds with a trust in his favor upon its insolvency. The court says that the holder of the checks and due bills was entitled to demand and receive the face of the checks in money before parting with them, but that as it did not elect to pursue its right to payment in currency, but consented to receive the bills of exchange drawn by its debtor on its New York correspondent instead, therefore, it occupied no better position than the other confiding creditors of the insolvent bank. *Citizens' Bank v. Bank of Greenville* (1893) 71 Miss. 271, 14 So. 456.

An answer to a petition which charged fraud in the receipt of money for a draft after the bank was insolvent to the knowledge of its officers, and after insolvency proceedings had been begun against it, which answer alleged good faith in the receipt of the money in the hope that the insolvency proceedings would be compromised and the bank enabled to continue business, was held to be good as against a demurrer in *Van Alstyne v.*

Crane (1874) 4 Thomp. & C. (N. Y.) 113. The action is stated to have been one brought to recover of the bankers the sum so paid for the draft apparently in full and in preference of other creditors.

The court in *Harrison v. Wright* (1885) 100 Ind. 515, 50 Am. Rep. 805, refused to make any difference in the rights of purchasers of drafts who had paid for the same in cash and those who had paid for drafts by checks on the insolvent bank, saying that there is no substantial distinction between the two cases, and further: "If the depositors had withdrawn the amount from the bank and with this purchased the checks it might well be said that they purchased them with cash. Whether the checks were paid for in cash or by the checks, the bank in each case received the amount of them." The checks or drafts involved in this case had been purchased at various times, some as late as the day preceding the suspension.

In *Grammel v. Carmer* (1884) 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418, *supra*, the drafts involved were ordinary banker's drafts, and were purchased and paid for in cash. At the time of the purchase the bank was insolvent, though it was not publicly known, and two days thereafter a general assignment was made for the benefit of creditors. The drawee bank had moneys belonging to the drawer at the date of the draft, more than sufficient for their payment, and continued to have this amount until the time of presentation.

One who purchased a draft of a savings bank, paying for the same in cash, which draft was dishonored for want of funds in the bank on which it was drawn, was held entitled to a preference upon the subsequent insolvency of the savings bank in *Stockton v. Mechanics' & L. Sav. Bank* (1880) 32 N. J. Eq. 163. This decision rests in part upon the peculiar character of a savings bank, which is defined to be an institution in the nature of a bank, formed for the purpose of receiving deposits of money for the benefit of the person depositing, to accumulate the produce of so

much thereof as shall not be required by the depositor at compound interest, and to return the whole or any part of such deposit and the produce thereof to the depositor, deducting the necessary expenses, but deriving no benefit whatever from any such deposit or the produce thereof. The court says that the money paid for the draft presumably went into the funds which were to be distributed upon the insolvency proceeding, that "the transaction was strictly ultra vires." And further it is stated that the exchange of the money for the check was merely for the accommodation of the person who obtained the latter, and under the circumstances the debt should be preferred.

The theory upon which the conclusion that there is no preference is reached is that the draft is purchased upon the credit of the bank; that the relation of debtor and creditor, not that of principal and agent, is thereby created. *Rosenthal v. Mastin Bank* (1879) 17 Blatchf. 318, Fed. Cas. No. 12,063; *Harrison v. Wright* (1885) 100 Ind. 515, 50 Am. Rep. 805; *Clark v. Toronto Bank* (1905) 72 Kan. 1, 2 L.R.A.(N.S.) 83, 115 Am. St. Rep. 173, 82 Pac. 582; *Grammel v. Carmer* (1884) 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418.

In *Harrison v. Wright* (1885) 100 Ind. 515, 50 Am. Rep. 805, the court says: "There is nothing in the case to create a superior equity in favor of the check holders as against the depositors and other creditors. No fraud is charged or shown whereby the payees were induced to part with their money for the checks. They were purchased in the usual course of business. The assets of the bank will not pay its debts in full. The depositors deposited their money, relying upon the credit of the bank that the amounts would be repaid to them when called for. The payees purchased the checks, relying upon the credit of the bank that the amounts paid for them would be refunded if, for any cause, the checks should not be paid by the drawees. It is a case where equality among the creditors is equity."

16 A.L.R.—13.

In *Clark v. Toronto Bank* (1905) 72 Kan. 1, 2 L.R.A.(N.S.) 83, 115 Am. St. Rep. 173, 82 Pac. 582, the holder of a check upon a bank presented the same at the bank, and upon his request was given in payment a draft payable to the order of his principal, upon a correspondent bank, against the funds then on deposit to the drawer's credit. Shortly afterwards the bank was closed by the bank commissioner, and in due course of time a receiver was appointed. In holding that the principal was not entitled to a preference, the court says: "In the petition an attempt was made to give the transaction described the color of a special deposit or a contract for the transferring of a fund in specie from Toronto to the plaintiff's home in Iowa. As clearly appears from the statement made, however, the facts will not bear that construction. The transaction was the ordinary one of the purchase of a draft for convenience in the remitting of money, and the giving to it of a different name cannot alter its essential character. In a stipulation regarding the facts upon which, together with the plaintiff's evidence, the case was submitted, it was stated that the plaintiff was at no time a creditor of the failed bank, but this statement cannot overcome the effect of the specific facts admitted and shown if inconsistent with them. It must be interpreted as meaning either that the plaintiff was not a creditor of the bank except so far as that relation was created by the facts already recited in detail, or as a mere conclusion of law to be disregarded by the court if found to be incorrect. An effort is also made to build up a right to have the money paid by plaintiff to the Toronto bank treated as a trust fund, upon the theory that it was a deposit unlawfully received by the officers of the bank while it was insolvent, and while they knew of its insolvency. If the facts in this case are otherwise sufficient to bring it within the principle invoked, they fall short in this: It is shown that the bank was insolvent when the draft was purchased, but not that the officers were cognizant of the

fact, and there is an entire failure of any showing that the money paid for the draft ever reached the hands of the receiver, or that the assets in his hands were increased in any way by the transaction."

The court in *Grammel v. Carmer* (Mich.) *supra*, says: "Something has been said in the case about this being an equitable proceeding, as if that should make a difference in the rules that should be applied to it. But in no proper sense is this an equitable proceeding at all. The receiver is appointed by an order made on the chancery side of the court; but this merely puts him in the place of the assignee, who failed to give bond, and in order that creditors may enforce through him their legal rights. . . . But if this were strictly an equitable proceeding it would make no difference. Courts of equity have no different rules in respect to the rights and obligations of parties to negotiable paper to those which are recognized in courts of law, but they recognize and enforce the same rules, and there would be gross injustice in their doing otherwise."

All the foregoing cases reject the theory that the draft operates as an assignment of the funds *pro tanto* in the drawee bank. Upon the theory that the draft did not operate as an assignment *pro tanto* of the fund in the hands of the drawee, the court in *Dickinson v. Coates* (1883) 79 Mo. 250, 49 Am. Rep. 228, holds that the payee of a draft issued by a bank is not entitled to a preference; the funds of the bank not being subject to a trust in his favor upon its insolvency.

Where the court adopts the theory that a draft operates as an assignment *pro tanto* of the funds of the drawer in the hands of the drawee, the owner of a draft is held entitled to a preference in such funds. *First Nat. Bank v. Coates* (1881) 3 McCrary, 9, 8 Fed. 540.

A trust was held to exist, entitling the payee of a draft to a preference, in *National Union Bank v. Earle* (1899) 93 Fed. 330, although that court was committed to the rule that a check did

not of itself operate as an assignment. But it is held to operate as an assignment where the delivery of the check was accompanied by or has been connected with circumstances from which it may be reasonably inferred that an appropriation of the funds to the extent of the amount of the check was intended, or if such an appropriation had been actually effected in such a case it was held to be equally well settled that the transaction as a whole constituted an equitable assignment *pro tanto*. In this case a bank to which the insolvent bank had sent a draft for the proceeds of collection presented it to the drawee, and it was paid through the clearing house, but upon acquiring knowledge that the drawer was insolvent, the money so paid was returned under a rule of the clearing house.

II. *Fraud in selling draft.*

If the bank receives money for a draft on a correspondent, when it knows that it is insolvent and has no funds in the hands of the drawee, and has no assurance that the draft will be honored, it will be held to have received the money wrongfully and to hold it as trustee. *Whitcomb v. Carpenter* (1907) 134 Iowa, 227, 10 L.R.A. (N.S.) 928, 111 N. W. 825; *Widman v. Kellogg* (1911) 22 N. D. 396, 39 L.R.A. (N.S.) 563; 133 N. W. 1020.

The court in *Whitcomb v. Carpenter* (Iowa) *supra*, compares the rights of the purchaser of a draft with those of a depositor who has made a deposit after the bank is hopelessly insolvent, and says: "It is sufficient to say that the act of Snyder [the banker] in taking the money of the plaintiff for the draft, which he knew was worthless, and which he had no assurance would be honored when presented for payment, was as wrong in law as it was reprehensible in morals. The money was not given to him as a deposit nor as a loan. He received it upon his expressed or implied representation that he had such moneys or credit with his Chicago correspondent that, upon presentation of the draft, a like sum would be paid to the plaintiff. That representation he knew to

be untrue, and he must be held to have received the money wrongfully, and to hold it in trust for the person who paid it to him."

III. *Transmission of money.*

Where a sum of money is deposited with a bank, to be transmitted, the courts uniformly hold that a trust exists therein in favor of the owner. *Ryan v. Phillips* (1896) 3 Kan. App. 704, 44 Pac. 909. That a trust exists was held in *St. Louis v. Johnson* (1879) 5 Dill. 241, Fed. Cas. No. 12,235, where a city which was a depositor in a bank put its check in the bank, payable to the bank, with instructions to remit the amount thereof to another city to meet maturing municipal bonds.

See *LEGNITI v. MECHANICS & METALS NAT. BANK* (reported herewith) ante, 155.

In *Ryan v. Phillips* (Kan.) supra, a debtor delivered to a bank a sum of money to be transmitted to the agent of his creditor for payment on the debt. Instead of transmitting the money the bank misappropriated and converted it to its own use, by mingling it with the money and other assets of the bank, and subsequently became insolvent, and made a general assignment for the benefit of creditors. In holding that the creditor to whom the money was remitted was entitled to a preference the court says: "The facts are undisputed, the evidence clearly showing the receipt of the money by the bank for the specific purpose of remitting the same to the holder and owner of the Sawyer note. The bank accepted the trust and assumed a duty of the cestui que trust, the plaintiff in error, which could be executed only by transmitting the money to her. No title to or interest in this fund ever passed to the bank. Its abuse of the trust conferred no rights upon it nor upon those in privity with it. As the money was

mingled with the assets of the bank and went to swell its general estate, a trust therefor attached to the entire estate even though the specific fund cannot be followed." It was urged in this case that the debtor was the proper party to bring the action, and therefore it could not be maintained by the creditor, or at least that the debtor and the agent to whom the money was directed to be sent should have been made parties, so that the assignee of the insolvent bank would have been protected from any claim or liability to either of these persons. The court says that this objection is without merit, that although a cause of action may have existed in favor of the debtor had he seen fit to institute an action, he waived any such right by appearing as a witness in the case and testifying in support of the claim of the plaintiff. The fact that the creditor may not have been specifically named as the one to whom the money was to be remitted was held immaterial, as it was conceded to have been accepted by the bank for the benefit of the holder of the note, and was to be remitted to such holder through the agent to whom it was sent. This was held a sufficient identification of the person who was to receive the money.

The customer of a bank who drew his check thereon payable to the bank or to himself, and indorsed by him, and delivered it to the bank, with the request that it should place the proceeds thereof in a nonresident bank to the credit of a named person, is entitled to impress the funds of the bank, upon its subsequent insolvency, with a trust in his favor to the extent of the sum so involved, where the nonresident bank refused to perfect the exchange of credit, notice to it not having been received until after the remitting bank had failed. *Stoller v. Coates* (1885) 88 Mo. 514.

W. A. E.

DUPLEX PRINTING PRESS COMPANY, Appt.,

v.

EMIL J. DEERING et al., Individually and as Business Agents of District No. 15 of the International Association of Machinists, et al.

United States Supreme Court—January 3, 1921.

(254 U. S. 443, 65 L. ed. —, 41 Sup. Ct. Rep. 172.)

Injunction — sympathetic strike — Clayton Act — boycott.

1. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed "peaceful and lawful" persuasion, within the meaning of the Clayton Act of October 15, 1914, § 20, restricting the use of injunction, and legalizing certain acts in industrial disputes.

[See note on this question beginning on page 230.]

— combination in restraint of trade — Clayton Act — pending suits.

2. In so far as the Clayton Act of October 15, 1914, provided for relief by injunction to private suitors, imposed conditions upon granting such relief under particular circumstances, and otherwise modified the Sherman Anti-trust Act of July 2, 1890, it was effective from the time of its passage, and applicable to pending suits for injunction not brought to a hearing until after the passage of the Clayton Act.

— relief to private suitors.

3. Private parties are given, by the Clayton Act of October 15, 1914, § 16, a right to relief by injunction, in any court of the United States, against threatened loss or damage by a violation of the Federal Anti-trust Laws, under the conditions and principles regulating the granting of such relief by courts of equity.

Conspiracy — lawful purpose — unlawful means.

4. A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. If the purpose be unlawful, it may not be carried out, even by means that otherwise would be legal; and although the purpose be lawful, it may not be carried out by criminal or unlawful means.

[See 19 R. C. L. 144, 145.]

Monopoly — combinations in restraint of trade — secondary boycott.

5. A secondary boycott is a combination not merely to refrain from dealing with a person, or to advise or by peaceable means persuade his customers to refrain, but to exercise coercive pres-

sure upon such customers, actually causing them to withhold or withdraw their patronage through fear of loss or damage to themselves should they deal with him.

[See 16 R. C. L. 455; see note in 6 A.L.R. 909.]

— peaceable persuasion.

6. A restraint produced by peaceable persuasion is as much within the prohibition of the Sherman Anti-trust Act of July 2, 1890, as one accomplished by force or threats of force.

[See 19 R. C. L. 57.]

— beneficial object.

7. A combination in restraint of interstate trade is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the Sherman Act of July 2, 1890, prohibiting such combinations.

— Clayton Act — labor organizations.

8. A labor organization, or its members, is not exempted from accountability for a combination in restraint of interstate trade, where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade, merely because the Clayton Act of October 15, 1914, § 6, provides that nothing in the Anti-trust Laws shall be construed to forbid the existence and operation of labor organizations, or to forbid their members from lawfully carrying out their legitimate objects.

[See 16 R. C. L. 420, 421.]

— Clayton Act — unlawful activity.

9. By no fair or permissible construction can the provision of the Clay-

ton Act of October 15, 1914, § 6, that nothing in the Anti-trust Laws shall be construed to forbid the existence and operation of labor organizations, or to forbid their members from lawfully carrying out their legitimate objects, be taken as authorizing any activity otherwise unlawful, or as enabling a normal lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Anti-trust Laws.

[See 16 R. C. L. 420, 421.]

Injunction — combination in restraint of trade — secondary boycott — Clayton Act.

10. Injunctive relief to a manufacturer against concerted action which members of labor organizations, standing in no employment relation with it, past, present, or prospective, have taken in aid of a strike in its factory in order to compel such manufacturer to unionize its factory, establish the closed shop, the eight-hour day, and the union scale of wages, by interfering with and restraining its interstate trade through coercive pressure upon actual or prospective customers, with the intent and result of causing them to withdraw patronage from such manufacturer for fear of loss or damage to themselves should they deal with it, may not be denied on the theory that such relief was forbidden, or that such action—the so-called secondary boycott—was legalized by the provisions of the Clayton Act of October 15, 1914, § 6, that nothing in the Anti-trust Laws shall be construed to forbid the existence and operation of labor organizations, or to forbid their members from lawfully carrying out their legitimate objects, and of § 20 of that

act, restricting the granting of injunctions in cases “between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment,” and providing that none of the acts specified therein shall be considered or held to be violations of any law of the United States.

[See note in 6 A.L.R. 969.]

Monopoly — combination in restraint of trade — industrial disputes — secondary boycott — Clayton Act.

11. The exceptional immunity from the operation of the Federal Anti-trust Laws, granted by the Clayton Act of October 15, 1914, § 20, in cases “between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment,” must be confined to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment—past, present, or prospective.

Statutes — construction — committee reports.

12. Reports of committees of the House of Representatives or of the Senate may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure, as may also explanatory statements in the nature of a supplemental report, made by the committee member in charge of a bill in course of passage.

[See 25 R. C. L. 1038, 1039.]

(Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke dissent.)

APPEAL by complainant from a decree of the United States Circuit Court of Appeals, Second Circuit, to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing a bill filed to enjoin an alleged unlawful conspiracy in restraint of interstate trade. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Daniel Davenport and Walter Gordon Merritt, for appellant:

The right to work or quit work is no more absolute than any other constitutional right, and ceases to be a right when exercised for the purpose of injuring another, or accomplishing a re-

sult contrary to public policy, or restraining trade contrary to law.

Aikens v. Wisconsin, 195 U. S. 204, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492;

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *Paine Lumber Co. v. Neal*, 244 U. S. 459, 61 L. ed. 1256, 37 Sup. Ct. Rep. 718; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815, 235 U. S. 522, 59 L. ed. 341, 35 Sup. Ct. Rep. 170; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; *Eastern States Lumber Dealers' Asso. v. United States*, 234 U. S. 600, 58 L. ed. 1490, L.R.A. 1915A, 788, 34 Sup. Ct. Rep. 951; *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A. (N.S.) 325, 33 Sup. Ct. Rep. 141; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; *State v. Duluth Bd. of Trade*, 107 Minn. 506, 23 L.R.A. (N.S.) 1260, 121 N. W. 395.

As a general proposition, even workmen on strike are not employees.

Atchison, T. & S. F. R. Co. v. Gee, 139 Fed. 582; *Knudsen v. Benn*, 123 Fed. 636; *Union P. R. Co. v. Ruef*, 120 Fed. 102; *Iron Molders' Union v. Allis-Chalmers Co.* 20 L.R.A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 48.

The word "employee" implies the existence of a continuing employment relation.

Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405.

If not even the recognition of a right by the Constitution can justify its exercise in furtherance of a criminal plot, and the constitutional privilege of free speech cannot be used as a defense to an injunction which restrains speech or writing in furtherance of an illegal conspiracy, then the recognition of a right by a statute such as the Clayton Act, will not justify the exercise of that right in furtherance of a criminal conspiracy, which is expressly recognized by the same statute.

Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; *Gompers v. Buck's Stove & Range Co.* 221 U. S. 439, 55 L. ed. 800, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492.

Vital statutory provisions would be pro tanto repealed by a construction of the Clayton Act which would legalize the acts specified in § 20, even when exercised for purposes forbidden by these enumerated statutes. Strikes could be called to prevent the carriage of a nonunion man to the shop or non-

union merchandise to the dealer or consumer, and shippers could thereby be discriminated against in violation of the terms of the Commerce Act.

Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Re Debs*, 158 U. S. 593, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492.

It would be possible to keep proscribed merchandise out of the reach of the consumers, and thereby deprive the public of its right of choice.

People v. Hughes, 137 N. Y. 29, 32 N. E. 1105; *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 6 A.L.R. 901, 124 N. E. 97, 89 Misc. 501, 152 N. Y. Supp. 475; *People v. Davis*, 159 App. Div. 464, 144 N. Y. Supp. 284.

An exemption from the Anti-trust Laws extended to any class of people, purely as a class, is unconstitutional, if the exemption extends to that class under the identical circumstances where other classes are bound by the law.

Cleland v. Anderson, 66 Neb. 252, 5 L.R.A. (N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

An injunction should issue under the Clayton Act.

Paine Lumber Co. v. Neal, 244 U. S. 459, 61 L. ed. 1256, 37 Sup. Ct. Rep. 718; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *Montgomery v. Pacific Electric R. Co.* 169 C. C. A. 398, 258 Fed. 383; *United States v. Rintelen*, 233 Fed. 793; *Alaska S. S. Co. v. International Longshoremen's Asso.* 236 Fed. 964; *Tri-City Central Trades Council v. American Steel Foundries*, 151 C. C. A. 578, 238 Fed. 728; *United States v. King*, 250 Fed. 908, 229 Fed. 275; *Stephens v. Ohio State Teleph. Co.* 240 Fed. 759; *Dowd v. United Mine Workers*, 148 C. C. A. 495, 235 Fed. 1.

When a statute not clear on its face is to be interpreted, courts will consult legislative debates, reports, and contemporaneous history for expressions indicating the intentions of the legislative body.

Tap Line Cases, 234 U. S. 27, 58 L. ed. 1185, 34 Sup. Ct. Rep. 741.

Defendants are engaged in a combination and conspiracy to injure plaintiff's good will, trade, and business, and such a combination is unlawful at common law.

Shine v. Fox Bros. Mfg. Co. 86 C. A. 311, 156 Fed. 357; Auburn Draying Co. v. Wardell, 227 N. Y. 1, 6 A.L.R. 901, 124 N. E. 97, affirming 178 App. Div. 270, 165 N. Y. Supp. 469, which affirms 89 Misc. 501, 152 N. Y. Supp. 475; Irving v. Joint Dist. Council, U. B. C. J. 180 Fed. 896, Huttig Sash & Door Co. v. Fuelle, 143 Fed. 363; Purvis v. Local Union, U. B. C. J. 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; Purington v. Hinchliff, 219 Ill. 159, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; Moores v. Bricklayers Union, 10 Ohio Dec. Reprint, 665; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 818; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; Thompson Mach. Co. v. Brown, 89 N. J. Eq. 326, 104 Atl. 129, 108 Atl. 116; Employing Printers' Club v. Dr. Blosser Co. 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 Ann. Cas. 694; Seubert v. Reiff, 98 Misc. 402, 164 N. Y. Supp. 522; Schlang v. Ladies' Waist Makers Union, 67 Misc. 221, 124 N. Y. Supp. 289; Burnham v. Dowd, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; Loewe v. Lawlor, 208 U. S. 274, 288, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; Branson v. Industrial Workers, 30 Nev. 270, 95 Pac. 354; Casey v. Cincinnati Typographical Union, 12 L.R.A. 193, 45 Fed. 135; Crump v. Com. 84 Va. 941, 10 Am. St. Rep. 895, 6 S. E. 620; Ertz v. Produce Exch. 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; Evenson v. Spaulding, 9 L.R.A.(N.S.) 904, 150 Fed. 517, 82 C. C. A. 263; Gray v. Building Trades

Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1 Ann. Cas. 172; Beattie v. Callanan, 82 App. Div. 7, 81 N. Y. Supp. 415; Matthews v. Shankland, 25 Misc. 604, 56 N. Y. Supp. 123; Hopkins v. Oxley Stove Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; Loewe v. California State Federation of Labor, 139 Fed. 71; Lucke v. Clothing Cutters & T. Assembly, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; My Maryland Lodge v. Adt, 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721; National Teleph. Co. v. Kent, 156 Fed. 173; Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 809; Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011; State v. Glidden, 55 Conn. 47, 3 Am. St. Rep. 23, 8 Atl. 890; Baldwin v. Escanaba Liquor Dealers' Asso. 165 Mich. 98, 130 N. W. 214; American Federation of Labor v. Buck's Stove & Range Co. 33 App. D. C. 83, 32 L.R.A.(N.S.) 748; Harvey v. Chapman, 226 Mass. 191, L.R.A.1917E, 389, 115 N. E. 304; Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465; Webb v. Drake, 52 La. Ann. 290, 26 So. 731; Wilson v. Hey, 232 Ill. 389, 16 L.R.A.(N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82; Jensen v. Cooks' & W. Union, 39 Wash. 531, 4 L.R.A.(N.S.) 302, 81 Pac. 1069; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; Tunstall v. Stearns Coal Co. 41 L.R.A.(N.S.) 453, 113 C. C. A. 132, 192 Fed. 808; W. P. Davis Mach. Co. v. Robinson, 41 Misc. 329, 84 N. Y. Supp. 837.

The combination unlawfully seeks to prevent truckmen, who are common carriers, from performing their common-law duty of serving those who purchase complainants' presses.

Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665; 10 C. J. 49; Heumann v. M. H. Powers Co. 175 App. Div. 672, 162 N. Y. Supp. 590; Pittsburgh, C. & St. L. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; Michie, Carr. § 381.

The combination unlawfully seeks to induce the complainant's customers to

violate their contracts with the complainant.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *Dr. Miles Medical Co. v. J. D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *Bitterman v. Louisville & N. R. Co.* 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 2, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *American Malting Co. v. Keitel*, 126 C. C. A. 277, 209 Fed. 351.

Messrs. Frank X. Sullivan and Frank L. Mulholland, for appellees:

The means employed by the defendant to secure an eight-hour day and minimum rate of wage throughout the trade are authorized by the Clayton amendment to the Sherman Anti-trust Law.

Wilson v. New, 243 U. S. 342, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; *Paine Lumber Co. v. Neal*, 244 U. S. 459, 471, 61 L. ed. 1256, 37 Sup. Ct. Rep. 718; *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *National Protective Asso. v. Cumming*, 170 N. Y. 324, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Tri-City Central Trades Council v. American Steel Foundries*, 238 Fed. 732, 151 C. C. A. 578.

Irreparable injury to property and property rights is neither alleged nor proven by the appellant.

Paine Lumber Co. v. Neal, 244 U. S. 459, 471, 61 L. ed. 1256, 1264, 37 Sup. Ct. Rep. 718.

There being no proof adduced upon the trial of irreparable injury to property and property rights, only the United States could apply for injunctive relief under the Sherman Act.

Ibid: *Southern Indiana Exp. Co. v. United States Exp. Co.* 35 C. C. A. 172, 88 Fed. 659; *Blindell v. Hagan*, 54 Fed. 40; *Mannington v. Hocking Valley R. Co.* 183 Fed. 140; *Metcalf v. American School Furniture Co.* 108 Fed. 909; *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Minnesota v. Northern Securities Co.* 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598.

To render an association or organization unlawful under the Act of July 2, 1890, it must appear that such combination was formed for the purpose of restraining trade or commerce among the several states or foreign nations, or that such restraint unnecessarily resulted from such combination, and thus deprived the public of the benefits which flow from free competition.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; *Gibbs v. McNeeley*, 60 L.R.A. 152, 55 C. C. A. 170, 118 Fed. 120; *Bigelow v. Calumet & H. Min. Co.* 167 Fed. 709; *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661.

There was no interference with interstate commerce.

United States v. E. C. Knight Co. 156 U. S. 1, 12, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Anderson v. United States*, 171 U. S. 615, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

Irrespective of the Clayton Act, there were no facts adduced on the trial which would warrant the issuance of an injunction.

Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 18 L.R.A.(N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127; *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Ames v. Union P. R. Co.* 62 Fed. 14; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 263; *Gill Engraving Co. v. Doerr*, 214 Fed. 111.

Mr. Justice Pitney delivered the opinion of the court:

This was a suit in equity brought by appellant in the district court for the southern district of New York for an injunction to restrain a course of conduct carried on by defendants in that district and vicinity in maintaining a boycott against the products of complainant's factory, in furtherance of a conspiracy

to injure and destroy its good will, trade, and business,—especially to obstruct and destroy its interstate trade. There was also a prayer for damages, but this has not been pressed, and calls for no further mention. Complainant is a Michigan corporation, and manufactures printing presses at a factory in Battle Creek, in that state, employing about 200 machinists in the factory in addition to 50 office employees, traveling salesmen, and expert machinists or road men who supervise the erection of the presses for complainant's customers at their various places of business. The defendants, who were brought into court and answered the bill, are Emil J. Deering and William Bramley, sued individually and as business agents and representatives of District No. 15 of the International Association of Machinists, and Michael T. Neyland, sued individually and as business agent and representative of Local Lodge No. 328, of the same association. The District Council and the Lodge are unincorporated associations having headquarters in New York city, with numerous members resident in that city and vicinity. There were averments and proof to show that it was impracticable to bring all the members before the court, and that the named defendants properly represented them; and those named were called upon to defend for all, pursuant to Equity Rule 38 (226 U. S. 659, 57 L. ed. 1643, 33 Sup. Ct. Rep. xxix.). Other jurisdictional averments need no particular mention. The district court, on final hearing, dismissed the bill (247 Fed. 192); the circuit court of appeals affirmed its decree (164 C. C. A. 562, 252 Fed. 722); and the present appeal was taken.

The jurisdiction of the Federal court was invoked both by reason of diverse citizenship and on the ground that defendants were engaged in a conspiracy to restrain complainant's interstate trade and commerce in printing presses, contrary to the Sherman Anti-trust

Act of July 2, 1890 (chap. 647, 26 Stat. at L. 209, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644). The suit was begun before, but brought to hearing after, the passage of the Clayton Act of October 15, 1914 (chap. 323, 38 Stat. at L. 730, Comp. Stat. § 8835a, 9 Fed. Stat. Anno. 2d ed. p. 730). Both parties invoked the provisions of the latter act, and both courts treated them as applicable. Complainant relied also upon the common law; but we shall deal first with the effect of the acts of Congress.

The facts of the case and the nature of the relief prayed are sufficiently set forth in the report of the decision of the circuit court of appeals (164 C. C. A. 562, 252 Fed. 722). The case was heard before Circuit Judges Rogers and Hough and District Judge Learned Hand. Judge Rogers, although in the minority, stated the case and the pleadings for the court (pp. 723-727), and delivered an opinion for reversal in which he correctly outlined (pp. 734-737) the facts as shown by the undisputed evidence—defendants having introduced none. Judges Hough and Hand followed with separate opinions for affirmance, not, however, disagreeing with Judge Rogers as to the facts. These may be summarized as follows: Complainant conducts its business on the "open-shop" policy, without discrimination against either union or nonunion men. The individual defendants and the local organizations of which they are the representatives are affiliated with the International Association of Machinists, an unincorporated association having a membership of more than 60,000, and are united in a combination, to which the International Association also is a party, having the object of compelling complainant to unionize its factory, and enforce the "closed shop," the eight-hour day, and the union scale of wages, by means of interfering with and restraining its interstate trade in the products of the factory. Complainant's principal manufacture is

newspaper presses of large size and complicated mechanism, varying in weight from 10,000 to 100,000 pounds, and requiring a considerable force of labor and a considerable expenditure of time—a week or more—to handle, haul, and erect them at the point of delivery. These presses are sold throughout the United States and in foreign countries; and, as they are especially designed for the production of daily papers, there is a large market for them in and about the city of New York. They are delivered there in the ordinary course of interstate commerce, the handling, hauling, and installation work at destination being done by employees of the purchaser, under the supervision of a specially skilled machinist supplied by complainant. The acts complained of and sought to be restrained have nothing to do with the conduct or management of the factory in Michigan, but solely with the installation and operation of the presses by complainant's customers. None of the defendants is or ever was an employee of complainant, and complainant at no time has had relations with either of the organizations that they represent. In August, 1913 (eight months before the filing of the bill), the International Association called a strike at complainant's factory in Battle Creek, as a result of which union machinists to the number of about eleven in the factory, and three who supervised the erection of presses in the field, left complainant's employ. But the defection of so small a number did not materially interfere with the operation of the factory, and sales and shipments in interstate commerce continued. The acts complained of made up the details of an elaborate program adopted and carried out by defendants and their organizations in and about the city of New York as part of a country-wide program adopted by the International Association, for the purpose of enforcing a boycott of complainant's product. The acts embraced the following,

with others: Warning customers that it would be better for them not to purchase or, having purchased, not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers, in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as "scabs" if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York city, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses. In some cases the threats were undisguised; in other cases polite in form, but none the less sinister in purpose and effect. All the judges of the circuit court of appeals concurred in the view that defendants' conduct consisted essentially of efforts to render it impossible for complainant to carry on any commerce in printing presses between Michigan and New York; and that defendants had agreed to do and were endeavoring to accomplish the very thing pronounced unlawful by this court in *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; 235 U. S. 522, 59 L. ed. 341, 35 Sup. Ct. Rep. 170. The judges also

agreed that the interference with interstate commerce was such as ought to be enjoined, unless the Clayton Act of October 15, 1914, forbade such injunction.

That act was passed after the beginning of the suit, but more than two years before it was brought to hearing. We are clear that the courts below were right in giving effect to it; the real question being, whether they gave it the proper effect. In so far as the act (a) provided for relief by injunction to private suitors, (b) imposed conditions upon granting such relief under particular circumstances, and (c) otherwise modified the

Injunction—combination in restraint of trade—Clayton Act—pending suits.

Sherman Act, it was effective from the time of its passage, and applicable

to pending suits for injunction. Obviously, this form of relief operates only in futuro, and the right to it must be determined as of the time of the hearing. *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 431, 432, 15 L. ed. 435, 437, 438. See also *United States v. The Peggy*, 1 Cranch, 103, 110, 2 L. ed. 49, 51; *Sampeyreac v. United States*, 7 Pet. 222, 239, 240, 8 L. ed. 665, 671, 672; *Mills v. Green*, 159 U. S. 651, 653, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 132; *Dinsmore v. Southern Exp. Co.* 183 U. S. 115, 120, 46 L. ed. 111, 113, 22 Sup. Ct. Rep. 45; *Berry v. Davis*, 242 U. S. 468, 470, 61 L. ed. 441, 442, 37 Sup. Ct. Rep. 208.

The Clayton Act, in § 1, includes the Sherman Act in a definition of "anti-trust laws," and, in § 16 (38 Stat. at L. 737, chap. 323, Comp. Stat. § 8835o, 9 Fed. Stat. Anno. 2d ed. p. 745), gives to private parties a right to relief

—relief to private suitors.

by injunction in any court of the United States against threatened loss or damage by a violation of the Anti-trust Laws, under the conditions and principles regulating the granting of such relief by courts of equity. Evidently this provision was intended to supplement the Sherman

Act, under which some of the Federal courts had held, as this court afterwards held in *Paine Lumber Co. v. Neal*, 244 U. S. 459, 471, 61 L. ed. 1256, 1264, 37 Sup. Ct. Rep. 718, that a private party could not maintain a suit for injunction.

That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that, as a result of it, complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future,—is proved by clear and undisputed evidence. Hence, the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act, as amended by the Clayton Act.

Looking first to the former act, the thing declared illegal by its first section (26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644) is: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." The accepted definition of a conspiracy is, a combination of two or more persons by concerted

Conspiracy—lawful purpose—unlawful means.

action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone v. United States*, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542. If the purpose be unlawful it may not be carried out even by means that otherwise would be le-

gal; and although the purpose be lawful, it may not be carried out by criminal or unlawful means.

The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott;" that is, a combination not merely

**Monopoly—
combinations in
restraint of
trade—secondary
boycott.**

to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primarily boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act. But, in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular states. Those acts, passed in the exercise of the power of Congress to regulate commerce among the states, are of paramount authority, and their prohibitions must be given full effect, irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes.

In *Loewe v. Lawlor*, 208 U. S. 274, 48 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815, where there was an effort to compel plaintiffs to unionize their factory by preventing them from manufacturing articles intended for transportation beyond the state, and also by preventing vendees from reselling articles purchased from plaintiffs, and negotiating with plaintiffs for further purchases, by means of a boycott of plaintiffs' products and of dealers who handled them, this

court held that there was a conspiracy in restraint of trade, actionable under § 7 of the Sherman Act, and in that connection said (p. 293): "The act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business. The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." And when the case came before the court a second time (235 U. S. 522, 534, 59 L. ed. 341, 348, 35 Sup. Ct. Rep. 170), it was held that the use of the primary and secondary boycott, and the circulation of a list of "unfair dealers," intended to influence customers of plaintiffs, and thus subdue the latter to the demands of the defendants, and having the effect of interfering with plaintiffs' interstate trade, was actionable.

In *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 58 L. ed. 1490, L.R.A. 1915A, 788, 34 Sup. Ct. Rep. 951, wholesale dealers were subjected to coercion merely through the circulation among retailers, who were members of the association, of information in the form of a kind of "black list," intended to influence the retailers to refrain from dealing with the listed wholesalers, and it was held that this constituted a violation of the Sherman Act. Referring to this decision, the court said, in *Lawlor v. Loewe*, 235 U. S. 522, 534, 59 L. ed. 341, 348, 35 Sup. Ct. Rep. 170: "That case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibition of the Sherman Act if it is intended to

restrain and restrains commerce among the states."

It is settled by these decisions that such a restraint produced by peaceable persuasion is as much

—peaceable persuasion.

within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some

—beneficial object.

object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Upon the question whether the provisions of the Clayton Act forbade the grant of an injunction under the circumstances of the present case, the circuit court of appeals was divided; the majority holding that under § 20, "perhaps in conjunction with § 6," there could be no injunction. These sections are set forth in the margin.¹ Defendants seek to derive from them some

authority for their conduct. As to § 6, it seems to us its principal importance in this discussion is for what it does *not* authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the Anti-trust Laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And

—Clayton Act—
labor organizations.

¹"Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the Anti-trust Laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the Anti-trust Laws."

"Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity

in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Anti-trust Laws.

The principal reliance is upon § 20. This regulates the granting of restraining orders and injunctions by the courts of the United States in a designated class of cases, with respect to (a) the terms and conditions of the relief and the practice to be pursued, and (b) the character of acts that are to be exempted from the restraint; and in the concluding words it declares (c) that none of the acts specified shall be held to be violations of any law of the United States. All its provisions are subject to a general qualification respecting the nature of the controversy and the parties affected. It is to be a "case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment."

The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that "no *such* restraining order or injunction" shall prohibit certain conduct specified,—manifestly still referring to a "case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include

particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context, and mean only that those acts are not to be so held, when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the Anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

The majority of the circuit court of appeals appear to have entertained the view that the words "employers and employees," as used in § 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong;" and that, as there had been a dispute at complainant's factory in Michigan concerning the conditions of employment there,—a dispute created, it is said, if it did not exist before, by the act of the Machinists' Union in calling a strike at the factory,—§ 20 operated to permit members of the Machinists' Union elsewhere,—some 60,000 in number,—although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own, and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant's factory, and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce,—and this where there was no dispute between such employers and their employees respecting terms or conditions of employment.

We deem this construction altogether inadmissible. Section 20

must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, and upon the general operation of the Anti-trust Laws,—a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and

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combination in
restraint of
trade—secondary
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substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war. "Terms or conditions of employment" are the only grounds of dispute recognized as adequate to bring into play the exemptions;

Monopoly—
combination in
restraint of
trade—industrial
disputes—
secondary
boycott—
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and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute.

Nor can § 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately af-

fects only a few of them, with the result of conferring upon any and all members,—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of § 20, which contain no mention of labor organizations, so as to produce an inconsistency with § 6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization. At the same time it would virtually repeal by implication the prohibition of the Sherman Act, so far as labor organizations are concerned, notwithstanding repeals by implication are not favored; and in effect, as was noted in *Loewe v. Lawlor*, 208 U. S. 274, 303, 304, 52 L. ed. 488, 503, 504, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 813, would confer upon voluntary associations of individuals formed within the states a control over commerce among the states that is denied to the governments of the states themselves.

The qualifying effect of the words descriptive of the nature of the dispute and the parties concerned is further borne out by the phrases defining the conduct that is not to be subjected to injunction or treated as a violation of the laws of the United States; that is to say: (a) "Terminating any relation of employment, . . . or persuading others by peaceful means so to do;" (b) "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working;" (c) "ceasing to patronize or to employ any party to such dispute, or . . . recommending, advising, or persuading others by peaceful and lawful means so to do;" (d) "paying or giving to, or withholding

from, any person engaged in such dispute, any strike benefits . . . ;"

(e) "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." The emphasis placed on the words "lawful" and "lawfully," "peaceful" and "peacefully," and the references to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the Anti-trust Laws, or otherwise unlawful. The subject of the boycott is dealt with specifically in the "ceasing to patronize" provision, and by the clear force of the language employed the exemption is limited to pressure exerted upon a "party to such dispute" by means of "peaceful and lawful" influence upon neutrals. There is nothing here to justify defendants or the organizations they represent in using either threats or persuasion to bring about strikes or a cessation of work on the part of employees of complainant's customers or prospective customers, or of the trucking company employed by the customers, with the object of compelling such customers to withdraw or refrain from commercial relations with complainant, and of thereby constraining complainant to yield the matter in dispute. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed "peaceful and lawful" persuasion.

**Injunction—
sympathetic
strike—Clayton
Act—boycott.**

In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees.

The majority of the circuit court of appeals, very properly treating the case as involving a secondary boycott, based the decision upon the view that it was the purpose of § 20 to legalize the secondary boycott, "at least in so far as it rests on or consists of refusing to work

for anyone who deals with the principal offender." Characterizing the section as "blindly drawn," and conceding that the meaning attributed to it was broad, the court referred to the legislative history of the enactment as a warrant for the construction adopted. Let us consider this:

By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. *Aldridge v. Williams*, 3 How. 9, 24, 11 L. ed. 469, 475; *United States v. Union P. R. Co.* 91 U. S. 72, 79, 23 L. ed. 224, 228; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540. But reports of committees of House or Senate stand upon a more solid footing, and may be re-

**Statutes—
construction—
committee
reports.**

garded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns v. United States*, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. *Ibid.*; *Pennsylvania R. Co. v. International Coal Min. Co.* 230 U. S. 184, 198, 199, 57 L. ed. 1446, 1451, 1452, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; *United States v. Coca Cola Co.* 241 U. S. 265, 281, 60 L. ed. 995, 1002, 36 Sup. Ct. Rep. 573, Ann. Cas. 1917C, 487; *United States v. St. Paul, M. & M. R. Co.* 247 U. S. 310, 318, 62 L. ed. 1130, 1134, 38 Sup. Ct. Rep. 525.

In the case of the Clayton Act, the printed committee reports are not explicit with respect to the meaning of the "ceasing to patronize" clause of what is now § 20. (See House Rept. No. 627, 63d

Cong. 2d Sess. pp. 33-36; Senate Rept. No. 698, 63 Cong. 2d Sess. pp. 29-31; the latter being a reproduction of the former.) But they contain extracts from judicial opinions and a then recent textbook sustaining the "primary boycott," and expressing an adverse view as to the secondary or coercive boycott; and, on the whole, are far from manifesting a purpose to relax the prohibition against restraints of trade in favor of the secondary boycott.

Moreover, the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb), who had the bill in charge when it was under consideration by the House. The question whether the bill legalized the sec-

ondary boycott having been raised, it was emphatically and unequivocally answered by him in the negative.³ The subject—he declared in substance or effect—was under consideration when the bill was framed, and the section as reported was carefully prepared with the settled purpose of excluding the secondary boycott, and confining boycotting to the parties to the dispute, allowing parties to cease to patronize and to ask others to cease to patronize a party to the dispute; it was the opinion of the committee that it did not legalize the secondary boycott; it was not their purpose to authorize such a boycott; not a member of the committee would vote to do so; clarifying

³ Extracts from Congressional Record, Vol. 51, Part 10, 63d Cong., 2d Sess. (Page 9652.)

Mr. Volstead: Would not this also legalize the secondary boycott?

Mr. Webb: Mr. Chairman, I do not think it legalizes a secondary boycott.

Mr. Volstead: Let me read the lines, if the gentleman will permit. And no such restraining order or injunction shall prohibit anyone—

"from ceasing to patronize *those who* [or to] employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do."

Now, does not the word "others" in that instance refer to others than parties to the dispute?

Mr. Webb: No; because it says in line 15:

"From ceasing to patronize or employ any parties to such dispute."

Mr. Volstead: . . . Can there be any doubt this is intended, or does, in fact, legalize the secondary boycott?

Mr. Webb: I will say frankly to my friend when this section was drawn it was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does. There may be a difference of opinion about it, but it is the opinion of the committee that it does not legalize the secondary boycott and is not intended to do so. It does legalize the primary boycott; it does legalize the strike; it does legalize persuading others to strike, to quit work, and the other acts mentioned in § 18 [now § 20], but we did not intend, I will say frankly, to legalize the secondary boycott.

(Page 9653.)

16 A.L.R.—14.

Mr. Webb: I will say this section was drawn two years or more ago, and was drawn carefully, and those who drew this section drew it with the idea of excluding the secondary boycott. It passed the House, I think, by about 243 to 16, and the question of the secondary boycott was not raised then, because we understood so clearly it did not refer to or authorize the secondary boycott.

(Page 9658.)

Mr. Webb: Mr. Chairman, I should vote for the amendment offered by the gentleman from Minnesota [Mr. Volstead] if I were not perfectly satisfied that it is taken care of in this section. The language the gentleman reads does not authorize the secondary boycott, and he could not torture it into any such meaning. While it does authorize persons to cease to patronize the party to the dispute, and to recommend to others to cease to patronize that same party to the dispute, that is not a secondary boycott, and you cannot possibly make it mean a secondary boycott. Therefore this section does not authorize the secondary boycott.

I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott, there would not be a man to vote for it. It is not the purpose of the committee to authorize it, and I do not think any person in this House wants to do it. We confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party, and to ask others to cease to patronize the party to the dispute.

amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that, except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported. In substantially that form it became law; and since, in our opinion, its proper construction is entirely in accord with its purpose as thus declared, little need be added.

The extreme and harmful consequences of the construction adopted in the court below are not to be ignored. The present case furnishes an apt and convincing example. An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nationwide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute,—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the Anti-trust Laws, of which the section under consideration forms, after all, a part.

Reaching the conclusion, as we do, that complainant has a clear right to an injunction under the Sherman Act, as amended by the Clayton Act, it becomes unnecessary to consider whether a like result would follow under the common law or lo-

cal statutes; there being no suggestion that relief thereunder could be broader than that to which complainant is entitled under the acts of Congress.

There should be an injunction against defendants and the associations represented by them, and all members of those associations, restraining them, according to the prayer of the bill, from interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce of any printing press or presses manufactured by complainant, or the transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any contract or contracts made by complainant respecting the sale, transportation, delivery, or installation of any such press or presses, by causing or threatening to cause loss, damage, trouble, or inconvenience to any person, firm, or corporation concerned in the purchase, transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any such contract or contracts; and also and especially from using any force, threats, command, direction, or even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, or engaged in hauling, carting, delivering, installing, handling, using, operating, or repairing any such press or presses for any customer of complainant. Other threatened conduct by defendants or the associations they represent, or the members of such associations, in furtherance of the secondary boycott, should be included in the injunction according to the proofs.

Complainant is entitled to its costs in this court and in both courts below.

Decree reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Mr. Justice Brandeis, dissenting, with whom Mr. Justice Holmes and Mr. Justice Clarke concur:

The Duplex Company, a manufacturer of newspaper printing presses, seeks to enjoin officials of the machinists' and affiliated unions from interfering with its business by inducing their members not to work for plaintiff or its customers in connection with the setting up of presses made by it. Unlike *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461, there is here no charge that defendants are inducing employees to break their contracts. Nor is it now urged that defendants threaten acts of violence. But plaintiff insists that the acts complained of violate both the common law of New York and the Sherman Act, and that, accordingly, it is entitled to relief by injunction under the state law and under § 16 of the Clayton Act, October 15, 1914, chap. 323, 38 Stat. at L. 730, 737, Comp. Stat. §§ 8835a, 8835o, 9 Fed. Stat. Anno. 2d ed. pp. 730, 745.

The defendants admit interference with plaintiff's business, but justify on the following ground: There are in the United States only four manufacturers of such presses, and they are in active competition. Between 1909 and 1913 the machinists' union induced three of them to recognize and deal with the union, to grant the eight-hour day, to establish a minimum wage scale, and to comply with other union requirements. The fourth, the Duplex Company, refused to recognize the union; insisted upon conducting its factory on the open-shop principle; refused to introduce the eight-hour day, and operated, for the most part, ten hours a day; refused to establish a minimum wage scale;

and disregarded other union standards. Thereupon two of the three manufacturers who had assented to union conditions notified the union that they should be obliged to terminate their agreements with it unless their competitor, the Duplex Company, also entered into the agreement with the union, which, in giving more favorable terms to labor, imposed correspondingly greater burdens upon the employer. Because the Duplex Company refused to enter into such an agreement, and in order to induce it to do so, the machinists' union declared a strike at its factory, and in aid of that strike instructed its members and the members of affiliated unions not to work on the installation of presses which plaintiff had delivered in New York. Defendants insist that by the common law of New York, where the acts complained of were done, and where this suit was brought, and also by § 20 of the Clayton Act (38 Stat. at L. 730, 737, chap. 323, Comp. Stat. §§ 8835a, 8835o, 1243d, 9 Fed. Stat. Anno. 2d ed. pp. 730, 6 Fed. Stat. Anno. 2d ed. pp. 141), the facts constitute a justification for this interference with plaintiff's business.

First. As to the rights at common law: Defendants' justification is that of self-interest. They have supported the strike at the employer's factory by a strike elsewhere against its product. They have injured the plaintiff, not maliciously, but in self-defense. They contend that the Duplex Company's refusal to deal with the machinists' union and to observe its standards threatened the interest not only of such union members as were its factory employees, but even more of all members of the several affiliated unions employed by plaintiff's competitors, and by others whose more advanced standards the plaintiff was, in reality, attacking; and that none of the defendants and no person whom they are endeavoring to induce to refrain from working in connection with the setting up of presses made by plaintiff is an out-

sider,—an interloper. In other words, that the contest between the company and the machinists' union involves vitally the interest of every person whose co-operation is sought. May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? Applying common-law principles the answer should, in my opinion, be: Yes, if, as matter of fact, those who so co-operate have a common interest.

The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life. It is conceded that, although the strike of the workmen in plaintiff's factory injured its business, the strike was not an actionable wrong, because the obvious self-interest of the strikers constituted a justification. See *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638. Formerly courts held that self-interest could not be so served. 2 Commons, *History of Labor in United States*, chap. 5. But even after strikes to raise wages or reduce hours were held to be legal, because of the self-interest, some courts held that there was not sufficient causal relationship between a strike to unionize a shop and the self-interest of the strikers to justify injuries inflicted. *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Lucke v. Clothing Cutters' & T. Assembly*, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327. But other courts,

found that there was justification, because they viewed the facts differently. *National Protective Assn. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; *Roddy v. United Mine Workers*, 41 Okla. 621, L.R.A.1915D, 789, 139 Pac. 126. When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the workingmen did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. *Burnham v. Dowd*, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; *Purvis v. Local No. 500*, U. B. C. J. 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; *Alfred W. Booth & Bro. v. Burgess*, 72 N. J. Eq. 181, 65 Atl. 226. But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself. *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *Cohn & R. Electric Co. v. Bricklayers, M. & P. Local Union*, 92 Conn. 161, 6 A.L.R. 887, 101 Atl. 659; *Gill Engraving Co. v. Doerr*, 214 Fed. 111; *State v. Van Pelt*, 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495; *George J. Grant Constr. Co. v. St. Paul Bldg.*

Trades Council, 136 Minn. 167, 161 N. W. 520, 1055; *Pierce v. Stablemen's Union*, 156 Cal. 70, 76, 103 Pac. 324.

So, in the case at bar, deciding a question of fact upon the evidence introduced and matters of common knowledge, I should say, as the two lower courts apparently have said, that the defendants and those from whom they sought co-operation have a common interest which the plaintiff threatened. This view is in harmony with the views of the court of appeals of New York. For in New York, although boycotts like that in *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815, are illegal because they are conducted not against a product, but against those who deal in it, and are carried out by a combination of persons not united by common interest, but only by sympathy (*Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 6 A.L.R. 901, 124 N. E. 97), it is lawful for all members of a union, by whomever employed, to refuse to handle materials whose production weakens the union (*Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *P. Reardon v. Caton*, 189 App. Div. 501, 178 N. Y. Supp. 713; compare *Paine Lumber Co. v. Neal*, 244 U. S. 459, 471, 61 L. ed. 1256, 1264, 37 Sup. Ct. Rep. 718). "The voluntary adoption of a rule not to work upon non-union-made material, and its enforcement, differs only in degree from such voluntary rule and its enforcement in a particular case. Such a determination also differs entirely from a general boycott of a particular dealer or manufacturer, with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer." *Bossert v. Dhuy*, supra, p. 355. In

my opinion, therefore, plaintiff had no cause of action by the common law of New York.

Second. As to the Anti-trust Laws of the United States: Section 20 of the Clayton Act declares:

"Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The acts which are thus referred to are, whether performed singly or in concert:

"Terminating any relation of employment, or . . . ceasing to perform any work or labor, or . . . recommending, advising, or persuading others by peaceful means so to do; or . . . attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or . . . peacefully persuading any person to work or to abstain from working; or . . . ceasing to patronize or to employ any party to such dispute, or . . . recommending, advising, or persuading others by peaceful and lawful means so to do; or . . . paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or . . . peaceably assembling in a lawful manner, and for lawful purposes; or . . . doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

This statute was the fruit of unceasing agitation, which extended over more than twenty years, and was designed to equalize before the law the position of workingmen and employer as industrial combatants. Aside from the use of the injunction, the chief source of dissatisfaction with the existing law lay in the doctrine of malicious combination,¹

¹ See "Malice and Unlawful Interference," Ernst Freund, 11 Harvard L. Rev. 449, 461; "Rights of Traders and Laborers," Edw. F. McClennen, 16 Harvard L. Rev. 237, 244; "Crucial Issues in Labor Litigation," Jeremiah Smith, 20 Harvard L. Rev. 429, 451; Commons & A. Princi-

ples of Labor Legislation, pp. 95-116; Hoxie, Trade Unionism in United States, p. 231; Groat, Attitude of American Courts towards Labor Cases, pp. 76, 77, 221, 246; Bryan, Development of English Law of Conspiracy, pp. 147 et seq.

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and, in many parts of the country, in the judicial declarations of the illegality at common law of picketing and persuading others to leave work. The grounds for objection to the latter are obvious. The objection to the doctrine of malicious combinations requires some explanation. By virtue of that doctrine, damages resulting from conduct such as striking or withholding patronage or persuading others to do either, which, without more, might be *damnum absque injuria* because the result of trade competition, became actionable when done for a purpose which a judge considered socially or economically harmful, and therefore branded as malicious and unlawful.² It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that, due to this dependence upon the individual opinion of judges, great confusion existed as to what purposes were lawful and what unlawful;³ and that, in any

event, Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.

By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them, Congress was to extract the element of *injuria* from the damages thereby inflicted, instead of leaving judges to determine, according to their own economic and social views, whether the damage inflicted on an employer in an industrial struggle was *damnum absque injuria*, because an incident of trade competition, or a legal injury, because, in their opinion, economically and socially objectionable. This idea was presented to the committees which reported the Clayton Act.⁴ The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends

1901, vol. xvii. p. cxiv. pp. 515, 556; Report of Royal Commission on Trade Disputes and Trade Combinations, 1906, p. 12; Report of Commission on Industrial Relations, 1915, pp. 135, 377.

For attempts to reach this doctrine by legislation, see also 52d Congress, H. R. 6640, § 1, 56th Congress, H. R. 11,667, § 7; 57th Congress, S. 649, § 7.

² See James Wallace Bryan, *The Development of the English Law of Conspiracy*:—

"We find little difficulty in attributing the illegality of combinations to strike or otherwise to advance the interests of labor, not to the material loss inflicted upon the employer concerned, but to the harm supposed to result from their activities to the public at large." And since the judge or jury believe the conduct socially bad, and since it is admittedly done intentionally, not inadvertently, they declare that the actors are animated by malice which negatives the justification of "fair competition," e. g., Lord Bowen in *Mogul S. S. Co. v. McGregor* [1892] A. C. 25: "Intentionally to do that which is calculated . . . to damage . . . and does damage another in his property or trade is actionable if done without just

cause or excuse, and . . . is what the law calls a malicious injury."

³ See A. V. Dicey, "The Combination Laws as Illustrating the Relation between Law and Opinion in England during the Nineteenth Century," 17 *Harvard L. Rev.* 511, 532: "The very confusion of the present state of the law corresponds with and illustrates a confused state of opinion."

⁴ It was said that this doctrine "completely unsettle (d) the law . . . and set up the chancellor in the midst of the labor organization at the inception of a strike as an arbiter of their conduct as well as a controller of their fates." 62d Congress, 2d Sess. Hearings before a Subcommittee of the Senate Committee on the Judiciary, on H. R. 23,635, p. 429.

Again, it was pointed out that the incorporation of this idea in the Sherman Law had "done violence to the right to strike—to cease work collectively . . . and to the right to withhold patronage and to agree to withhold patronage." Brief by Samuel Gompers, Hearings before the House Committee on the Judiciary on Trust Legislation, 63d Congress, 2d Sess. vol. 2, p. 1808.

for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words, the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful, and that it justified injuries necessarily inflicted in its course.⁵ Both the majority and the minority report of the House Committee indicate that such was its purpose.⁶ If, therefore, the act applies to the case at bar, the acts here complained of cannot "be considered or held to be violations of any law of the United States," and, hence, do not violate the Sherman Act.

The Duplex Company contends that § 20 of the Clayton Act does not apply to the case at bar, because it is restricted to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment;" whereas the case at bar arises between an employer in Michigan and workingmen in New

York, not in its employ, and does not involve their conditions of employment. But Congress did not restrict the provision to employers and workingmen *in their employ*. By including "employers and employees" and "persons employed and persons seeking employment," it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, the plaintiff's contention proves too much. If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies sever the continuity of the legal relationship. *Iron Molders' Union v. Allis-Chalmers Co.* 20 L.R.A.(N.S.) 315, 91 C. C. A. 631, 166 Fed. 45, 52, 53; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 505, 34 L. ed. 1023, 1025, 11 Sup. Ct. Rep. 405; cf. *Rex v. Neilson*, 44 N. S. 488, 491. The further contention that this case is not one arising out of a dispute concerning the conditions of work of one of the parties is, in my opinion, founded upon a misconception of the facts.

Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justifi-

⁵ Compare the following: "There are, apparently only two lines of action possible: First, to restrict the rights and powers of employers to correspond in substance to the powers and rights now allowed to trade-unions, and, second, to remove all restrictions which now prevent the freedom of action of both parties to industrial disputes, retaining only the ordinary civil and criminal restraints for the preservation of life, property, and the public peace. The first method has been tried and failed absolutely. . . . The only method, therefore, seems to be the removal of all restrictions upon both parties, thus legalizing the strike, the lockout, the boycott, the black list, the bringing in of strikebreakers, and peaceful picketing." Report of the Committee on Industrial Relations, 1915, p. 136.

⁶ The majority declared that the section sets out "specific acts which the best opinion of the courts hold to be within the right of parties involved upon one side or the other of a trade dispute," which it has been necessary to affirm because of "the divergent views which the courts have expressed on the subject, and the difference between courts in the application of recognized rules." The minority insisted that the section prescribes "a set rule for bidding, under any circumstances, the enjoining of certain acts which may or may not be actuated by a malicious motive, or for the purpose of working an unlawful injury, etc." 63d Congress, 2d Session, House Report, 627, p. 30; *id.* Part 2, Appx. A, p. 20.

cation of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is

the function of the legislature, which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.

NOTE.

The boycott as a weapon in industrial disputes forms the subject of annotation in 6 A.L.R. 909, which is supplemented by the annotation appended to *PARKER PAINT & WALL PAPER Co. v. LOCAL UNION, No. 813*, post, 230.

SAMUEL BUYER, Doing Business as Samuel Buyer & Company, Appt.,
v.

WILLIAM S. GUILLAN et al., Individually and as Representatives of District Council 16 of the International Brotherhood of Teamsters, etc.

United States Circuit Court of Appeals, Second Circuit — February 2, 1921.

(271 Fed. 65.)

Injunction — against conspiracy in restraint of trade.

1. Injunction lies to restrain the enforcement of a combination between members of labor unions and transportation companies to refuse to handle freight brought to the wharf for shipment by other than union employees.

[See note on this question beginning on page 230.]

Conspiracy — parties — refusal to transport property.

2. A steamboat company which refuses to receive and transport shipments until its employees consent to handle them may be regarded as a par-

ty to a combination among the employees to refuse to handle shipments tendered by a certain class of persons, which is illegal as in restraint of trade.

[See 19 R. C. L. 69.]

APPEAL by complainant from an order of the District Court of the United States for the Southern District of New York (Hand, Dist. J.) vacating a restraining order and denying a motion for a preliminary injunction to restrain the enforcement of a certain combination to refuse to handle freight brought to the wharf for shipment by other than union employees. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Ward, Hough, and Manton, Circuit Judges.

Messrs. Walter Gordon Merritt, and Austin, McLanahan, & Merritt, for appellant:

Defendants are engaged in an unlawful conspiracy in violation of the

United States Shipping Act and United States Criminal Code, § 37.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; *Burgess Bros. Co. v. Stewart*, 112 Misc. 347, 184 N. Y. Supp. 199; *Hocking Valley R. Co. v. United States*, 127

(271 Fed. 65.)

C. C. A. 285, 210 Fed. 735; *United States ex rel. Stony Fork Coal Co. v. Louisville & N. R. Co.* 195 Fed. 88; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *United States v. Cassidy*, 67 Fed. 698; *Waterhouse v. Comer*, 19 L.R.A. 403, 5 Inters. Com. Rep. 564, 55 Fed. 149; *Stephens v. Ohio State Teleph. Co.* 240 Fed. 759; *Chicago, B. & Q. R. Co. v. Burlington*, C. R. & N. M. R. Co. 34 Fed. 481; *Wabash Co. v. Hannahan*, 121 Fed. 563; *Beers v. Wabash, St. L. & P. R. Co.* 34 Fed. 244; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 395, 5 Inters. Com. Rep. 522, 54 Fed. 746; *Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; *United States v. Debs*, 5 Inters. Com. Rep. 163, 64 Fed. 724; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052; *Seasongood S. K. Co. v. Tennessee & O. Rivers Transp. Co.* 21 Ky. L. Rep. 1142, 49 L.R.A. 270, 54 S. W. 193; *Chicago & A. R. Co. v. Pillsbury*, — Ill. —, 8 N. E. 803; *Wilson v. New*, 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L.R.A. 396, 40 Am. St. Rep. 616, 37 N. E. 466; *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545, 16 Am. Neg. Cas. 765; *People ex rel. Price v. Sheffield Farms-Slawson Decker Co.* 225 N. Y. 25, 121 N. E. 474; *Re Cullinan*, 39 Misc. 636, 80 N. Y. Supp. 607, affirmed in 85 App. Div. 621, 82 N. Y. Supp. 1098.

The defendant common carrier is under a common-law obligation to serve the public without discrimination, and a combination to bring about the non-performance of that obligation is unlawful.

Root v. Long Island R. Co. 114 N. Y. 300, 4 L.R.A. 331, 2 Inters. Com. Rep. 576, 11 Am. St. Rep. 643, 21 N. E. 403; *Windsor v. New York C. & H. R. R. Co.* 82 Misc. 38, 143 N. Y. Supp. 645, affirmed in 220 N. Y. 695, 116 N. E. 1084; *Cheney Bros. v. Hines*, 266 Fed. 310; *Bank of Orange v. Brown*, 3 Wend. 153; *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178, 5 Am. Neg. Cas. 21; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052; *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682; *Michie, Carr. § 381*; *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 144 N. Y. 200, 43 Am. St. Rep. 752, 39 N. E. 79; *Yazoo*

& M. Valley R. Co. v. Crawford, 107 Miss. 352, L.R.A.1915C, 250, 65 So. 462; *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; 10 C. J. 102; *Monroe v. Longren*, 87 Kan. 342, 124 Pac. 367; *Rogers Locomotive Works v. Erie R. Co.* 20 N. J. Eq. 379.

If the combination is in violation of the criminal provisions of the Shipping Act, or of any other law, a party irreparably injured in his property rights by such combination is entitled to an injunction.

Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. 874, 36 Sup. Ct. Rep. 482; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 730; *Rourke v. Elk Drug Co.* 75 App. Div. 145, 77 N. Y. Supp. 373; *Kellogg v. Sowerby*, 190 N. Y. 370, 83 N. E. 47; *Straus v. American Publishers' Asso.* 85 App. Div. 446, 83 N. Y. Supp. 271, 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107.

The carrier and its agents are co-conspirators with the union defendant.

Aberthaw Constr. Co. v. Cameron, 194 Mass. 209, 120 Am. St. Rep. 542, 80 N. E. 478; *Lehigh Structural Steel Co. v. Atlantic Smelting & Ref. Works*, — N. J. Eq. —, 111 Atl. 376; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 42 Hun, 153, affirmed in 106 N. Y. 669, 12 N. E. 825; *Howland v. Corn*, 146 C. C. A. 227, 232 Fed. 35; *Perry v. Hayes*, 215 Mass. 296, 102 N. E. 318; *Wilson v. New*, 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024.

The combination violates Act of Congress of July 2, 1890, known as the Sherman Anti-trust Law, as amended by the Clayton Act of October 15, 1914.

United States v. Workmen's Amalgamated Council, 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 L. ed. 994, affirmed in 6 C. C. A. 258, 13 U. S. App. 426, 57 Fed. 85; *United States v. Debs*, 5 Inters. Com. Rep. 163, 64 Fed. 738; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 821; *United States v. Cassidy*, 67 Fed. 698; *Waterhouse v. Comer*, 19 L.R.A. 403, 5 Inters. Com. Rep. 564, 55 Fed. 149; *United States v. Elliott*, 62 Fed. 801; *United States v. Agler*, 62 Fed. 824.

The combination violates the common law, inasmuch as it seeks to injure the complainant and deprive him of his law-

ful rights to have his goods transported by common carriers.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 6 A.L.R. 901, 124 N. E. 97.

Messrs. Loomis, Barrett, & Jones, for appellees Guillian et al.:

No unlawful or improper act on the part of the Old Dominion Transportation Company or its officers is disclosed, and whatever be the liability of the members of the labor unions employed by it, no injunction should lie against these defendants for such employees' acts.

Girvin v. New York C. & H. R. R. Co. 166 N. Y. 289, 59 N. E. 921, 9 Am. Neg. Rep. 547; *Sharp v. Erie R. Co.* 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, 19 Am. Neg. Rep. 448; *Muller v. Hillenbrand*, 179 App. Div. 831, 167 N. Y. Supp. 259; *Kilmer v. Dr. Kilmer & Co.* 175 App. Div. 670, 162 N. Y. Supp. 617.

Whatever be the rights of the complainant upon the trial of the action, he is not entitled to this preliminary injunction.

Moller v. Lincoln Safe Deposit Co. 174 App. Div. 458, 161 N. Y. Supp. 171; *Galveston, H. & S. A. R. Co. v. Karrer*, — Tex. Civ. App. —, 109 S. W. 440.

There is no unreasonable discrimination against the complainant, since to accede to his demand would cause a serious strike. The carrier is entitled and obliged to take into consideration the general interests of the public, as well as those of the complainant.

The Styria v. Morgan, 186 U. S. 1, 13, 46 L. ed. 1027, 1034, 22 Sup. Ct. Rep. 731; *Pearson v. Duane*, 4 Wall. 605, 18 L. ed. 447; *York Haven Water & P. Co. v. York Haven Paper Co.* 119 C. C. A. 508, 201 Fed. 270; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *McCarthy v. Bunker Hill & S. Min. & Concentrating Co.* 92 C. C. A. 259, 164 Fed. 927; *Barney v. New York*, 83 App. Div. 237, 82 N. Y. Supp. 124.

Messrs. Mann Trice and James F. O'Neill, for appellees Lacey et al.:

It is lawful for a labor organization to adopt and enforce by peaceable

means, and for any combination of workmen to agree to, a policy or rule that no member of the union or combination shall work with nonunion men or handle material furnished by an employer of nonunion labor or upon which nonunion labor has been employed.

Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Mills v. United States Printing Co.* 99 App. Div. 605, 91 N. Y. Supp. 185; *Paine Lumber Co. v. Neal*, 244 U. S. 459, 61 L. ed. 1256, 37 Sup. Ct. Rep. 718; *Jacobs v. Cohen*, 183 N. Y. 211, 2 L.R.A. (N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; *Kissam v. United States Printing Co.* 199 N. Y. 76, 92 N. E. 214; *P. Reardon v. Caton*, 189 App. Div. 501, 178 N. Y. Supp. 713.

Messrs. Gilbert & Gilbert for appellees Carney et al.

Ward, Circuit Judge, delivered the opinion of the court:

This is an appeal from an order of Judge Augustus N. Hand, vacating a restraining order granted by Judge John C. Knox, and denying a motion for a preliminary injunction in a suit arising under § 24 (23) of the Judicial Code (Comp. Stat. § 991 (23) 4 Fed. Stat. Anno. 2d ed. p. 838). The plaintiff is engaged in the business of manufacturing and selling elastic garters and notion specialties, having his principal office and salesroom in New York city and a factory at Norfolk, Virginia, and another at Norwich, Connecticut.

The defendant Old Dominion Transportation Company is a common carrier, and the only common carrier by water between New York city and Norfolk, Virginia. The defendant Guillian is the company's general agent in New York city. The defendant Ettenger is chief clerk of the New York office, and the defendant John E. Ryan a checker. The other defendants are labor unions connected with the shipping of goods by water from this port, and are organized into voluntary unincorporated associations as follows:

The International Brotherhood of

Teamsters, Chauffeurs, Stablemen, and Helpers has local unions throughout the United States, among which is the Drivers' & Chauffeurs' Local Union No. 807, engaged in driving horse or motor trucks in New York city and vicinity. District Council 16 of the Brotherhood is composed of delegates from various local unions located in New York city and vicinity, including the Local Union 807.

The International Longshoremen's Association is composed of workmen engaged in checking, handling, weighing, loading, and unloading merchandise and coaling vessels, and in operating lighters, tugs, and steamships, in different ports of the United States, and is subdivided into local unions, among which are the following operating in New York city and vicinity: Commercial Checkers' Union, Local 874, engaged in checking merchandise for transportation by water; Local Union 791, consisting of members engaged in general longshore work; Scalesmen's Union Local 935, engaged in weighing merchandise for transportation by water; Local Union 947, engaged in the same business; Steamship Pier Office Employees, Local 1017, engaged in handling merchandise for transportation by water; Local Union 895, engaged in general longshore work; Local Union 856, engaged in the same work.

The District Council of New York and vicinity of the International Longshoremen's Association is composed of delegates from the various local unions located in New York and vicinity.

Finally, the Transportation Trades Council of the port of New York and vicinity is composed of delegates from all the local unions of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers, and of the International Longshoremen's Association. Officers or business agents of each one of the foregoing unincorporated associations have been named as parties defendant individually and as

representing the respective associations and their members.

The plaintiff's bill and affidavits allege that the Old Dominion Transportation Company and Guillan, induced and coerced by the associations defendant, have refused to receive and transport the plaintiff's goods, in violation of their duty as common carriers, and that they have entered into a combination with the associations defendant in violation of acts of Congress, among others the Sherman Law, to prevent the handling or transportation of the plaintiff's merchandise, or of any merchandise handled or operated on by nonunion men, or which is offered for transportation by any transfer company or individual teamster not employing union men exclusively.

July 8, 1920, the plaintiff delivered to the Citizens' Trucking Company, Incorporated, which employs both union and nonunion men, a shipment of raw materials to be used in his factory at Norfolk, Virginia. The Trucking Company brought the goods to the pier of the Transportation Company and tendered them, together with bills of lading for shipment; but the company's checker refused to check them on the ground that the truck was a scab truck and he had been instructed by the delegate of his union not to check them. The defendant Guillan was then called upon, and he tried to get two other checkers to check the goods; but they refused for the same reason. Thereupon the truckmen offered to unload, weigh, and check the goods themselves; but Guillan refused, on the ground that he was unfamiliar with the details and his employees would not attend to them. July 12 the same shipment was again tendered to the Old Dominion Transportation Company and refused for the same reasons.

Exactly the same thing took place with a shipment by the International Cork Company, of Brooklyn, to Suffolk, Virginia, via Norfolk, the company's checkers refusing to

check the freight; one of the checkers telling the defendant Guillan that he would like to check the goods, but if he did so he would be fined \$50 by his union. The checker was the defendant John E. Ryan.

There are also submitted by the plaintiff a number of affidavits, made in April and May, 1920, of officers and business agents of the Transportation Trades Council and of various of the local organizations, including Local Unions 807, 874, and 791, in the case of Burgess Co. Inc. v. Frederick Stewart et al., in which these deponents allege that the local unions have voluntarily agreed to follow the advice of the Transportation Trades Council, in pursuance of which they will not handle any nonunion merchandise transported or operated on in any way by any firm, individual, or corporation that refuses to recognize the unions, and this not for the purpose of injuring such persons, but for their own benefit, to establish the policy that all waterfront business shall be done exclusively by union men.

The affidavit and answer of the defendant Guillan is to the effect that he did not refuse to receive the plaintiff's shipment, but, on the contrary, desired to transport it, ordered the company's dock employees to receive, handle, and check it, which they refused to do, and that neither he nor the Old Dominion Transportation Company has ever combined with the unions to refuse to handle nonunion merchandise or the merchandise delivered by nonunion teamsters.

The answer of the Old Dominion Transportation Company is to the effect that the company was and is willing and anxious to receive and transport the plaintiff's merchandise, but that its employees refused to handle the same because it was brought on a nonunion truck; that if the company had discharged these employees its whole business would have been tied up, to the great injury of the public.

The answer of B. F. Ettenger is that he is chief clerk of the com-

pany's office, and has nothing to do with receiving, loading, checking, or weighing freight; that he is not a member of any labor union, and never combined with anyone to injure the plaintiff's business, or to induce the Old Dominion Transportation Company to refuse to receive or carry his goods.

The answer of the defendant Carney, individually and as president of the United Weighers' Association, Local 974, of the International Longshoremen's Association and its members, denies that he or they have entered into any combination to injure the plaintiff or his business, or have coerced the Transportation Company to refuse to accept and transport the plaintiff's merchandise, referred to in the complaint, in interstate commerce.

The answer of John D. Welch, individually and as president of Local Union 895 of the International Longshoremen's Association and its members, is to the same effect, but admits that the Old Dominion Transportation Company does employ some of its members. The answer of Peter Hussey, individually and as secretary of Local Union 895 of the International Longshoremen's Association and its members, is to the same effect. The answer of John Quinn, as secretary and treasurer of Local Union 874 of the International Longshoremen's Association and its members, is to the same effect.

The affidavits of Martin Lacey, as representative of District Council 16 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers and its members, of John F. Quinn, as representative of Truck Drivers' and Chauffeurs' Local Union 807, and of W. F. Kehoe, representative of the Transportation Trades Council of the Port of New York, are to the effect that neither they individually nor the bodies they represent had any part in the refusal of the Old Dominion Transportation Company to receive the plaintiff's freight as alleged in the complaint.

While it is true that the injunc-

tion asked for is of a mandatory nature, rarely granted on affidavits, the question is really one of law, and we believe that it will be to the interest of the public, and with the approval of the parties, with the exception of the Old Dominion Transportation Company, to dispose of the question now.

It will be seen that the representatives of the unions admit the existence of an agreement that their members will not handle the plaintiff's interstate shipments unless he sends them to the Old Dominion Transportation Company by some transfer agency operated entirely by union men, and the Old Dominion Transportation Company admits

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that it will not transport his shipments until its employees consent to

handle them. For this reason it may be regarded as a party to the combination. It is also plain that the plaintiff has sustained, and is sustaining, and will sustain in the future, special and irreparable damage as the result of this combination, for which he has no adequate remedy at law, because of the difficulty of ascertaining the damage in case of each shipment refused and of the necessity of bringing a multiplicity of suits.

The whole case of the defendants and the conclusions of the learned judge of the court below are based upon the law of the state of New York as laid down in *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661, to the effect that a combination of individuals whose primary intent is the protection of their own interests, as, for instance, to establish complete unionization of the longshore work of the water front of the port of New York, not accompanied by violence or intimidation, and not to gratify malice, is lawful, even if it does injure others.

In *Duplex Printing Press Co. v. Deering*, 164 C. C. A. 562, 252 Fed. 722, we followed this view, and also held that such combinations did not

violate the Sherman Law (Comp. Stat. §§ 8820–8823, 8827–8830, 9 Fed. Stat. Anno. 2d ed. pp. 644, 687, 699, 701, 712, 713, 726). We construed § 20 of the Clayton Act (Comp. Stat. § 1243, 5 Fed. Stat. Anno. 2d ed. p. 984) as legalizing a secondary boycott so far as it consists in refusing to deal with anyone who deals with an employer whose employees are on strike. But this decision has been lately reversed by the Supreme Court, holding that, if the combination was

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in violation of an act of Congress, it is of minor consequence whether either kind of boycott (primary or secondary) is lawful or unlawful at common law or under the statutes of particular states; that § 6 of the Clayton Act (§ 8835f), providing that labor organizations shall not be held illegal combinations in restraint of trade under the Anti-trust Laws, contemplates only such organizations as lawfully carry out their legitimate objects; that § 20, prohibiting United States courts and judges from issuing injunctions, applies only to disputes between employers and employees.

The combination in this case being in restraint of interstate commerce, and no controversy between employer and employees being involved, the order is reversed, and the court below directed to issue a preliminary injunction in accordance with this opinion.

NOTE.

The boycott as a weapon in industrial disputes forms the subject of annotation in 6 A.L.R. 909, which is supplemented by the annotation appended to *PARKER PAINT & WALL PAPER CO. v. LOCAL UNION* (reported herewith) post, 230. The other decisions on the particular aspect of the subject involved in *BUYER v. GUILLAN* (reported herewith) ante, 216, may be found in subd. V. 1, of that annotation.

PARKER PAINT & WALL PAPER COMPANY, Appt.,

v.

LOCAL UNION NO. 813 et al.

West Virginia Supreme Court of Appeals — February 8, 1921.

(— W. Va. —, 105 S. E. 911.)

Picketing — injury to neutral business.

1. Where a contractor has entered into a contract to paint a store building with the owner, who then conducts a retail merchandise business therein, and is actually in the performance of his contract, it is unlawful for others to carry banners in front of the store with the words thereon, "This store is unfriendly to union labor," or, "This store is unfair to union painters," or like legends, the said persons carrying said banners, or causing the same to be carried, having no industrial dispute with the store owner, thereby causing the said store owner, in fear of loss or violence, to cancel said contract and discharge the contractor, to his irreparable loss; and such "bannering" will be enjoined.

[See note on this question beginning on page 230.]

Conspiracy — lawful purpose — unlawful acts.

2. An association of persons will not be permitted to accomplish a lawful purpose by the use of unlawful acts, and, conversely, will not be permitted to accomplish an unlawful purpose even by means that would otherwise be lawful.

[See 5 R. C. L. 1061.]

— destruction of business.

3. Where a person or combination of persons seeks to destroy another's trade or business, and by their actions influence or intimidate others with whom he has valuable contracts, caus-

ing said others to break such contracts and discharge his employees then actually performing the same, and the loss is actual, continuing, and irreparable, injunction will lie to compel such person or combination of persons to desist from such acts.

Contract — conspiracy to induce breach — liability.

Persons who conspire to induce others to break a valid contract between other persons are liable to action therefor, and, if the loss occasioned thereby is continuing and irreparable, injunction will lie to prevent it.

[See 5 R. C. L. 1095, 1096.]

Headnotes by LIVELY, J.

APPEAL by plaintiff from an order of the Circuit Court for Cabell County dissolving an injunction in a suit brought to enjoin defendants from interference with the orderly conduct of plaintiff's business or in any way attempting to influence other persons with whom it has valuable contracts to cancel the same. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Warth, McCullough, & Peyton, for appellant:

It is unlawful to placard or banner a store or building, as the same amounts to a boycott, and in this instance was done for an unlawful purpose.

16 R. C. L. 429; Roraback v. Motion Picture Mach. Operators Union, 140 Minn. 481, 3 A.L.R. 1290, 168 N. W. 766, 169 N. W. 529; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A.

753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172.

It is unlawful to produce a breach of contract as shown and attempted by the defendants.

Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 5 L.R.A. (N.S.) 1091, 53 S. E. 161, 8 Ann. Cas. 885; Jaggard, Torts, § 155; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

It is unlawful to interfere with the

employees of the plaintiff and to picket plaintiff's place of business, as shown by the affidavits.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Boston Store v. Retail Clerks International Protective Asso. 216 Ill. App. 428; Moore v. Cocks, Waiters & Waitresses' Union, 39 Cal. App. 538, 179 Pac. 417; Atchison, T. & S. F. R. Co. v. Gee, 139 Fed. 582.

It is a constitutional right for one to work on his own job and contract, and any attempt to prevent it by any means whatsoever is unlawful.

Roraback v. Motion Picture Mach. Operators Union, 140 Minn. 481, 3 A.L.R. 1293, 168 N. W. 766, 169 N. W. 529; Traux v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Berry v. Boston Elev. R. Co. 188 Mass. 536, 108 Am. St. Rep. 499, 74 N. E. 933; Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 866, 10 S. E. 285; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Young v. Com. 101 Va. 853, 45 S. E. 327; Butchers' Union, S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Larkin v. Long [1915] A. C. 814, [1915] W. N. 191, 84 L. J. P. C. N. S. 201, 113 L. T. N. S. 337, 31 Times L. R. 405, 59 Sol. Jo. 455, 49 Ir. L. T. 121, Ann. Cas. 1915D, 509.

It is unlawful to conspire to injure and to ruin the business of another by any means.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 251, 62 L. ed. 276, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461.

Injunction is the proper remedy.

Gray v. Building Trades Council, 91

Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; 14 R. C. L. 390.

Lively, J., delivered the opinion of the court:

An injunction was sought by the Parker Paint & Wall Paper Company against Local Union No. 813 and others to prevent defendants from interfering with the orderly conduct of plaintiff's business, to prevent picketing of complainant's place of business and its employees, or terrorizing them, or persons with whom plaintiff has contracts, or in any way attempting to cause or influence other persons with whom plaintiff has valuable contracts to cancel the same.

Plaintiff is engaged in painting, decorating, and papering in the city of Huntington, and employs from five to ten men and sometimes more, in carrying out its contracts and the conduct of its business. It became a member of an organization known as the Master Painters' Association of the city of Huntington, which had been incorporated for the purpose of organizing the employers of painters, decorators, and paper hangers for mutual aid in the conduct of their affairs, and to obtain uniformity in bidding on contracts, possibly to prevent competitive bidding among its members. The members were operating under a wage contract with Local Union No. 813, effective until April 1, 1920, and conducting the "closed shop." The defendant Local Union No. 813 was a union labor organization, a branch of the Brotherhood of Painters, Decorators, and Paper Hangers of America, with headquarters in the city of Indianapolis, Indiana. In the month of January, 1920, friction arose between the local union and those of its members who composed the Master Painters organization, and these members were not allowed to sit in the meeting of the local union or to participate in its affairs, although holding "union cards," under a rule or by-law which annulled the membership of any employer who joined any or-

ganization of employers. After some futile attempts to adjust the differences between the two organizations, the local union refused to allow its members to work on any contracts being carried on by the Master Painters, or labor on any work in which any member of the Master Painters organization worked. They would not labor on the same work on which the employer also labored, unless he withdrew from the Master Painters and took out a "union card" in Local Union No. 813. On February 7, 1920, the local union called its men off of a house where they were employed by one G. W. Day, a member of the Master Painters, because he (Day) had painted a mantel in the house. The Master Painters then began to employ nonunion men on their contracts, and the trouble began in earnest with increasing intensity. Plaintiff company, managed by P. C. Parker, who had been an active participant in the troubles, presented its bill for injunction to the judge of the circuit court of Cabell county on March 19, 1920, alleging, among other things, that it had valuable contracts for painting, decorating, and papering houses in said city, and especially with L. H. Cammack, for painting, papering, and decorating a new house on Third avenue, and with McCrorey's 5 & 10 Cent Store for interior work, and with Huntington Homes Building Company for various buildings; that defendants had combined and conspired together to destroy its business, and had caused to be carried to and fro in front of the 5 & 10 Cent Store, banners, which bore the legends, "This store is unfriendly to union labor," and, "This store is unfair to union painters," and that thereby the manager of the store became intimidated, and, fearing loss in trade, compelled complainant to cease work; that then the agents of the defendants approached said store manager, declaring to him that plaintiff would not be permitted to finish the work, and asked him to give them the job

of finishing the same. He refused, and plaintiff's men were again placed on the work, and the intimidation and "bannering" again began, when the store manager again refused to allow plaintiff to proceed unless defendants could be made to cease the "bannering." It is also alleged that in further pursuance of the conspiracy the defendants went to the Cammack house, where plaintiff's employees were laboring, and induced them and others not in plaintiff's employ to cease work, or interfered with them in such a way as to cause the work to be hindered or delayed to such an extent that Cammack canceled his contract with plaintiff, and, in order to get his house finished, contracted with the members of the local union for that purpose, causing great loss to the plaintiff; that plaintiff had its principal place of business and paint shop in the Deardorff-Sisler Department Store in said city, and defendants were carrying banners in the street before the store building, with the legend thereon, "The wall paper department of this store is unfriendly to union labor," and "The wall paper store in this building is unfair to union labor," causing confusion and near breaches of the peace, and causing embarrassment of and financial loss to the department store. The bill also charged defendants with placing "pickets" at the entrance to plaintiff's place of business for the purpose of intimidating its employees, and persuading them to leave plaintiff's employ, and that a confederate of defendants, not giving his name, had attempted to bribe the janitor, a colored man, in the 5 & 10 Cent Store to pull down the scaffolding in the store from under plaintiff's employees while at work. There are other allegations in the bill which it is unnecessary to detail.

Upon refusal of the circuit court to grant an injunction, the bill was presented to the judges of this court, and an injunction as prayed for was awarded on March 20, 1920, effective until the further order of

the circuit court of Cabell county. On March 29, 1920, the defendants answered, denying the commission of any unlawful act; denying any conspiracy to injure the plaintiff; denying the picketing or the carrying of banners with legends thereon in front of either of the stores mentioned; in short, denying all the material allegations of the bill. The bill and answer were supported by nineteen affidavits. The circuit court dissolved the injunction on April 2, 1920, from which action this appeal was awarded.

Inspection of the pleadings and analysis of the affidavits bring the conclusion that this litigation is the result of a controversy between Local Union No. 813 and Master Painters, primarily over the right of a member of the Master Painters organization to continue as a member of the local union, and to personally labor on his own contracts while a member of the Master Painters. The Master Painters asserted their right so to labor, and, not having union cards in the local union recognized as genuine by the members of the local union, the union laborers refused to work on contracts with members of the Master Painters. This occurred on the 7th of February, when the union men withdrew from the George W. Day job because Day had painted a mantel without having a recognized union card. This brought about the employment of nonunion men by the members of the Master Painters in order to complete their contracts and carry on their business. These nonunion men were brought from various points without and within the state. The local union then began the acts complained of against the plaintiff, a member of the Master Painters. There was no controversy over a wage scale or questions of that character. The local union succeeded, so far as the record goes, in preventing any of its members from working for the plaintiff. While the answer denies the material allegations of the bill, and the affidavits affirm that noth-

ing was done by defendants to prevent the plaintiff from peaceably and orderly carrying out its contracts, we are faced with the fact that by reason of the activities of the defendants, through their business agents and walking delegates, they caused plaintiff to lose its partly performed contract with L. H. Cammack. The bannering in front of the 5 & 10 Cent Store caused a loss of that contract to plaintiff, or at least delay until this suit was begun. The bannering of the Dear-dorff-Sisler Department Store was calculated to bring about strained relations between that store and plaintiff, and did cause annoyance to the landlord of plaintiff and possible financial loss. It tended to destroy plaintiff's business. It is true that this bannering of these stores was disavowed by the business manager of defendant local union, but it is shown, and not controverted, that members of the local union carried these banners to and fro; and when any number of persons form an organization and act together in a common undertaking, each member is the agent of all, and the act or declaration of one in pursuing the common undertaking is the act of all and is admissible as evidence against them. 1 Greenl. Ev. 16th ed. § 184b. We do not attach much weight to the affidavit of the janitor in the 5 & 10 Cent Store to the effect that he was offered a bribe, by someone unknown to him, to pull the scaffolding from under the nonunion workmen of plaintiff while working in the store. We rather think it was ascribable to the peccant humor of some individual enthusiast, and are loath to believe it was planned or countenanced by defendants. The affidavit of L. H. Cammack is illuminating on what occurred at his new house, and, although partially controverted, it is not denied that the result was as charged. Cammack's affidavit is as follows:

"Early in February—on the 4th day of February—I made a contract with the Parker Paint & Wall Paper

Company to finish my house at 1606 Fifth avenue, paint it outside and in, for which I was to pay them \$720. Mr. Parker was in, and in a couple of days he put three men on the job. At the same time I made arrangements with Hagan & Company to put on a tin tile roof, and Hagan's men were working on the roof at the time that Parker's men came to work. They had only worked a part of a day when I began to see various people that I didn't know coming into my house without asking permission, and walking around and looking at the workmen, and then going out and holding conferences on the sidewalk and back of the house. At one time there were two or three sets of them on the premises. None of them spoke to me; they brushed past me and went on in the house and all over the house, and would then come back and hold a conference and go off. The next day the tanners were on the house at work, when a man by the name of Galt, whom I know by sight and whom I was told was some sort of a walking delegate, came up to the house and kept motioning to the tanners to come down and see him, and finally one of them went down. Galt was there several times during the day in company with other men, who I was told were painters; and along during the afternoon, just before a big storm came up, the tanners came off of the house and said nothing to me. However, a big storm came and did great damage to my plastering and woodwork, because they left the roof entirely unprotected and went on down to Hagan & Company's place of business. I went on to Hagan & Company and found from Mr. Hagan that the tanners had been ordered off by this fellow Galt, or somebody who seemed to be attending to their affairs, because they said they would not work with any of Parker's men. A fellow by the name of Bond here in town, whom I never employed to attend to my business, and had only heard of,—J. H. Bond, I believe it is,—

came up that evening and said that he wanted to arbitrate the affair. I told him that I had not employed him in any connection on the house, and there was nothing for us to arbitrate; that it was my business, and not his, and the only thing I would ask him to do would be to attend to his business and let me attend to mine. The next few days following this I was visited by several painters, who said that they were union painters, and among them I remember a fellow by the name of Corley, who urged that I let him do the work because he was a union painter, and that I could go ahead and not have any trouble if I would let him do the work. He made three or four trips to the office to see me. I paid no attention to that, and was expecting to have Mr. Parker go ahead with the contract. Other painters, some of whom I knew and some of whom I did not know, came on the same mission, saying that they were union painters, and that if I employed them they would straighten it out and put the tanners back to work and save my house from being ruined by rain, etc. Much to my disgust, and although it was very repugnant to me to do so, I employed a man who said that he was a union painter to go ahead with the work, because of the fact that I could not get a roof on the house and protect it from the weather otherwise. In the meantime I had asked Mr. Parker to take his men from the house, which he very courteously did, saying that he did not want to embarrass me in the matter at all; and in order to get the roof on and at the same time get into a house which I had been held out of for months on account of a seemingly unending series of delays while the work was being done by some of those employed, I put a man on who said that he was a union painter to finish some of the painting, and then the tanners went back on the job. The whole business was scattered over a very long time. Mr. Parker came in on Friday very early in February, and the

next Monday he had some men there, and that day or the next day the tinner were on the roof, and they worked that day, but the next day they came off; that was the first day that all these walking delegates were around there attending to my business for me.

"Mr. Davis, the man I employed to look after the carpenter work, said that he had been called down to union headquarters and ordered to quit the job and also take his carpenters off, and Mr. Davis informed me that he had told them he would not quit the job under any circumstances, no matter what they did or what threats they made. So Mr. Davis and his carpenters stayed on the job.

"I employed Jesse Saddler to put in the tile mantel about a week after giving the contract to Parker for the painting, and his men started to work, but Mr. Saddler came to me and told me that they were making so much fuss that he doubted whether he could get his men to work on the job as long as any of Parker's men were working. It was for these reasons, and because I wanted to get in the house, that I asked Mr. Parker to take his men away and let me get ahead with the work, and protect the house, particularly, by getting a roof on it."

There are two legal propositions which are applicable to this case:

(1) A lawful purpose cannot be carried out by the use of unlawful means; (2) if the purpose be unlawful, it may not be accomplished even by means that would otherwise be legal.

What was the purpose of these various acts of the defendants? They affirm that their purpose was a lawful one, and was for the maintenance of their organization; that their acts were peaceful and persuasive. But it is manifest that the means by which this end was sought to be attained was the destruction of plaintiff's business by bringing combined pressure upon the persons with whom plaintiff had contracted

for the sale of its labor, and causing them to abrogate those contracts. There can be no question of the right of the defendants to form a union for their mutual protection and advantage, and enlarge their union by inducing others to join for this legitimate and proper object; but there can be no question, on the other hand, that this right must be so used as not wantonly to conflict with the rights of others. The same is true of the Master Painters organization. A person can use the highway in his automobile, but he must not forget that others have the same right, and he must not damage them wantonly or unwittingly. If one person wantonly or maliciously, whether for his own benefit or not, induces a person to —destruction of business.

violate his contract with a third person to the injury of that third person, an action will lie. *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 5 L.R.A. (N.S.) 1091, 53 S. E. 161, 8 Ann. Cas. 885. The bannering of the 5 & 10 Cent Store, charging it with being unfair to union labor and unfair to union painters, could be for the purpose only of causing that

store to break its —Picketing— injury to neutral business.

contract with plaintiff. It had that result. Defendants knew that such a contract existed and was in actual performance. "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade, is actionable if done without just cause or excuse." *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 613. Does it make any difference whether it is accomplished by peaceful bannering? The result is the same as if the manager of the store had been put in fear by rioting or violence. A combination to procure a breach of contract is an unlawful conspiracy at common law.

Folsom v. Lewis, 208 Mass. 336, 35 L.R.A. (N.S.) 787,

94 N. E. 316; *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 5 L.R.A.(N.S.) 1091, 53 S. E. 161, 8 Ann. Cas. 885. Where contracts existed between a plaintiff, who was a painter, and various other persons, owners of houses, for the painting of their buildings, and the labor organization caused a strike because the plaintiff would not recognize its walking delegate, and thereby caused the owners of the buildings to break their contracts with the plaintiff, the court said that the defendants might as well resort to physical force to enforce alleged rights or redress real or imaginary wrongs, that they were actuated by improper motives and by a malicious desire to injure the plaintiff, which the law would not tolerate, and that an injunction would be awarded. *Beattie v. Callanan*, 82 App. Div. 7, 81 N. Y. Supp. 413.

The method adopted by a combination of workmen for the accomplishment of a lawful purpose must itself be lawful, and they will not be permitted to cause a breach of a lawful contract, for instance, by strike by plasterers against their employer, a subcontractor, for the plastering of a building, to coerce the owner into canceling a contract for the use of a patent process of applying plaster to the outside of the building, unless the men so working on the outside are unionized or have union cards. *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, L.R.A. 1916C, 986, 105 N. E. 885. Martin on Modern Law of Labor Unions asserts that the great weight of authority is to the effect that organized labor's right of coercion and compulsion by strikes, or withholding labor, or threats thereof is limited to strikes, or withholding of labor, or threats thereof against persons with whom the union has trade disputes. And the use of such means against one's customers in order to coerce them to compel him to comply with demands made on him by the union is an unjusti-

fiable interference with the rights of such customers. *Martin, Labor Unions*, § 77; *Casey v. Cincinnati Typo. Union (C. C.)* 12 L.R.A. 193, 45 Fed. 135; *Matthews v. Shankland*, 25 Misc. 604, 56 N. Y. Supp. 123; *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172.

It is not clear just what reasons dictated the acts complained of in the bill. If for the purpose of compelling plaintiff to withdraw from membership in the Master Painters, it is unlawful. Plaintiff is as free to join an organization for the lawful furtherance and protection of its affairs as are the members of the Local Union No. 813 to become members of that organization, designed for their protection. If for the purpose of preventing a member of the Master Painters from laboring with his hands in performing his own contracts, it is unlawful. A man's labor is his most sacred asset. It is often his only capital, and as long as he exerts it without injury to others government will protect him. A government which imposes taxes and other public duties, even going so far as to demand life for its defense, and which will not protect its subjects in the "enjoyment of life and liberty with the means of acquiring property and of pursuing and obtaining happiness and safety," is not worthy of the name of government, nor of the support of its subjects. A person's occupation or calling, by which he obtains a livelihood, is property, entitled to protection as such from boycotts or unlawful interferences by others. *Baldwin v. Escanaba Liquor Dealers Asso.* 165 Mich. 98, 130 N. W. 214. If the acts were for the purpose of destroying plaintiff's contracts by making it impossible for him to employ nonunion labor, and ultimately to obtain these contracts themselves and destroy competition, the purpose was unlawful. *W. P. Davis Mach. Co. v. Robinson*, 41 Misc. 329, 84 N. Y. Supp. 837.

"The same liberty which enables

men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes allegiance or obligation to the union." *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 251, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 72, Ann. Cas. 1918B, 461.

It is a well-settled principle, based on sound reasoning, that no person or persons have the right to maliciously injure or destroy the business of another, by acts which serve no legitimate purpose of his own.

"One man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him." *Ertz v. Produce Exch.* 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 31 N. W. 737.

It would be cumbersome and serve no purpose here to review the various decisions and textbooks on boycott, primary and secondary, or on the subject of picketing. The decisions are legion, and some of the niceties and distinctions found in them are difficult to comprehend and are not very instructive. It is sufficient to say that the secondary boycott, where A is brought into a labor dispute between B and C, A having no difference with either, is generally condemned. This "secondary boycott" contemplates that A, upon the request of B, and under the moral intimidation lest B boycott him, may thus be constrained to withdraw his contracts or patronage from C, with whom he has no dispute, the controversy being only between B and C. The English courts, and the Federal courts of this country, vigorously condemn it. *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488,

28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 65 L. ed. —, ante, 196, 41 Sup. Ct. Rep. 172, decision handed down January 3, 1921. The majority of the state courts follow the Federal courts. The proposition, stated tersely by William H. Taft, as quoted by the California supreme court, is as follows: "A body of workmen are dissatisfied with the terms of their employment. They seek to compel their employer to come to their terms by striking. They may legally do so. The loss and inconvenience he suffers he cannot complain of. But when they seek to compel third persons, who have no quarrel with their employer, to withdraw from all association with him by threats that unless such third persons do so the workmen will inflict similar injury on such third persons, the combination is oppressive, involves duress, and, if injury results, it is actionable." *Pierce v. Stablemen's Union*, 156 Cal. at page 76, 103 Pac. 327.

Even some of the state courts which hold that a reasonable boycott is lawful condemn "picketing," holding that the end to be attained thereby, however artful may be the means employed, is the injury of the boycotted business through physical molestation and physical fear caused to the employer and his employed, or who may seek his employment, and to the general public. *Ibid.* See also *Moore v. Cooks, Waiters & Waitresses' Union*, 39 Cal. App. 538, 179 Pac. 417; *Roraback v. Motion Picture Mach. Operators Union*, 140 Minn. 481, 3 A.L.R. 1290, 168 S. W. 766, 169 S. W. 529.

Under the facts shown by this record and the principles of law applicable thereto, we reverse the order of the Circuit Court of Cabell County, entered April 2, 1920, dissolving the injunction, reinstate the injunction, and remand the cause.

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The boycott as a weapon in industrial disputes.

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(*No later decisions herein.*)

I. Scope and introduction.

This annotation is supplemental to one on the same subject in 6 A.L.R. 909, to which reference should be made for a discussion of the general principles involved.

II. Judicial theories.

The judicial theories of the tort involved in boycotting are not discussed in any of the later decisions. For general discussion of this point, see the annotation in 6 A.L.R. 911.

III. The right to refuse to deal with another and to ask others not to do so.

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er's customers to cease business dealings with him is not justifiable where employed in aid of a striker for an unlawful purpose. *Folsom Engraving Co. v. McNeil* (1920) 235 Mass. 269, 126 N. E. 479.

In *Godin v. Niebuhr* (1920) 236 Mass. 350, 128 N. E. 406, it is held that one who interferes with another's business for the purpose of compelling present or prospective customers to withhold their patronage is responsible for the harmful consequences, unless he shows a legal justification for such interference; and that to constitute such justification it must appear not only that the interference was in pursuance of a lawful

purpose, but that it was carried on by lawful means.

IV. Legality of purpose of boycott.

(Supplementing annotation in 6 A.L.R. 916.)

Members of a labor organization cannot object to an employer's laboring with his hands in performing his own contracts. **PARKER PAINT & WALL PAPER CO. v. LOCAL UNION** (reported herewith) ante, 222.

A boycott to compel the proprietor of a moving picture theater to refrain from working as an operative therein is unlawful. **Hughes v. Kansas City Motion Picture Mach. Operators** (1920) 282 Mo. 304, 221 S. W. 95.

Neither employees, nor the unions to which they belong, can be permitted to take affirmative action injurious to an employer, for the purpose of compelling him to continue a department of his business which he wishes to abandon. **Welinsky v. Hillman** (1920) 185 N. Y. Supp. 257.

The refusal of an employer to keep a certain man in his employ is held not a legitimate object of industrial dispute, in **Mechanics' Foundry & Mach. Co. v. Lynch** (1920) 236 Mass. 504, 12 A.L.R. 1057, 128 N. E. 877.

But in **W. A. Wood Mowing & R. Mach. Co. v. Toohey** (1921) 114 Misc. 185, 186 N. Y. Supp. 95, it is held that a labor union may strike to secure the reinstatement of a member alleged to have been improperly discharged.

The membership of an employer in an association of employers is not a legitimate subject of dispute. **PARKER PAINT & WALL PAPER CO. v. LOCAL UNION** (reported herewith).

A boycott is unlawful where its purpose is to influence third persons to break their contract with the complainant. **PARKER PAINT & WALL PAPER CO. v. LOCAL UNION**.

A strike for the purpose of compelling an employer to eliminate from his agreement with his employees, a stipulation that during the continuance of their employment they shall refrain from becoming members of any labor union, is unlawful. **Floersheimer v. Schlesinger** (1921) 115 Misc. 9, 187 N. Y. Supp. 891; **McMichael v.**

Atlanta Envelope Co. (1921) — Ga. —, — A.L.R. —, 108 S. E. 226.

A boycott for the purpose of compelling an employer to unionize his employees is unlawful. **Stuyvesant Lunch & Bakery Corp. v. Reiner** (1920) 110 Misc. 357, 181 N. Y. Supp. 212, affirmed without opinion in (1920) 192 App. Div. 951, 182 N. Y. Supp. 953.

The negotiation of a contract conferring on members of the union the right of preferential employment with a minimum wage scale, and stipulating that permanent employees shall not be temporarily "laid off" even if there should not be sufficient work to keep them employed, and that disputes not covered by the agreement must be submitted to arbitration, is not a legitimate object of industrial dispute. **Folsom Engraving Co. v. McNeil** (1920) 235 Mass. 269, 126 N. E. 479.

And a strike for the purpose of compelling an employer to agree not to operate for more than five days a week, and that no worker shall be laid off, discharged, or suspended because of lack of work, but all available work shall be distributed among all workers in an equitable manner, is illegal. **Jaekel v. Kaufman** (1920) 187 N. Y. Supp. 889.

So is a strike to compel an employer who has laid off part of his working force because of lack of work, to divide all work available among all his employees. **Benito Rovira Co. v. Yampolsky** (1921) 187 N. Y. Supp. 894.

A strike in violation of a contract fixing the rate of wages during a stated term is unlawful. **Gilchrist Co. v. Metal Polishers, Buffers, & Platers Local Union** (1919) — N. J. Eq. —, 113 Atl. 320.

A boycott is lawful in furtherance of a strike occasioned by the violation by the employer of a contract with a labor union relating to terms and conditions of employment. **Greenfield v. Central Labor Council** (1920) — Or. —, 192 Pac. 783.

But the enforcement of a closed-shop agreement is not a legitimate object of industrial dispute, where it appears that the object sought is a monopolization of the labor market. **Lehigh Structural Steel Co. v. Atlan-**

tic Smelting & Ref. Works (1920) — N. J. Eq. —, 111 Atl. 376.

The closed shop is not a legitimate subject of industrial dispute. *Cooks', Waiters' & Waitresses' Local Union v. Papageorge* (1921) — Tex. Civ. App. —, 230 S. W. 1086.

And a strike is unlawful where its purpose is not only to secure a "closed shop," which excludes all workers not members of the union, but also to maintain in the employer's business a "shop representative" whose duty it is to see that union rules are enforced, and that no one is discharged except for reasonable cause, of which the union is to be the sole judge. *Pre' Catelan v. International Federation of Workers* (1921) 114 Misc. 662, 188 N. Y. Supp. 29.

A boycott is for a lawful purpose where its object is to compel an employer to adopt the eight-hour day and pay the union scale for overtime. *P. Reardon v. Caton* (1919) 189 App. Div. 501, 178 N. Y. Supp. 713.

It has been held that collective bargaining is not a legitimate subject of dispute (*United Shoe Machinery Corp. v. Fitzgerald* (1921) — Mass. —, — A.L.R. —, 130 N. E. 86); and that a boycott to compel recognition of the union and collective bargaining is unlawful (*Heitkemper v. Central Labor Council* (1920) 99 Or. 1, 192 Pac. 765).

But recognition of the union, in order to secure a more effective means of collective bargaining, is held to be a legitimate object of an industrial dispute in *Michaels v. Hillman* (1920) 112 Misc. 395, 183 N. Y. Supp. 195.

A strike is justifiable where occasioned by the employer's intentional failure, without apparent excuse and without notice, to keep an engagement deliberately made with representatives of his employees for further consultation touching their contractual relations with one another. *Walton Lunch Co. v. Kearney* (1920) 236 Mass. 310, 128 N. E. 429.

In *Birmingham Trust & Sav. Co. v. Atlanta, B. & A. R. Co.* (1921) 271 Fed. 743, it is said that a strike is lawful if for the purpose of asserting a supposed right, or of obtaining an economic advantage, though if done

for the sole purpose of injuring the employer, it may be a malicious tort. This statement is, however, too broad. The right must be an actual right, not merely a supposed right (see *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905) 1 B. R. C. 1, and note); nor is an economic advantage a justification, where the rights of the public are prejudiced.

V. *Legality of means employed.*

a. *Threats and intimidation, in general.*

That the law recognizes and gives full force to threats which are not spoken, as well as to those which are spoken, see, in addition to the cases cited to this point in the annotation in 6 A.L.R. at p. 920, *Grimes v. Durnin* (1921) — N. H. —, 114 Atl. 273; *Cooks', Waiters' & Waitresses' Union v. Papageorge* (1921) — Tex. Civ. App. —, 230 S. W. 1086.

b. *Circulars, cards, and newspaper articles.*

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 920.

c. *Banners and placards.*

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 924.

d. *"Unfair" lists.*

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 925.

e. *Untrue statements.*

(Supplementing annotation in 6 A.L.R. 928.)

In *Godin v. Niebuhr* (1920) 236 Mass. 350, 128 N. E. 406, in which it appeared that the defendant, who was the business agent and secretary of the local barbers' union, stood in front of the plaintiff's barber shop and handed to passers-by cards stating that such shop was "unfair to organized labor" and that the proprietor "refuses to employ union barbers or conduct a union barber shop," it was held that, assuming that the defendant's purpose was a lawful one, the jury were justified in finding that the means employed were unlawful, it

appearing that in truth the shop was conducted under union regulations, that two of the three employees were members of the union in good standing, that the third was also a member of the union, having a union book duly stamped showing the receipt of dues, and that if there was any question in the union as to his good standing, there was no evidence that the plaintiff was informed of it or requested to discharge him.

1. Picketing and physical intimidation.

Picketing, though peaceably carried on, is an infringement upon the rights of the person picketed, where it is in furtherance of an unlawful purpose. *Heitkemper v. Central Labor Council* (1920) 99 Or. 1, 192 Pac. 765.

Accordingly, in *Bonnegut Machinery Co. v. Toledo Mach. & Tool Co.* (1920) 263 Fed. 192, reversed on ground of lack of jurisdiction in (1921) — C. C. A. —, 274 Fed. 66, it was held that picketing in furtherance of the strike occasioned by the unwillingness of the strikers to work on certain contracts taken by their employer with one with whom the union was in controversy was unlawful per se; although it was also found that the conduct of the pickets was, independent of its purpose, unlawful as being intimidating and coercive in character.

In *Greenfield v. Central Labor Council* (1920) — Or. —, 192 Pac. 783, it was held that, although it appeared that plaintiff's business was materially reduced thereby, the plaintiff's rights had not been infringed by pickets stationed in front of each of his stores wearing scarfs inscribed "Unfair to organized labor," who, in an ordinary tone of voice, addressed customers about to enter or depart from such stores, saying: "This place is unfair to organized labor; please do not patronize it. Friends of union labor and all workingmen will not patronize this place; all others should not,"—and advising intending purchasers to go elsewhere, saying that they could buy footwear cheaper at union stores.

In *Cook v. Wilson* (1919) 108 Misc. 438, 178 N. Y. Supp. 463, an action

brought to restrain defendants from conspiring together to compel or induce employees of the plaintiffs to violate existing contracts, and to leave the employ of the plaintiffs while such contracts were in force, to the end that the plaintiffs might be compelled to recognize the Actors' Equity Association in their dealings with actors, it was said: "The actions of the actors and of the Actors' Association, which have for their object the obstruction of the public in going to the theaters peacefully and freely and without molestation, are unlawful; the acts of the strikers, as they are called, which interfere with that right, and with the right of the managers to have the public come freely to them and to trade with them without obstruction, whether those acts be acts of threat or persuasion, of themselves are a violation of law." The opinion, however, does not disclose the nature of the acts complained of.

See also, in this connection, *Kinloch Teleph. Co. v. Local Union* (1920) 265 Fed. 312, in subd. VI. [a], post, 238.

Picketing in front of a place of business is unlawfully conducted where it appears that the patrollers approached the entrance from opposite directions, meeting near the entrance and making their turns as near within the entrance as it was physically possible to do; that such turnings were so frequent that nearly all persons seeking to enter were discommoded, and many were deterred from attempting to approach; that, attracted by the noise and the outcries of the patrol, large and sympathetic crowds gathered on the sidewalk, blocked the passage, hooted, jeered, pushed, struck, and withheld would-be customers to a degree seriously to discommode all and to intimidate many persons who sought to enter; and that these acts were not discouraged by the strikers' representatives but had their tacit approval. *Walton Lunch Co. v. Kearney* (1920) 236 Mass. 310, 128 N. E. 429.

In *Grimes v. Durnin* (1921) — N. H. —, 114 Atl. 273, it was held that an injunction was properly issued against picketing plaintiff's restau-

rants by pickets who called out in a loud voice, "Strike on at Grimes's lunch, unfair to organized labor; this restaurant on strike," having the effect greatly to reduce patronage, where it is found that the pickets were endeavoring to prevent not only members of organized labor, but others, from patronizing their restaurants, and their real intention was "to win the strike regardless of effects on the plaintiff's business."

In *Pre' Catelan v. International Federation of Workers* (1921) 114 Misc. 662, 188 N. Y. Supp. 29, a motion to continue an injunction pendente lite was granted where it appeared that the plaintiff's place of business had been picketed by groups or squads consisting of from two to fifteen persons, who intimidated and attacked its employees, and threatened some of its patrons with bodily harm if they continued to patronize plaintiff, and told other patrons that the place was disorderly and was to be raided.

In *Cook's Waiters' & Waitresses' Local Union v. Papageorge* (1921) — Tex. Civ. App. —, 230 S. W. 1086, it was held that the rights of the owner of a restaurant were violated by the placing of pickets carrying signs having printed in red letters on them; "Patronize a union house," underneath which was a union card and the inscription, "Look for this label when you eat," the pickets also addressing passers-by, saying: "Pass it up, brothers," "This is a nonunion place of business," "Help the union and they will help you," "Don't eat in there, this place is unfair to union labor," and "This is an unfair place," as a result of which the patronage of the restaurant was considerably diminished. Although the court does not characterize this picketing as coercive in character, it would seem, from the reference to the case of *Webb v. Cooks', Waiters' & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465, in which similar conduct was held to be coercive, that it was so regarded here.

Picketing as a violation of Anti-trust Law.

In *Cook's, Waiters' & Waitresses'*

Local Union v. Papageorge (Tex.) supra, it was held that the act of a labor union in picketing a restaurant was violative of the Texas Anti-trust Law.

g. Secondary boycotts; notifying third persons not to deal with persons boycotted under penalty of losing patronage or having strike called.

(Supplementing annotation in 6 A.L.R. 984.)

In *DUPLEX PRINTING PRESS CO. v. DEERING* (reported herewith) ante, 196, a secondary boycott is described as "a combination not merely to refrain from dealing with complainant or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with him."

And in *PARKER PAINT & WALL PAPER CO. v. LOCAL UNION* (reported herewith) ante, 222, it is said that the secondary boycott contemplates that A, upon the request of B, and under the moral intimidation lest B boycott him, may thus be constrained to withdraw his contracts or patronage from B, with whom he has no dispute, the controversy being only between B and C.

The case of *Duplex Printing Press Co. v. Deering* (1918) 164 C. C. A. 562, 252 Fed. 722, cited in the earlier annotation in 6 A.L.R. at page 956, as holding that the effect of the Clayton Act is to legalize the secondary boycott, has been reversed by the Supreme Court of the United States in *PARKER PAINT & WALL PAPER CO. v. LOCAL UNION* (reported herewith) ante, 222.

In *Michaels v. Hillman* (1920) 112 Misc. 395, 183 N. Y. Supp. 195, it is said that while members of a union have the right to refuse to work with nonunion men or to work on nonunion material in the contractor's shop, they may not, in furtherance of the purposes of a strike against an employer, call strikes against independent contractors undertaking work for such employer.

h. Refusal to handle goods manufactured or sold by person boycotted.

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 957.

i. Refusal to work on job on which person with whom union is in dispute is a contractor.

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 962.

j. Enforcement of union by-law.

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 964.

k. Imposition of fine on nonmember.

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 966.

l. Refusal of carrier's employees to handle cars or freight.

(Supplementing annotation in 6 A.L.R. 966.)

Refusal to handle freight called for or delivered by nonunion truckmen.

In *BUYER v. GUILLAN* (reported herewith) ante, 216, it was held that where a carrier refused to receive and transport shipments because of the refusal of its employees to handle shipments brought by nonunion truckmen, there was an unlawful combination in restraint of interstate commerce in violation of the Sherman Anti-trust Act.

And in *Burgess Bros. Co. v. Stewart* (1921) 114 Misc. 673, 187 N. Y. Supp. 873, a case involving the same state of facts, the court said: "Those defendants, who were owners or agents of steamships, were required to serve the public without discrimination, and if their employees continued voluntarily in their service the same obligation rested also upon the employees. This record is barren of any evidence which would indicate a desire on the part of the steamships' representatives to receive or handle plaintiff's lumber. They did not discharge or reprimand any of their employees for discriminating against plaintiff, but openly sanctioned such conduct and connived at it, on the

theory, no doubt, that it was better that plaintiff should suffer than that the movement of freight in the port be 'tied up.' The concerted action both of the employer and the employees leads to the accomplishment of an unlawful act, i. e., that of violating both the United States Shipping Act (39 Stat. at L. 728, chap. 451, Comp. Stat. §§ 8146a-8146r, Fed. Stat. Anno. Supp. 1918, p. 785) and the United States Criminal Code, § 37 (Comp. Stat. § 10,201, 7 Fed. Stat. Anno. 2d ed. p. 534). The Shipping Act . . . is declaratory of the common law, which placed an obligation upon the common carrier to serve the public without discrimination. A carrier cannot avoid this responsibility. It is no answer to a charge of misconduct, amounting to a discrimination, to say that the unlawful act is that of an employee. It was the duty of the employers to find those who would handle all goods offered for shipment, and if those employed to do that work refused there could be no other alternative but to discharge such employee, even though it may have led to a great financial loss to the steamship owners and inconvenience to the public. The employee is the alter ego of the principal, and any act of the employee in violation of the common law, or of the statute, is the act of the principal, for which the principal is liable."

In *P. Reardon v. Caton* (1919) 189 App. Div. 501, 178 N. Y. Supp. 713, reversing (1919) 107 Misc. 541, 177 N. Y. Supp. 803, it was held that a trucking company was not entitled to enjoin the members of transportation workers' unions from refusing to handle freight called for or delivered by nonunion truckmen, although it appeared that in consequence of the difficulty thereby occasioned, shippers and receivers of freight, formerly employing plaintiff's trucks, threatened to, and in some cases did, transfer their business to other trucking concerns, there being no proof of any pressure being brought to bear on them to refuse employment to plaintiff; and that it was immaterial that the workers sought to be enjoined were employees of common carriers.

In discussing the latter point the court said: "But it is said that these men are employees of common carriers, and that they are in a different class from the defendants, whose right to refuse to handle nonunion material was sustained by the court of appeals in *Bossert v. Dhuy* (1917) 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661. It will be remembered that on the record here presented no governmental agency, no common carrier, or shipper or receiver of freight is before the court complaining of the defendants. The plaintiff is a trucking concern employed to cart freight to and fro, under no public obligation. It may carry or refuse to carry merchandise, as it sees fit. From the necessities of the case the common carrier steamship companies and the like in the port of New York cannot give regular employment to the dock laborers and employees, by the month, the week, or even by the day. The labor is uncertain, depending on the arrival and departure of vessels, and the character and quantity of freight to be moved. The men are hired and paid by the hour. They have no regular steady employment or income. It seems to me that it may be argued that it is as unreasonable to deny them the right accorded to the defendants in the *Bossert* Case as it would be to insist that the common carriers should employ their laborers regularly by the day, the week, the month, or the year. I do not think these casual laborers are in the same class with regular employees of those serving the public. There are diverse contentions concerning strikes and boycotts which affect public service, but I think these are for the legislative branch of government, and no legislature, state or national, has so far enacted that they are illegal." Two members of the court, however, dissented from the latter conclusion, saying: "The question presented by this appeal is simply this: Can an employee of a common carrier, while acting as such, refuse to extend to any person accommodation, e. g., carriage of goods or persons, upon the same terms as are extended by the carrier to the public

generally? It seems to me self-evident that he cannot so refuse. He may, if he so elect, decline to work for such an employer, but if he does work for him he must give the same service to all. It seems to me likewise plain that he, as well as the employer, is subject to the injunctive process of the court. I quite agree with the view presented to us upon the argument, that one of the defendants—for example, a freight-receiving clerk—can no more refuse to receive freight from a nonunion truck driver than, if he were acting as a conductor of a street railroad car, he could refuse to receive a fare from a nonunion man, and refuse to admit such person to the car as passenger. It is a primary duty of anyone engaged in the performance of such a public service to extend that service to all without discrimination. There is no precedent to the contrary. The proposition thus asserted appears to me to be elementary. It is not at all contrary to the doctrine of *Bossert v. Dhuy* (N. Y.) *supra*, which merely sustains the right of union men to decline to work with or upon the product of nonunion laborers in private employment. The point here is that these defendants are undertaking, while choosing to render a public service, to discriminate in its performance against a certain class of people. That they may not do."

The same court held in *Reardon v. International Mercantile Marine Co.* (1919) 189 App. Div. 515, 178 N. Y. Supp. 722, that a preliminary injunction was improperly issued which restrained the employers of the transportation workers from permitting their employees to declare and enforce a boycott against plaintiff. Several grounds are given for this conclusion, the principal one of which is that, as it appeared that practically the entire force of transport workers was unionized, any attempt by the carrier companies to force them to work with nonunion drivers would only result in a general strike and tie-up of the freight of the port, thereby defeating the object of the injunction.

In *Burgess Bros. Co. v. Stewart* (1920) 112 Misc. 347, 184 N. Y. Supp.

199, it was held that an exporter of lumber was entitled to a preliminary injunction against defendant steamship companies and their employees, and the unions of which such employees were members, restraining them from refusing to handle and transport merchandise tendered by the plaintiff for transportation, such refusal being occasioned by the determination of the employees not to assist in the transportation of goods forwarded by employers adhering to the open-shop policy. With reference to the preceding cases the court said: "An examination of the cases of *P. Reardon v. Caton* (1919) 189 App. Div. 501, 178 N. Y. Supp. 713, and *Reardon v. International Mercantile Marine Co.* (N. Y.) *supra*, cited in defendants' brief, shows that in the *Reardon* suit against the unions there was no allegation as to the duties of common carriers, and such question was not presented by the record, as appears in the court's opinion, which says: "The plaintiff does not make the employers or common carriers or shippers of freight parties to this action. . . . No common carrier or employer or shipper or receiver of freight is before the court complaining of the defendants. . . . It will be remembered that on the record here presented no governmental agency, no common carrier, or shipper or receiver of freight is before the court complaining of the defendants." And Mr. Justice Jenks, in a concurring opinion, makes the same point clear, and says: "The facts, as Kelly, J., shows, do not present the issue of a common carrier who refuses carriage of goods." And further, in the case of *Reardon v. International Mercantile Marine Co.*, the injunction in this case was denied on four stated grounds of which only No. 3, relating to the obligation of common carriers, has any application. In this connection the court said: "The action is based entirely upon the allegation that the defendant common carriers knowingly and wrongfully permit the workmen to refuse dealing with the nonunion drivers of the league members. But each of the common carriers makes

positive affidavit that the action of the dock laborers is without their assent and without their approval. No conspiracy between the common carriers and the dock laborers is pleaded or suggested. The affidavits for the carriers state that they are powerless in the matter, because if they discharge their men they can procure no one else to do the work which is of so great importance to the entire community. As already suggested, the plaintiff has not joined the labor organizations as parties defendant in the action. The preliminary injunction is unnecessary and uncalled for. If the injunction in the action against the labor unions is sustained, there is no reason or necessity for enjoining the steamship companies.' On all these points the present case shows the contrary. It appears from the affidavits that the carriers acquiesced in the unions' demands and that the heads of the companies refused to transport. They also show a conspiracy between the carriers and the unions to commit a violation of the Federal statutes by discriminating against plaintiff's freight. And the carriers cannot be heard to state that they are powerless, because in this same suit the injunction is sought against the unions to prevent the calling of strikes which might otherwise be called when the carriers perform their statutory duty."

The granting of the injunction pendente lite in the foregoing case was affirmed without passing on the merits in (1920) 194 App. Div. 913, 185 N. Y. Supp. 85, and the injunction was made permanent in (1921) 114 Misc. 673, 187 N. Y. Supp. 873, in which the court said: "The views herein expressed do not conflict with the decisions in the *Reardon* Cases. *P. Reardon v. Caton* (1919) 189 App. Div. 501, 178 N. Y. Supp. 713, and *Reardon v. International Mercantile Marine* (1919) 189 App. Div. 515, 178 N. Y. Supp. 722. In the first of these cases, neither the employers, common carriers, nor shippers of freight were made parties; and in the second of these cases, there was no suggestion that a conspiracy between the common carriers

or the employees was pleaded, and the labor unions were not parties defendant. I do not regard what has been said in the Reardon Cases as controlling here. The most that can be claimed for them is that, upon the facts presented, the court held that the injunction granted at special term was improper. But a careful analysis of all the opinions written in those cases will show that the majority of the court agrees with the contentions herein made. In *P. Reardon v. Caton* (N. Y.) *supra*, no common carrier was joined as party defendant. The question of an unlawful discrimination was not, therefore, before the court. Presiding Justice Jenks and Justice Rich concurred in the prevailing opinion, while Justices Putnam and Mills dissented. In *Reardon v. International Mercantile Marine* (N. Y.) *supra*, however, Mr. Justice Rich was of the opinion that the carrier should have received the freight when offered, and therefore concurred in the dissenting opinion of Mr. Justice Mills, while Mr. Justice Putnam concurred in the reversal solely because there had been a reversal in *P. Reardon v. Caton*, and, inasmuch as the actions were closely related, he held that consistency required a reversal in the latter case. The reasoning of the majority of the court leads to the conclusion that, had the unions and common carriers been joined as parties defendant, as in this case, the court would, upon the facts shown in the two cases, have sustained the injunction granted at special term."

VI. Statutes permitting workmen to combine as affecting validity of boycott.

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 967.

VI.[a]. (New) Effect of statutes permitting "peaceful persuasion."

In *Godin v. Niebuhr* (1920) 236 Mass. 350, 128 N. E. 406, it was held that the Massachusetts "Peaceful Persuasion Act" (Stat. 1913, chap. 690) does not purport to excuse unlawful conduct, such as the publication of libelous matter coercive in its nature.

In *Kinlock Teleph. Co. v. Local Union* (1920) 265 Fed. 312, it was held by the district courts for the eastern district of Missouri that the provisions of the Clayton Act do not permit the picketing of a place of business in such numbers as to menace or produce intimidation by reason of the very facts of numbers, the court saying: " 'Peacefully' as used in this act means peacefully in the strict sense of that word; for it will be noted that the words 'peacefully' and 'lawfully' run as red threads through the very warp and woof of this act. Surely no persons can be said to act peacefully when they crowd the streets, sidewalks, or alleys near to or adjacent to the shop or place of business under their displeasure, and, though silent, threaten and intimidate by numbers. Neither can a person be within the peace or the protection of this statute when he or she, singly or with others, in furtherance of the strike, uses threats, abuse, profane or obscene language, physical force, or other intimidation to any employer or to his agents, servants, or employees, present or potential, or to the customers or agents and employees of customers, present or potential."

A statute which declares that it shall not be unlawful for members of trades-unions and other organizations to induce by peaceful means any person to accept or relinquish any certain employment does not apply to a case where a labor union pickets a place of business for the purpose of coercing the employer to sign a closed-shop contract. *Cooks', Waiters' & Waitresses' Local Union v. Papageorge* (1921) —Tex. Civ. App. —, 230 S. W. 1086.

VII. Remedies of person aggrieved by boycott.

a. Actions for damages.

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 967.

b. Injunctive relief.

1. Right to, in general.

(Supplementing annotation in 6 A.L.R. 969.)

The general rule stated in the anno-

tation in 6 A.L.R. 969, that injunction is an appropriate remedy for unjustifiable interference in one's business by boycotting, where irreparable injury is likely to ensue and the defendants threaten to continue their unlawful interference with the complainant's business, is also supported by the following later decisions:

United States.—**BUYER v. GUILLAN** (reported herewith) ante, 216.

Missouri.—**Hughes v. Kansas City Motion Picture Mach. Operators** (1920) 282 Mo. 304, 221 S. W. 525.

New York.—**Stuyvesant Lunch & Bakery Corp. v. Reiner** (1920) 110 Misc. 357, 181 N. Y. Supp. 212, affirmed without opinion in (1920) 192 App. Div. 951, 182 N. Y. Supp. 953; **Burgess Bros. Co. v. Stewart** (1920) 112 Misc. 347, 184 N. Y. Supp. 199, s. c. on subsequent hearing (1921) 114 Misc. 673, 187 N. Y. Supp. 873.

Oregon.—**Heitkemper v. Central Labor Council** (1920) 99 Or. 1, 192 Pac. 765.

Texas.—**Cooks', Waiters' and Waitresses' Local Union v. Papageorge** (1921) — Tex. Civ. App. —, 230 S. W. 1086.

West Virginia.—**PARKER PAINT & WALL PAPER CO. v. LOCAL UNION** (reported herewith) ante, 222.

A complainant is entitled to injunctive relief against conduct by which other persons are induced to violate their contracts with him. **PARKER PAINT & WALL PAPER CO. v. LOCAL UNION**.

Under the principle that picketing is unlawful where it is in furtherance of an unlawful purpose, the picketing of the plaintiff's premises may be enjoined where the object is to compel plaintiff to unionize its employees. **Stuyvesant Lunch & Bakery Corp. v. Reiner** (N. Y.) supra.

Equity will restrain picketing for the purpose of coercing an employer to sign a closed-shop agreement. **Cooks', Waiters' & Waitresses' Local Union v. Papageorge** (Tex.) supra.

Equity will enjoin interference with a business by unlawful picketing and other methods of boycotting, when irreparable damage will be inflicted. **Hughes v. Kansas City Motion**

Picture Mach. Operators' Local (Mo.) supra.

An injunction is properly issued restraining carriers and their employees from refusing to accept or to assist in the transportation of freight tendered by a shipper, where it appears that such refusal inflicts irreparable injury upon the plaintiff. **Burgess Bros. Co. v. Stewart** (1920) 112 Misc. 347, 184 N. Y. Supp. 199.

Injunction lies to restrain the enforcement of a combination between members of labor unions and transportation companies to refuse to handle freight delivered by nonunion truckmen, there being no adequate remedy of law because of the difficulty of ascertaining the damages in each case of each shipment refused and of the necessity of bringing a multiplicity of suits. **BUYER v. GUILLAN** (reported herewith) ante, 216.

An injunction is properly issued against picketing, where the purpose in view is not a proper one, and it appears that the defendants are insolvent and that the plaintiffs have sustained material injury to their business, which will be continuous if the defendants are permitted to picket, and for which the plaintiffs will not have a complete and adequate remedy at law, even in a multiplicity of actions. **Heitkemper v. Central Labor Council** (1920) 99 Or. 1, 192 Pac. 765.

The statement made in the annotation in 6 A.L.R. page 970, that the fact that acts charged in a bill for injunction for unlawful boycott amount to crimes or threatened crimes does not constitute a reason why equity should refuse to restrain them, is also supported by the later case of **Burgess Bros. v. Stewart** (1921) 114 Misc. 673, 187 N. Y. Supp. 873, in which it is said that the plaintiff is not required to await the result of criminal proceedings, and allow its business to be ruined in the meantime, but may proceed by civil action to prevent a continuance of a wrong, although the wrong is the result of a conspiracy in violation of the criminal law.

In connection with the statement made in the annotation in 6 A.L.R. 971, that the remedy by injunction

given by the Federal Anti-trust Act against conduct constituting a violation of such act is available only to the government, and does not authorize injunctive relief to an individual injured thereby, attention is called to the fact that the law in this respect is altered by the Clayton Act of October 15, 1914, chap. 323, § 16, of which, provides "that any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the Anti-trust Laws, including §§ 2, 3, 7, and 8 of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings; and upon the execution of proper bond against damages for an injunction improvidently granted, and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue" (38 Stat. at L. 737, Comp. Stat. § 8835c, 9 Fed. Stat. 2d ed. p. 745), excepting suits against any common carrier in interstate commerce in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. This provision, however, does not allow a private individual to redress a violation of the statute merely because it is a violation of public law; but he must show that he has sustained or is likely to sustain loss other than as a member of the general public. See *Venner v. New York C. & H. R. R. Co.* (1917) 177 App. Div. 296, 164 N. Y. Supp. 626, affirmed without opinion in (1919) 226 N. Y. 583, 123 N. E. 893, which has writ of certiorari denied in (1919) 249 U. S. 617, 63 L. ed. 803, 39 Sup. Ct. Rep. 391.

—as affected by constitutional guaranties.

No constitutional guaranties are violated by an injunction against picketing a place of business by walking up and down outside and saying to persons who pass: "This place is

not fair to organized labor; please do not patronize it," where the purpose sought to be attained by the picketers is an unlawful one. *Hughes v. Kansas City Motion Picture Mach. Operators* (1920) 282 Mo. 304, 221 S. W. 95.

The constitutional right of free speech is not infringed by an injunction against picketing an employer's place of business by persons who informed passers-by that the place was unfair to union labor. *Cooks, Waiters' & Waitresses' Local Union v. Papageorge* (1921) — Tex. Civ. App. —, 230 S. W. 1086.

Involuntary servitude is not imposed upon members of labor unions by an injunction restraining them as employees of a common carrier from refusing to handle or assist in the transportation of merchandise tendered for shipment, since no employee is forbidden to quit work by the injunction, or to accept better employment if he may find it, or to change his position should he see fit. "The law cannot force any man to remain in the service of the public, but he has certain obligations when engaged in public service, and is bound by public statutes as well as his employer. While it is indisputable that a man may enter any vocation that he chooses, yet if he sees fit to select a field indissolubly linked with the rights of the public, such as that of a common carrier, he must subserve his own rights to that of the public welfare, and must at all times stand ready and willing to assume all of the exacting duties which he knows are owed the public. When he enters the public service he impliedly acquiesces in assuming all of these obligations. He must either get out of the transportation business or serve all persons alike." *Burgess Bros. Co. v. Stewart* (1920) 112 Misc. 347, 184 N. Y. Supp. 199. See also, to the same effect (1921) 114 Misc. 673, 187 N. Y. Supp. 873.

1½ [New] *Effect of statutes restricting issuance of injunctions in labor disputes.*

In *Greenfield v. Central Labor Council* (1920) — Or. —, 192 Pac. 783, §§ 2 and 3 of chap. 346, Oregon Laws

of 1919, prohibiting the granting of any restraining order and injunction in any case between an employer and employee, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right, and declaring that no restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from peacefully persuading any person to abstain from working or from ceasing to patronize any party to such dispute, or from recommending, advising or persuading others by peaceful or lawful means so to do,—were held constitutional.

In *Greenfield v. Central Labor Council (Or.) supra*, it was held that the relation of employer and employee, and the terms and conditions of employment, continue to exist after the calling of a strike during the currency of a contract between the employer and a labor union relating to terms and conditions of employment, in consequence of the employer's violation thereof, so as to bring the case under a statute prohibiting the issuance of injunctions in cases between employer and employee growing out of a dispute concerning terms or conditions of employment.

In *DUPLEX PRINTING PRESS Co. v. DEERING* (reported herewith) ante, 196, it is held that injunctive relief may not be denied, on the ground that such relief is forbidden by the Clayton Act, to a manufacturer against concerted action which members of labor organizations standing in no employment relation with it, past, present or prospective, have taken in aid of a strike in a factory in order to compel such manufacturer to unionize his factory, establish the closed shop, the eight-hour day, and the union scale of wages, by interfering with and restraining his interstate trade by warning customers that it will be better for them not to purchase complainant's products, and threatening them

with loss if they do so, threatening customers with sympathetic strikes in other trades, notifying a trucking company usually employed by customers to haul its products not to do so, threatening it with trouble if it should, inciting employees of the trucking company and other men employed by complainant's customers to strike against their respective employers, and thus bring pressure to bear upon the customers, notifying repair shops not to do repair work on the complainant's products, coercing union men by threatening them with loss of union cards and being black-listed as scabs if they insist in installing complainant's products, and threatening an exhibition company with a strike if it permit complainant's products to be exhibited.

The provisions of the Clayton Act which restrict the issuance of injunctions in disputes between employers and employees do not apply where the employees have struck for a reason which the law does not recognize as a lawful one. *Vonnegut Machinery Co. v. Toledo Mach. & Tool Co.* (1920) 263 Fed. 192, reversed on ground of lack of jurisdiction in (1921) — C. C. A. —, 274 Fed. 66.

A statute (*Or. Laws 1919, chap. 346, § 2*) which provides that no restraining order or injunction shall be granted between an employer and employees involving or growing out of a dispute concerning terms or conditions of employment does not embrace or legalize picketing an employer's place of business and destroying his patronage, where the subject of dispute is not a lawful one. *Heitkemper v. Central Labor Council* (1920) 99 Or. 1, 192 Pac. 765.

2. Considerations affecting complainant's right to relief.

(Supplementing annotation in 6 A.L.R. 974.)

An injunction against acts constituting an unjustifiable invasion of the rights of the plaintiff will not be denied because the plaintiff may have conspired with others to destroy the rights and privileges of the labor union and its members. *Cooks,*

Waiters' & Waitresses' Local Union v. Papageorge (1921) — Tex. Civ. App. —, 230 S. W. 1086.

3. Parties against whom injunction granted.

No later decisions herein. For earlier cases, see annotation in 6 A.L.R. 974.

4. Extent of relief granted.

(Supplementing annotation in 6 A.L.R. 974.)

Forms of interference with the plaintiff's rights which are not found to have been practised or threatened are not rightfully included within the terms of an injunction. *Walton Lunch Co. v. Kearney* (1920) 236 Mass. 310, 128 N. E. 429.

In *DUPLEX PRINTING PRESS CO. v. DEERING* (reported herewith) ante, 196, the United States Supreme Court in authorizing the issuance of an injunction under the Sherman Act as amended by the provisions of the Clayton Act, giving private parties the right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the Anti-trust Laws, said: "There should be an injunction against defendants and the associations represented by them, and all members of those associations, restraining them, according to the prayer of the bill, from interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce of any printing press or presses manufactured by complainant, or the transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any contract or contracts made by complainant respecting the sale, transportation, delivery, or installation of any such press or presses, by causing or threatening to cause loss, damage, trouble, or inconvenience to any person, firm, or corporation concerned in the purchase, transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any such contract or contracts; and also and especially from using any force, threats, command, direction, or even

persuasion, with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, or engaged in hauling, carting, delivering, installing, handling, using, operating, or repairing any such press or presses for any customer of complainant. Other threatened conduct by defendants or the associations they represent, or the members of such associations, in furtherance of the secondary boycott, should be included in the injunction according to the proofs."

In *Walton Lunch Co. v. Kearney* (Mass.) supra, the court approved a decree by which the defendants were "perpetually enjoined and restrained from interfering with the plaintiff's business by taking it in such a manner as to annoy, arrest, and intimidate the plaintiff's customers, or intended customers, or his present employees, or those desirous of entering his employment, or by inducing by any means whatever any employee now or hereafter under written contract of employment to violate such contract," the court saying: "Although not minute as to details, it unmistakably enjoins in every particular all the acts and conduct of the defendant set forth in the findings of fact as means by which the strike was carried on."

In *Greenfield v. Central Labor Council* (1920) — Or. —, 192 Pac. 783, the court directed the entry of a decree as follows: "Permitting the defendants during business hours to place and maintain one picket only, on the outer edge of the sidewalk, at each public entrance to plaintiff's stores, with authority to each picket to wear a banner or scarf inscribed with the words, 'Unfair to Organized Labor, Local Union No. 1257,' and in the usual, ordinary tone of voice used by one individual in addressing another on the public street, to say to any prospective customer: 'This place is unfair to organized labor. Please

do not patronize it. Friends of union labor and all workmen will not patronize this place,—but not in any manner to impede or interfere with the right of anyone to enter or depart from the said stores, or any passer-by. Any picket so placed is hereby enjoined from the doing of any other act or thing which is intended to or would divert or turn away any patron or prospective customer from plaintiff's places of business. Otherwise the defendants and each of them, their agents, servants, and employees, are hereby enjoined and prohibited from interfering with, intimidating, or harassing the plaintiff or any of his employees at his said places of business, or from the use of any violence, threat, or intimidation to induce any customer or patron to withhold or withdraw patronage from the plaintiff."

5. Contempt.

No later decisions herein. For earlier cases, see 6 A.L.R. 978.

VIII. Criminal Liability.

(Supplementing annotation in 6 A.L.R. 979.)

The refusal of steamship companies and their employees to accept freight in consequence of the determination of the latter not to assist in the transportation of merchandise for employers of nonunion labor constitutes a combination and conspiracy in violation of the Shipping Act of September 7, 1916 (39 Stat. at L. 729) chap. 451, Comp. Stat. § 8146a, Fed. Stat. Anno. Supp. 1918, p. 785) which forbids discrimination by common carriers by water, and the provisions of § 5440 of the Revised Statutes (Comp. Stat. § 10,201), which imposes a penalty on persons conspiring to commit any offense against the United States. *Burgess Bros. Co. v. Stewart* (1920) 112 Misc. 347, 184 N. Y. Supp. 199, s. c. on subsequent hearing (1921) 114 Misc. 673, 187 N. Y. Supp. 873 E. S. O.

MILLEGE LAIRD

v.

BOSTON & MAINE RAILROAD.

New Hampshire Supreme Court—February 1, 1921.

(— N. H. —, 114 Atl. 275.)

Evidence — finding of draft examiners — employer's liability.

1. The finding of the board of draft examiners as to the physical condition of a draftee is not admissible in a subsequent proceeding by him for injuries alleged to have been received in employment prior to the date of such examination.

[See note on this question beginning on page 247.]

Appeal — incompetent evidence — immateriality to issue. —when evidence immaterial.

2. A judgment cannot be reversed for admission of incompetent evidence which has no bearing upon the issue involved.

3. Evidence immaterial to the issue on which a case turns cannot be held to have been harmless, where it tended to impeach the truthfulness of plaintiff, whose testimony alone supported such issue.

TRANSFER by the Superior Court for Merrimack County (Branch, J.) for determination by the Supreme Court of questions arising upon exception by plaintiff to the introduction by defendant of certain evidence

in an action brought under the Employers' Liability Act to recover damages for personal injuries received by plaintiff while in the employ of defendant. *Exceptions sustained.*

The facts are stated in the opinion of the court.

Messrs. Joseph C. Donovan and Robert W. Upton, for plaintiff:

The defendant's time book was not properly proven, and ought not to have been received in evidence.

Mason v. Dover, S. & R. Street R. Co. 79 N. H. —, 109 Atl. 841; State v. Shinborn, 46 N. H. 503, 88 Am. Dec. 224; Swain v. Cheney, 41 N. H. 235; Rich v. Eldredge, 42 N. H. 158; Webster v. Clark, 30 N. H. 253; Wigmore, Ev. § 734; Burnham v. Stillings, 76 N. H. 122, 79 Atl. 987.

The evidence as to the physical standard of the draft examination, and that the plaintiff had passed the draft, was improperly received.

Keefe v. Sullivan County R. Co. 75 N. H. 117, 71 Atl. 379; Com. v. Cheney, 141 Mass. 102, 55 Am. Rep. 448, 6 N. E. 724; Pinkerton v. Sargent, 112 Mass. 110; Day v. Floyd, 130 Mass. 488; Shores v. Hooper, 153 Mass. 228, 11 L.R.A. 308, 26 N. E. 846; Davis v. Clements, 2 N. H. 391; State v. Wells, 11 Ohio, 261; Bridges v. State, 110 Ga. 246, 34 S. E. 1087; Chicago, M. & St. P. R. Co. v. Staff, 46 Ill. App. 499; Central R. Co. v. Moore, 61 Ga. 151.

Messrs. Streeter, Demond, Woodworth, & Sulloway and William N. Rogers, for defendant:

Defendant's time book was competent, and its contents properly verified.

Roberts v. Claremont Power Co. 78 N. H. 491, 102 Atl. 537; 2 Wigmore, Ev. § 1422; Page v. Hazelton, 74 N. H. 252, 66 Atl. 1049; Mason v. Dover, S. & R. Street R. Co. 79 N. H. —, 109 Atl. 841; Mississippi River Logging Co. v. Robson, 16 C. C. A. 400, 32 U. S. App. 520, 69 Fed. 773; Pelican Lumber Co. v. Johnson, 44 Tex. Civ. App. 6, 98 S. W. 207; Griffin v. Boston & M. R. Co. 87 Vt. 278, 89 Atl. 220; Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 3 L.R.A.(N.S.) 1190, 91 S. W. 691; Firemen's Ins. Co. v. Seaboard Air Line R. Co. 138 N. C. 42, 107 Am. St. Rep. 517, 50 S. E. 452; Wisconsin Steel Co. v. Maryland Steel Co. 121 C. C. A. 507, 203 Fed. 403; Reyburn v. Queen City Sav. Bank & T. Co. 96 C. C. A. 373, 171 Fed. 609.

The admission of the time book, if error, does not vitiate the verdict.

Smith v. Morrill, 71 N. H. 409, 52 Atl. 928; Beckley v. Alexander, 77 N. H. 255, 90 Atl. 878; Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67; Wier v. Allen, 51 N. H. 177; Perley v. Hilton, 55 N. H. 444; Hunt v. Haven, 56 N. H. 87; Forest v. Jackson, 56 N. H. 357; Bodge v. Butler, 57 N. H. 204; Hilliard v. Beattie, 59 N. H. 462; Woodbury v. Whiting, 68 N. H. 607, 44 Atl. 385; Bunker v. Manchester Real Estate & Mfg. Co. 75 N. H. 131, 71 Atl. 866; State v. Gross, 76 N. H. 304, 82 Atl. 533; Kuba v. Devonshire Mills, 78 N. H. 245, 99 Atl. 91.

Evidence relative to the draft examination was competent.

Cooper v. Hopkins, 70 N. H. 271, 48 Atl. 100; Page v. Hazelton, 74 N. H. 252, 66 Atl. 1049.

The evidence related solely to the question of damages, and, if incompetent, was rendered immaterial by the verdict for the defendant.

Beckley v. Alexander, 77 N. H. 255, 90 Atl. 878.

Plummer, J., delivered the opinion of the court:

The plaintiff was employed by the defendants as a rivet heater, and his work required him to heat and carry rivets to the riveters. The rivets occasionally, before use, became too cold for riveting, in which case they were returned to the forge and reheated. Upon the occasion of the accident, November 3, 1913, a fellow employee returned a rivet to the forge by throwing it. This rivet hit the plaintiff in the right eye, causing the injuries complained of. It is the claim of the plaintiff, substantiated by his evidence, that his eye was seriously injured by the accident, and that his sight was very badly impaired; on the other hand, the defendants contend, and their evidence tended to prove, that the plaintiff's sight was not seriously affected. The plaintiff was permitted, subject to exception, to show by a draft examiner in the late war that he would not expect the plain-

tiff to be accepted for service by reason of his badly impaired vision. The defendants were then allowed, subject to exception, to introduce evidence that the plaintiff successfully passed the examination of the board of draft examiners and was accepted for service in the war. The effect of this testimony was to place before the jury the finding of the board of draft examiners, and to show that he had not suffered any such serious impairment of vision as his evidence indicated. In other words, it tended strongly to impeach the plaintiff's evidence, and to destroy the credibility of the plaintiff as a witness, not only upon the question of damages, but also upon the issue of liability; and, if the testimony was improperly admitted, the verdict should be set aside.

The finding of the board of draft examiners was not binding upon the plaintiff, except for the purpose for which it was made, and therefore evidence of it should not have been admitted. The

**Evidence—
finding of draft
examiners—
employer's
liability.**

examination of the plaintiff by the board was an *ex parte* proceeding, so

far as he was concerned. He was summoned and compelled to appear and submit to the examination; but no hearing, in which he had any part, preceded their finding as to his physical condition. He had no opportunity to cross-examine the board, to discover how they reached their conclusions, or to take any action in his own behalf. "It is a well-established general rule that a litigant cannot be affected by the words or acts of others with whom he is in no way connected, and for whose sayings or doings he is not legally responsible." 22 C. J. 741. The findings of the board of draft examiners cannot stand any better as evidence against the plaintiff in this case than a judgment of a court, which is not evidence against one who is not a party or privy to it. *Warren v. Cochran*, 27 N. H.

339. The following statement of Richardson, Ch. J., in *Lawrence v. Haynes*, 5 N. H. 33, 20 Am. Dec. 554, is applicable to the present case: "It did not appear that either of these parties was in any way a party to those proceedings. The whole must therefore be considered, with respect to this plaintiff and defendant, as *res inter alios acta*, and we consider it as settled that no record of an adjudication can be used as evidence of the facts upon which it is founded, in a suit between persons who are strangers to the adjudication."

In *Burrill v. West*, 2 N. H. 190, it was said: "Neither a verdict nor a judgment can, in general, be evidence for either party in an action against one, who was a stranger to the former proceeding, who had no opportunity to examine witnesses or defend himself."

"It is an axiom of the law that no man shall be affected by proceedings to which he is a stranger, —to which, if he is a party, he must be bound. He must have been directly interested in the subject-matter of the proceedings, with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control, in some degree, the proceedings, and to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause." 10 R. C. L. 1117, and cases there cited.

The valuation of property by municipal officials for the purpose of taxation cannot be introduced, as evidence of the actual value of the property, in controversies between persons not claiming rights under the tax assessment. *Concord Land & Water Power Co. v. Clough*, 69 N. H. 609, 45 Atl. 565; *Stevens v. Fellows*, 70 N. H. 148, 47 Atl. 135; *Flint v. Flint*, 6 Allen, 34, 83 Am. Dec. 615; *Kenerson v. Henry*, 101 Mass. 152; *Anthony v. New York, P. & B. R. Co.* 162 Mass. 60, 37 N. E. 780; *Martin v. New York & N. E. R. Co.* 62 Conn. 331, 25 Atl. 239.

In *Concord Land & Water Power Co. v. Clough*, supra, the court said: "The appraisal for taxation not being made by the owner, or at his instance, and almost always in his absence, and without his being heard, he is not bound by it, except for the purposes for which it was made."

The proceedings of a board of assessors in finding the valuation of property for tax assessment are analogous to those of a board of draft examiners in determining the physical qualifications of a drafted man, so far, at least, as the rights and privileges of the parties affected by the decision of these boards are concerned. No one would contend that the finding of the draft examiners, relative to the physical condition of the plaintiff, would be binding upon the defendants, or that, if it had been favorable to the plaintiff in this case, it could have been presented as evidence against them. How, then, can it be introduced as competent evidence in their behalf? No sound and logical reason, based upon the principles of evidence, can be adduced for holding that the testimony under consideration could be received as legal evidence for the purpose for which it was introduced.

The jury returned a verdict for the defendants upon the question of liability, and never reached the issue of damages. The evidence above considered was solely upon damages. Therefore the defendants contend that, even if the evidence was incompetent and improperly admitted, it cannot affect the verdict. It is undoubtedly true that the verdict must stand, unless the evidence was prejudicial to the plaintiff upon the issue of liability. *Beckley v. Alexander*, 77 N. H. 255, 257, 90 Atl. 878; *Morin v.*

Nashua Mfg. Co. 78 N. H. 567, 570, 103 Atl. 312; *Griffin v. Auburn*, 59 N. H. 286; *Lisbon v. Lyman*, 49 N. H. 553, 583. But, as said in *McBride v. Huckins*, 76 N. H. 206, 213, 81 Atl. 532: "It must clearly appear that the effect of the error did not extend to all the issues tried."

It cannot be said in this case that the incompetent evidence was not prejudicial to the plaintiff upon the question of liability.

All of the plaintiff's testimony upon this issue came from his own lips. And while the defendants introduced no evidence to contradict the plaintiff's statement relative to the accident, still the jury were not bound to believe him, if they considered him untruthful and unworthy of credence.

The defendants having been permitted to introduce improper testimony, which was well calculated to establish the untruthfulness of the plaintiff's statement relative to the extent of his vision, the jury may have found that he testified falsely in this respect, and have come to the conclusion that none of his testimony was credible and worthy of belief. They may have applied to him the principle of the maxim, "Falsus in uno, falsus in omnibus." If the jury did not believe the plaintiff's personal testimony, giving the cause of the accident, and describing the circumstances surrounding it, they would render a verdict for the defendants upon the question of liability, because there was no other evidence upon that issue. As it is not improbable that the defendants' improper and incompetent evidence was prejudicial to the plaintiff upon the issue of liability, the verdict must be set aside.

Exceptions sustained; verdict set aside; new trial granted.

All concur.

Appeal—
incompetent
evidence—
immateriality to
issue.

ANNOTATION.

Finding of draft board as evidence of physical condition of registrant.

The reported case (*LAIRD v. BOSTON & M. R. Co.* ante, 243) seems to be the only case which has passed on the admissibility of the finding of a military draft board in a collateral proceeding as evidence of the physical condition of the registrant. It is held in that case that a finding of such a board, accepting the registrant for war service, was not admissible in a personal injury suit by the registrant to disprove evidence that his eyesight was seriously impaired, the ruling being put on the ground that the finding of the board was binding only for the purpose for which it was made.

A different conclusion, however, was reached in a Canadian case, *Casey v. Kennedy* (1920) 48 N. B. 85, 52 D. L. R. 326, in which a medical history sheet purporting to be the result of an examination, by a medical board connected with a military service tribunal, of the plaintiff in an action for assault and battery, made about eight months after the assault occurred, and showing that he was recovering from an injury and in consequence of his physical condition was not considered fit for active service at that time, was held, as against the objection that it was hearsay evidence, to be admissible in evidence as a public document. In discussing the point the court said: "The only ground of objection urged by the defendant's counsel is that it brings in unsworn testimony, and that it is impossible to cross-examine a document; or, in other words, that it is simply hearsay evidence. It seems to me that this ground is entirely untenable, for it is an established rule of law that public documents are admitted for certain purposes. The point which has to be considered is as to what a public document is, within that sense, and if this medical history sheet falls within it. No objection is taken on the ground that the medical board was not properly constituted, that the persons whose names are affixed were not members of the board,

or that the signatures were not proved, or that the document in question was not obtained by the plaintiff from the proper custodian. None of these grounds was urged at the trial, and I do not think they can be urged successfully now, for, had they been urged at the trial and objection taken to the admission on any of these grounds, it might have been possible for the plaintiff to have met such objections by satisfactory proof. As a matter of fact he asked for the privilege of doing so at the time of this motion, which request the court thought it unnecessary to comply with. The question of whether a court of appeal should allow a point of law not raised on the trial to be raised on appeal goes to discretion. See *Banbury v. Bank of Montreal* [1918] A. C. (Eng.) 626, 87 L. J. K. B. N. S. 1158, 119 L. T. N. S. 446, 34 Times L. R. 518, 62 Sol. Jo. 665, 23 Com. Cas. 337. I think, under the circumstances, the objection should be confined to the ground taken at the trial. As is stated in one of the textbooks, the cases establishing the reception of public documents and certificates of public officers are neither uniform nor very satisfactory. The question as to what public documents may be admitted in evidence, as exceptions to the hearsay rule, has been much discussed by the textbook writers, and they have analyzed and considered, in some cases most elaborately, the different cases bearing upon the subject. We are told in *Halsbury, Laws of England*, vol. 13, p. 475, that 'surveys, assessments, inquisitions, and reports are evidence of the truth of the matters stated, even against strangers, if made under public authority and concerning matters of public interest. To render such documents admissible there must have been a judicial, or quasi judicial, duty to inquire, undertaken by a public officer, and the matter must have been required to be ascertained for a public purpose.' It

seems to me that these elements are present in connection with the medical history sheet. There was certainly a judicial or quasi judicial duty on the part of those constituting the tribunal to inquire into the state of health of the plaintiff. It was undertaken by public officers, and the matter was required to be ascertained for an important public purpose, viz., the ability of the plaintiff to serve his country as a soldier. It should be noted, however, that it is laid down in some cases, and by some of the text-books, that the opportunity of inspection by the public at large has, by some judges, been advanced as one of the essential reasons on which the exception is based. If it is an essential reason, and not merely an incidental and usual advantage, then it follows that documents not so open to general inspection are inadmissible, even though made under an official duty. But Wigmore, while citing in support of this contention Lord Blackburn in *Sturla v. Freccia* (1880) L. R. 5 App. Cas. (Eng.) 623, says: 'But this may perhaps be regarded as in fact a modern innovation in that country (England).' Before the opinion of Lord Blackburn in that case, it does not seem to have been laid down distinctly as essential, and in the opinion of Wigmore [Ev. § 1634] the limitation does not seem to be a desirable one. 'But,' he adds, 'should it be accepted, however, the class of official documents excluded by it will after all be a narrow one, viz., those which are strictly confidential; for example, reports by inspectors, tax officers, and the like. These would perhaps usually be privileged from disclosure in any case, so that perhaps the question is not likely often to arise. It can hardly be supposed that the scope of this limitation, as explained by Lord Blackburn, was intended to include other than confidential documents, i. e., to include that vast class of official records, including certified copies, which are customarily not compiled for reference by the general public, nor placed where the public has constant opportunity to inspect.' In the case, at p.

643, Lord Blackburn says: 'Now, my lords, taking that decision (*Rex v. Debenham* (1818) 2 Barn. & Ald. 185, 106 Eng. Reprint, 334), the principle upon which it goes is that it should be a public inquiry, a public document, and made by a public officer. I do not think that "public," there, is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public, in the sense that it concerns all the people interested in the manor. And an entry, probably in a corporation book, concerning a corporate matter, or something in which all the corporation is concerned, would be "public" within that sense. But it must be a public document and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial, or quasi judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.' It seems to me that this medical history sheet falls within this description. It declares on the very face of the document that in any event the duplicate medical history sheet will be sent by the medical board to the district officer commanding, unless he is given instructions to forward it direct to a registrar or a deputy registrar. The document is, therefore, placed on record with one who, I think, can properly be called a public official, viz., the district officer commanding, or the registrar or deputy registrar for the district. That is done, I think, for the purpose of its being kept public, so that access may be had to it afterwards by persons who are concerned. I have come to the conclusion that this medical history sheet complies with all the conditions

that are necessary in order that it should be admitted in evidence, as an exception to the rule under which statements made by persons not called as witnesses are inadmissible, to prove the truth of the facts stated. Had other objections been taken to its admission at the trial, and had counsel for the plaintiff been unable to furnish proof to meet such objections, I might have been compelled to take a different view; but, as it is, I think the objection should be limited to the grounds taken at the trial, and that

he cannot succeed on the ground that the evidence was improperly admitted."

In an English case, *Anthony v. Anthony* (1919) 35 Times L. R. (Eng.) 559, it was held that where, in the opinion of the Secretary of State for War, it is not in the public interest that a man's army medical history sheets should be produced, they are privileged from production, and that such privilege cannot be waived by the person to whom they relate.
W. A. S.

ÆTNA INSURANCE COMPANY et al., Appts.,
v.

CHICAGO GREAT WESTERN RAILROAD COMPANY et al.

Iowa Supreme Court—December 31, 1920.

(— Iowa, —, 180 N. W. 649.)

Constitutional law — impairment of contract — police power.

1. No constitutional provision is violated by a statute making railroad companies answerable for loss of buildings on their rights of way through fire set out by their negligence, notwithstanding stipulations to the contrary in existing contracts, since the enactment is within the police power of the state.

[See note on this question beginning on page 254.]

Statute — retroactive effect — existing leases.

2. A statute making railroad companies liable for negligent destruction by fire of buildings on their rights of way, any provision in any lease or contract to the contrary notwithstanding, applies to leases existing at the time of its passage.

[See 25 R. C. L. 787-790.]

(Stevens, J., dissents.)

Constitutional law — extent of police power.

3. A state can, by no act, deprive itself of the right or authority to enact legislation within the proper scope of the police power, although the effect of a particular enactment be to impair the obligation of private contracts and prevent the enforcement of the terms thereof.

[See 6 R. C. L. 190, 199, 347.]

APPEAL by plaintiffs from a judgment of the District Court for Howard County (Taylor, J.) overruling a demurrer to the answer in an action brought to recover the amount paid by them to the defendant company in losses upon a building situated upon the defendant railroad's right of way.
Reversed.

Statement by Ladd, J.:

Action by several insurance companies jointly against the defendant railway company to recover \$2,500 paid in losses to Gilchrist & Com-

pany upon an elevator building situated upon defendant's right of way. A demurrer to defendants' answer was overruled, and plaintiffs appeal.

Messrs. H. L. Spaulding and McCook & Lyons, for appellants:

The appellee railway company was subject at all times to legislative control, and to any limitation or modification which the legislature saw fit to make in the interest of public welfare.

Sioux City Street R. Co. v. Sioux City, 78 Iowa, 742, 39 N. W. 498, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; Marshalltown Light, Power & R. Co. v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005; Wood v. Iowa Bldg. & L. Asso. 126 Iowa, 464, 102 N. W. 410; St. John v. Iowa Business Men's Bldg. & L. Asso. 136 Iowa, 448, 15 L.R.A. (N.S.) 503, 113 N. W. 863; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; McGuire v. Chicago B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902; Virginia Development Co. v. Crozer Iron Co. 90 Va. 126, 44 Am. St. Rep. 893, 17 S. E. 806; Macon & B. R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135, 11 S. E. 442; Leep v. St. Louis I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; 12 C. J. § 531.

The legislature had the right to limit the railway company in its contract rights, and to make void any contract which limited its liability.

Wood v. Iowa Bldg. & L. Asso. 126 Iowa, 464, 102 N. W. 410; Marshalltown Light, Power & R. Co. v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005.

Where the modification or control is in the nature of a police regulation, the legislature has extensive authority, and in the interest of public welfare may interfere with or subject property rights.

McGuire v. Chicago B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592.

Legislative control cannot be either limited or abridged by a private contract.

Marshalltown Light, Power & R. Co. v. Marshalltown, *supra*; Sioux City Street R. Co. v. Sioux City, 78 Iowa, 367, 43 N. W. 224, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226.

Messrs. Carr, Carr, & Evans and Reed & Pergler for appellees.

Ladd, J., delivered the opinion of the court:

Plaintiffs allege in their petition: That the defendant Gilchrist &

Company owned a building situated on the right of way of the Chicago Great Western Railroad Company at Elma, Iowa, used for receiving and storing articles of commerce transported or to be transported, which on May 17, 1917, caught on fire from sparks and cinders emitted from one of defendant's locomotives and was totally destroyed. That at the time Gilchrist & Company held policies of insurance on said building issued by plaintiff companies as follows: By the Phoenix Assurance Company, \$625; the Commonwealth Insurance Company, \$625; and the Aetna Insurance Company, \$1,250. That by and upon the payment of the loss, each of plaintiffs became entitled by right of subrogation to the claim of Gilchrist & Company against the defendant railroad company to the extent of the loss paid thereby, for which amount separate judgments are asked against it.

Defendant answered, admitting the loss, the payment of the sums alleged by plaintiffs to Gilchrist & Company, and in a separate division or count thereof, and as a separate defense to plaintiffs' cause of action, set up a lease with Gilchrist & Company, dated November 1, 1912, by the terms of which the latter assumed all loss or damage by fire and released the railroad company from liability therefor. Plaintiffs demurred to this count of defendant's answer, upon the ground that this provision of the lease contravenes § 2110m of the 1913 Supplement to the Code, and that same is therefore void and unenforceable. The demurrer was overruled, and plaintiffs appeal. The ruling on the demurrer presents the only question for our decision.

Section 2110m, which forms § 2 of chap. 178, Acts of the Thirty-Fifth General Assembly, went into effect July 4, 1913, and is as follows: "In the event that any elevator, warehouse, coal shed, icehouse, buying station, flour mill or any other building used for receiving, storing or manufacturing any arti-

cle of commerce transported or to be transported, situated on the right of way or other land of a railroad company shall be injured or destroyed by the negligence of any railroad company, or the servants or agents of any railroad company in the conduct of the business of such company, the railroad company so causing such injury or destruction shall be liable therefor to the same extent as if such elevator, warehouse, coal shed, icehouse, buying station, flour mill or any other building used for receiving, storing or manufacturing any article of commerce transported or to be transported, was not situated on the right of way or other land of such railroad company, any provision in any lease or contract to the contrary notwithstanding."

It will thus be seen that the lease containing the provision relied upon by defendant as a defense was entered into prior to the enactment of this statute by the thirty-fifth general assembly, and that the fire which destroyed the building insured occurred subsequent thereto. Defendant does not seek to avoid the provisions of § 2110m upon constitutional grounds, but contends that it was intended by the legislature to operate prospectively only, and that existing contracts are not affected thereby; whereas, appellants in argument assert that the statute was intended to operate upon existing, as well as subsequent, contracts containing provisions relieving a railroad company from liability for the destruction of buildings situated on its right of way by fire caused by its negligence, and that, as same was enacted in the exercise of the police power, it does not violate the provision of the Constitution of the United States prohibiting the enactment of laws impairing the obligations of contracts.

The statute contemplates property injured or destroyed subsequent to the enactment thereof, and only when caused by the negligence of the company or its agents or servants in the conduct of the busi-

ness of said company. In other words, liability is predicated solely on a future wrong, which presumably may be avoided by the continuous exercise of ordinary care, but may not by any clause in any lease

Statute—
retroactive
effect—existing
leases.

or contract existing at the time of the wrong perpetrated. This plainly appears from the last clause of the law, declaring the liability, "any provision in any lease or contract to the contrary notwithstanding." To construe this as contended by appellee would exact the addition to "any lease" the words "not executed prior to the enactment of this statute," or "not heretofore executed." The expression "any provision of any lease or contract" is broad enough to include every release from liability, regardless of form, and every lease or contract, regardless of when made, if existing at the time of the injury or destruction. There is nothing in the language of the statute restricting its meaning to leases or contracts of a subsequent date. All leases are treated as a class, and any one of them may not relieve the railroad company from liability for the consequences of its own negligence. Of course, injury or destruction subsequent to the taking effect of this statute was contemplated, and it is equally true that only a clause or provision of a lease existing at that time might in any event be interposed as a defense. The statute, then, cannot well be said to be retroactive, certainly in no respect other than in dealing with provisions in existing contracts executed prior to its enactment. The evil sought to be remedied is precisely the same, whether the release from liability is found in a lease or contract antedating the enactment of this statute or subsequently entered into. As laid down in *Galusha v. Wendt*, 114 Iowa, 597, 87 N. W. 512: "If the statute refers to an existing condition, it is applicable, although the condition is one which has been in

existence before the taking effect of the statute, and the construction gives it, therefore, a retroactive effect, notwithstanding the language of the statute is prospective only."

The evident design of the law-makers was to eliminate the ruling of a bare majority of the court in *Griswold v. Illinois C. R. Co.* 90 Iowa, 265, 24 L.R.A. 647, 57 N. W. 843, and thereby remove any existing barriers to requiring that railroad companies answer for the consequences of their own negligence. There might be some ground for limiting the effect of the inclusive language employed by the legislature, were this essential to uphold the constitutionality of the statute.

But, however interpreted, it is not inimical to the Constitution, as the authority to enact is plainly within the police power of the state. The meaning of that term is well expounded by Weaver, J., in *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902:

"The police power, as that term is commonly employed, may be paraphrased as society's natural right of self-defense, and its definition and limitation vary with the circumstance calling for its exercise. To embalm it in any fixed or rigid formula would be to destroy its value, for it would then be deprived of its indispensable quality of adaptation to changing conditions, and thus defeat the ends it was intended to promote. 6 Words & Phrases, p. 5424, and cases there cited. While protection of public health and public morals and the promotion of social order are peculiarly within its province, these are but instances of its application, and do not limit its sphere of action. *People v. Budd*, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

"The police power of the state is

the power to govern men and things within the limit of its dominions. It comprehends all those general laws of internal regulations necessary to secure peace, good order, health, and prosperity of the people, and the regulations and protection of property and property rights."

Chief Justice Shaw, in *Com. v. Alger*, 7 Cush. 53, defined it as follows: "The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise."

Other definitions of similar import are found in *State v. Armour Packing Co.* 124 Iowa, 323, 100 N. W. 59, 2 Ann. Cas. 448; *State v. Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Marshalltown Light, Power & R. Co. v. Marshalltown*, 127 Iowa, 637, 103 N. W. 1005; *Colorado Postal Teleg. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Barbier v. Connolly*, supra; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Allyn's Appeal*, 81 Conn. 534, 23 L.R.A. (N.S.) 630, 129 Am. St. Rep. 225, 71 Atl. 794.

Section 1289 of the Code of 1873, corresponding to § 2056 of the Code of 1897, making railway corporations liable for damages sustained on account of loss or injury by fire to property caused by the operation of a railway, was upheld in *Rodemacher v. Milwaukee & St. P. R.*

(— Iowa, —, 180 N. W. 649.)

Co. 41 Iowa, 297, 20 Am. Rep. 592, as a proper and valid exercise of the police power of the state. The statute in question was enacted in the exercise of the same lawful power and for a similar purpose. Fires, originating from the operation of railway locomotives, in buildings upon its right of way, may often be readily communicated to near-by buildings, resulting in great loss to private or public property and possibly to life.

The question here involved is whether § 2110m, supra, as applied to the provisions of the lease set forth in division two of defendant's answer, is invalid, because of the constitutional provision prohibiting the enactment of laws impairing the obligation of contracts. It is fundamental that a state can by no act deprive itself of the right or authority to enact legislation within the

—extent of
police power.

proper scope of its police power, although the effect of a particular enactment be to impair the obligation of private contracts and prevent the enforcement of the terms thereof. *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *New Orleans Gaslight Co. v. Louisiana Light & H. P. Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Lynch v. Baltimore & O. S. W. R. Co.* 240 Ill. 567, 88 N. E. 1034; *Com. v. R. I. Sherman Mfg. Co.* 189 Mass. 76, 75 N. E. 71, 4 Ann. Cas. 268; *Seattle v. Hurst*, 50 Wash. 424, 18 L.R.A.(N.S.) 169, 97 Pac. 454; *Washington v. Atlantic Coast Line R. Co.* 136 Ga. 638, 38 L.R.A.(N.S.) 867, 71 S. E. 1066; *Grand Trunk Western R. Co. v. South Bend*, 174 Ind. 203, 36 L.R.A.(N.S.) 850, 89 N. E. 885, 91 N. E. 809; *Atty. Gen. v. Williams*, 178 Mass. 330, 59 N. E. 812; *Yeatman v. Towers*, 126 Md.

513, P.U.R.1915E, 811, 95 Atl. 158; *State v. Redmon*, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 103, 114 N. W. 137, 15 Ann. Cas. 408.

In *Manigault v. Springs*, supra, the court said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good. While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary,—a discretion which courts ordinarily will not interfere with."

Laws enacted in the interest of the public health, morals, and welfare are valid within the police power of the state, and are not rendered invalid under § 10, art. 1, of the Constitution of the United States, because their effect may be to impair the obligation of private contracts. The whole subject is exhaustively treated in many of the cited cases, and it is unnecessary here to repeat the arguments of—

ried in further support of their conclusion. The statute in question is remedial in nature, and the evil, as said, if existing, is quite as persistent in the provisions of existing contracts as though they were thereafter inserted. All intended by the statute is that a railroad company may not shield itself from the consequences of its own negligence. The removal of releases or exemptions contained in the leases

or contracts is well calculated to accomplish this, and this will be done if the language of this statute is construed according to the context and the approved usage of the language. The demurrer should have been sustained.

Reversed.

Weaver, Ch. J., and Preston, Salinger, and Arthur, JJ., concur.

Stevens, J., dissents.

ANNOTATION.

Constitutionality, construction, and effect of statute invalidating stipulations relieving railroad from liability for destruction of buildings situated on its right of way.

A careful search has revealed no other cases passing on the precise point involved in the reported case *ÆTNA INS. CO. v. CHICAGO G. W. R. CO.* ante, 249.

The general rule as to the validity of contracts like the one in question is laid down in 11 R. C. L. 978, as follows; "It is well settled that a railroad company may, by contract, exempt itself from liability for injuries by fires to buildings upon its right of way, although such burnings be due to negligence. Such a contract is not open to the usual objections to contracts exempting from liability for negligence, that they are against the public interest or that the parties do not stand on a footing of equality and the weaker party is compelled to submit to the stipulation."

It seems to be equally clear that the legislature may impose upon railroads an absolute liability for injuries resulting from fires originating from the operation of the road. Thus in 11 R. C. L. 979, it is said: "The courts have uniformly held, or assumed as a basis for their decisions, that such statutes are valid, and not unconstitutional as denying to railroad companies the equal protection of the laws, or as depriving them of their property without due process of law, or as conflicting with the provisions of the Federal Constitution which prohibit any state from making or en-

forcing any law which shall abridge the privileges and immunities of citizens of the United States, or as interfering with the power of Congress to regulate commerce among the several states. Statutes which impose upon railroad companies an absolute liability where before they were liable only when negligent are not subject to the objection that they impair the obligation of contracts, even though the power to alter or amend the charter of any company by legislation is not reserved in the Constitution of the state. The common law permitted a recovery for damage caused by fire without proof of negligence; and, while this rule has been modified in the development of the law, there is no reason why it may not be restored in cases where the lawful use of property by one necessarily exposes the property of another to damage by fire. The adoption of statutes making railroad companies liable for damages by fire caused by the operation of their locomotives is but the re-enactment pro tanto of the ancient common law for the better protection of property exposed to such unusual dangers. Such matters are peculiarly within the control of the local legislatures; and such laws may be enacted, changed, or repealed to suit the varied conditions and circumstances of the people. These statutes can also be

sustained on the broad ground that they are merely remedial in character, and authorized under the general power of the legislature to provide appropriate remedies for the redress of just wrongs as are contemplated."

The particular question, however,

as to the effect upon such a statute of an express provision therein invalidating existing contractual stipulations relieving the railroad company from liability does not appear to have been passed upon heretofore.

M. A. L.

SOUTHERN COTTON OIL COMPANY, Plff. in Err.,

v.

L. J. ANDERSON.

Florida Supreme Court—June 30, 1920.

(— Fla. —, 86 So. 629.)

Automobile — dangerous agency.

1. A motor vehicle operated on the public highways is a dangerous instrumentality, and the owner who intrusts it to another to operate is liable for injury caused to others by the negligence of the person to whom it is intrusted.

[See note on this question beginning on page 270.]

Master and servant — management of dangerous agency — liability.

2. The servant is empowered by the master to discharge certain duties, and it is incumbent upon him to exercise the same care and attention which the law requires of the master; and, if that care and attention be about the management and custody of dangerous appliances, the master cannot shift the responsibility connected with the custody of such instruments to the servant to whom they have been intrusted, and escape liability therefor. This rule arises from the absolute duty which is owing to the public by those who employ in their business dangerous agencies or appliances, engines, or instruments, liable, if negligently managed, to result in great damage to others.

[See 18 R. C. L. 789-791.]

Automobile — owner's liability for injury.

3. An automobile operated upon the public highways being a dangerous machine, its owner is responsible for the manner in which it is used, and his liability extends to its use by anyone with his knowledge or consent.

[See 2 R. C. L. 1190, 1198; 18 R. C. L. 790, 813-815.]

Highways — use of motor vehicles — police power.

4. The legislature, under its police power to protect the public from dangerous instrumentalities using the highways, has imposed rigid restraints, regulations, and restrictions upon the use of motor vehicles, thus recognizing the danger from their operation which makes owners liable in damages under the doctrine of respondeat superior as applied to dangerous agencies.

[See 2 R. C. L. 1171; 18 R. C. L. 789-791.]

Automobile — statutory status.

5. Chapter 7275, Acts 1917, treats the automobile, when operated on the public highways, as a dangerous instrumentality, so as to require special regulation and control under the police power, and it is not divested of its dangerous character in an action for damages caused by the negligence of the operator, who is using the car with the owner's knowledge or consent.

Master and servant — mismanagement of dangerous agency — liability.

6. In intrusting a servant with a highly dangerous agency, the master

puts it in his servant's power to mismanage it, and as long as it is in his custody or control under such authority, the master is liable for any injury committed through the servant's negligence.

[See 18 R. C. L. 789, 790.]

Appeal — effect of ruling on second appeal.

7. A ruling reversing a judgment for defendant on the ground that

there is substantial evidence to support the plaintiff's case is binding on a second appeal, where the evidence is substantially the same.

[See 2 R. C. L. 223-225.]

Negligence — instrumentality dangerous per se.

8. An instrumentality is dangerous per se if it may inflict injury without the immediate application of human aid.

(Ellis and West, JJ., dissent.)

ERROR to the Court of Record for Escambia County (Jones, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligent operation of defendant's automobile. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Watson & Pasco, for plaintiff in error:

Where the driver of the car at the time of the accident was acting exclusively for his own personal ends, whether his business or his pleasure, the owner is not responsible. Where he is acting both about his own business and his master's business, it is for the jury to determine whether he has so far abandoned the business of the master as to release the master from liability.

McKiernan v. Lehmaier, 85 Conn. 111, 81 Atl. 969; Cohen v. Meador, 119 Va. 429, 89 S. E. 876; Brinkman v. Zuckerman, 192 Mich. 624, 159 N. W. 316; Gardiner v. Solomon, 200 Ala. 115, L.R.A.1917F, 381, 75 So. 621; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 9 Ann. Cas. 1227; Fleischner v. Durgin, 207 Mass. 435, 33 L.R.A.(N.S.) 79, 93 N. E. 801, 20 Ann. Cas. 1291; Hartley v. Miller, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; Reilly v. Connable, 214 N. Y. 586, L.R.A.1916A, 957, 108 N. E. 853, Ann. Cas. 1916A, 656; Danforth v. Fisher, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; Ludberg v. Barghoorn, 73 Wash. 476, 131 Pac. 1165; Berry, Automobiles, §§ 601, 602.

The obligation upon an owner of an automobile to have it "properly operated when it is by his authority on the public highway" extends no further than to render an owner liable who puts an incompetent or reckless driver in charge, or who permits a machine known to be defective and

dangerous to be used on the public highway.

Gardiner v. Solomon, 200 Ala. 115, L.R.A.1917F, 384, 75 So. 621; Farnsworth v. Tampa Electric Co. 62 Fla. 166, 57 So. 233.

Messrs. Blount & Blount & Carter also for plaintiff in error.

Messrs. F. W. March and Scott M. Loftin, for defendant in error:

A ruling of the appellate court that certain evidence was sufficient to entitle plaintiff to go to the jury is conclusive on the second appeal of the same case, presenting substantially the same evidence.

Masterson v. Chicago, R. I. & P. R. Co. 58 Mo. App. 572; Costigan v. Michael Transp. Co. 38 Mo. App. 219.

Where the new evidence introduced on the second trial does not appear to have made any substantial change in the case, the former decision will control, notwithstanding such additional evidence.

Landis v. Wolf, 119 Ill. App. 88; Cowles v. Chicago, R. I. & P. R. Co. — Iowa, —, 88 N. W. 1072.

A decision of the supreme court on a prior appeal, that the evidence on a particular issue was sufficient to justify submission to the jury, is conclusive on a subsequent appeal.

Southern Mut. Ins. Co. v. Hudson, 115 Ga. 638, 42 S. E. 60; Chesapeake & O. R. Co. v. Judd, 106 Ky. 364, 50 S. W. 539; Texas & P. R. Co. v. Shoemaker, — Tex. Civ. App. —, 81 S. W. 1019; Crooker v. Pacific Lounge & Mattress Co. 34 Wash. 191, 75 Pac. 632; Klatt v. N. C. Foster Lumber Co. 97 Wis. 641, 73 N. W. 563; Wunder-

(— Fla. —, 86 So. 629.)

lich v. Palatine Ins. Co. 115 Wis. 509, 92 N. W. 264.

A ruling of the appellate court that the evidence is sufficient to carry the case to the jury is the law of the case, and conclusive upon a subsequent appeal from a judgment supported by substantially the same evidence as was before the court on the prior appeal.

Gila Valley, G. & N. R. Co. v. Lyon, 9 Ariz. 218, 80 Pac. 337, affirmed in 203 U. S. 465, 51 L. ed. 276, 27 Sup. Ct. Rep. 145; *Washington & G. R. Co. v. Adams*, 11 App. D. C. 396; *Anderson Carriage Co. v. Pungs*, 140 Mich. 437, 103 N. W. 839; *Todd v. Houghton*, 59 Neb. 538; 81 N. W. 508; *Cunningham v. Nilson*, 84 N. Y. Supp. 669.

On a second appeal, instructions which are in accordance with the law as declared on the first appeal will not be reviewed.

Louisville & N. R. Co. v. Blair, 12 Ky. L. Rep. 294; *Nelson v. Wallace*, 57 Mo. App. 397.

Instructions which would otherwise work a reversal cannot have that effect where they are framed in accordance with the views expressed by the appellate court on a former appeal.

Feurt v. Ambrose, 34 Mo. App. 360; *Hombs v. Corbin*, 34 Mo. App. 393.

When a servant receives permission to use his master's vehicle on a journey which he desires to make for his own purpose, and at the same time agrees to perform, during the journey, some act on behalf of his master, the responsibility of the master for the negligence of the servant in respect of the vehicle during the journey is ordinarily a matter to be determined by the jury, upon a consideration of the whole evidence.

Labatt, Mast. & S. p. 6965, § 2300; *Cormack v. Digby, Jr.* Rep. 9 C. L. 557; *Haywood v. Hamm*, 77 Conn. 158, 58 Atl. 695.

Browne, Ch. J., delivered the opinion of the court:

This is an action by Louis J. Anderson against the Southern Cotton Oil Company for personal injuries caused by the negligent operation of an automobile belonging to the Southern Cotton Oil Company.

The case is before the court for the second time.

On the first hearing Anderson, the plaintiff below, brought writ of

error to test the ruling of the trial judge in directing a verdict for the defendant. This we held was error, and the judgment was reversed on that ground. *Anderson v. Southern Cotton Oil Co.* 73 Fla. 482, L.R.A. 1917E, 715, 74 So. 975.

On a retrial of the cause the plaintiff obtained a verdict and judgment for \$7,500 with interest, and the defendant is here on writ of error, complaining that the evidence was insufficient to sustain the verdict, and of rulings of the court on the evidence, and of certain instructions given on request of the plaintiff.

The defendant in error contends that, as this court reversed the former judgment on the ground that there was substantial evidence tending to prove the issue, we are bound by that as the law of the case, and should not disturb the ruling of the trial judge on the sufficiency of the evidence to support the verdict rendered on the second trial, where the testimony is substantially the same as on the first.

Appeal—effect
of ruling on
second appeal.

The rule contended for in that proposition is supported by strong authority. In *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780, it is thus stated: "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether, on all the evidence, the preponderating weight is in his favor—that is the business of the jury; but, conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of plaintiff,

that verdict would be set aside and a new trial had? Such a proposition is absurd; and accordingly we hold the true principle to be that, if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

In *Wilson v. Jernigan*, 57 Fla. 277, 49 So. 44, the distinction is drawn between the duty of the court on a motion to direct a verdict, where there is evidence tending to prove the issue, and the denial of a motion to set aside the verdict on the ground of the insufficiency of the testimony to support it. The court said: "The first assignment is based upon the overruling of the motion for a new trial, while the seventh is based upon the refusal of the trial court to instruct or direct the jury to return a verdict in favor of the plaintiffs," and held that the request for a directed verdict in favor of the plaintiffs "was properly refused"—citing *German American Lumber Co. v. Brock*, 55 Fla. 577, 46 So. 740; *Starks v. Sawyer*, 56 Fla. 596, 47 So. 513; *McKinnon v. Johnson*, 57 Fla. 120, 48 So. 910.

The case being submitted to the jury, a verdict was rendered for defendant, and this court reversed the judgment, because the trial judge refused to set it aside on the ground that the evidence was insufficient to warrant the jury in finding a verdict for the defendant.

Thus the court approved the ruling of the trial court, refusing to direct a verdict for the plaintiffs, and reversed the judgment, because he denied the motion to set aside the verdict on the ground that "the evidence adduced was not sufficient to warrant the jury in returning a verdict for the defendant."

This court has endeavored in several cases to point out the distinction between what is essential on motion to direct a verdict, and on motion to set aside a verdict because the evidence is insufficient to support it. The distinction is probably

as clear as language is capable of showing so shadowy a difference, but it is the frequent cause of contention before this court, and the trial judges are often lost in its mazes.

What this court has said on this subject can be found in *Carney v. Stringfellow*, 73 Fla. 700, 74 So. 866; *Gravette v. Turner*, 77 Fla. 311, 81 So. 476.

It is not necessary to consider the assignments of error separately, as this case must be decided on a doctrine that disposes of all of them adversely to the plaintiff in error.

It is conceded by the plaintiff in error that the negligence of the driver of the automobile that caused the injury to the defendant in error is established, and the only issue is the responsibility of the Southern Cotton Oil Company for this negligence. This responsibility must be measured by the obligation resting on the master or owner of an instrumentality that is peculiarly dangerous in its operation, when he intrusts it to another to operate on the public highways.

The rule is not a new one, and, far from being the enunciation of "a judicial statute," as intimated by counsel for plaintiff in error, it is but the application of an old and well-settled principle to new conditions. The rule is thus stated in *Pollock on Torts*, 506: "The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbor to such a risk is held, although his act is not of itself wrongful, to insure his neighbor against any consequent harm not due to some cause beyond human foresight. . . . Sometimes the term 'consummate care' is used to describe the amount of caution required, but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him. . . . This amounts to saying that, in dealing

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with a dangerous instrument of this kind, the only caution that will be held adequate in point of law is to abolish its dangerous character altogether."

It is true that, in the early development of this very salutary doctrine, the dangerous agencies consisted largely of fire, flood, water, and poisons. In *Dixon v. Bell*, 5 Maule & S. 198, 105 Eng. Reprint, 1023, 1 Starkie, 287, 17 Revised Rep. 308, 19 Eng. Rul. Cas. 26, Lord Ellenborough extended the doctrine to include loaded firearms. With the discovery of high explosives, they were put in the same class. As conditions changed it was extended to include other objects that common knowledge and common experience proved to be as potent sources of danger as those embraced in the earlier classifications. The underlying principle was not changed, but other agencies were included in the classification. Among them are locomotives, push cars, street cars, etc., and it is now well settled that these come within the class of dangerous agencies, and the liability of the master is determined by the rule applicable to them. The reasons for putting these agencies in the class of dangerous instrumentalities apply with equal, if not greater, force, to automobiles.

This is recognized in the case of *Weil v. Kreutzer*, 134 Ky. 563, text 567, 24 L.R.A. (N.S.) 557, 121 S. W. 472: "An automobile is nearly as deadly as, and much more dangerous than, a street car, or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as great weight and more rapidity, can be turned as easily as can an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train."

The discussion of this question in *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52, 24 Am. Rep. 296, is enlightening in this connection. There

the court said: "It was the established doctrine of the common law that the master is not liable for the torts of the servants not committed in the line of the master's service, or with his assent or ratification. This doctrine has been greatly modified as applied to railroad companies, on account of the absolute necessity for more stringent rules for the protection of life and property against the perils of the steam engine and its capacity for mischief."

In *Black v. Rock Island, A. & L. R. Co.* 125 La. 101, 26 L.R.A. (N.S.) 166, 51 So. 82, the court said: "The right to operate a steam locomotive on or across a street in a town involves the use of an agency highly dangerous to life, limb, and property, and the responsibility for the exercise of such right cannot be shifted by the corporation in which it is vested to the person who, by its authority, actually exercises it."

Says the Supreme Court of the United States: "The intrusting such a powerful and dangerous engine as a locomotive, to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the 'causa causans' of the mischief; while the proximate cause, or the ipsa negligentia which produces it, may truly be said, in most cases, to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety." *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602.

On the subject of a locomotive being a dangerous agency, see also *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560; *Nashville & C. R. Co. v. Starnes*, supra; *Bittle v. Camden*

& A. R. Co. 55 N. J. L. 615, 23 L.R.A. 283, 28 Atl. 305; *Kerwhacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Texas & P. R. Co. v. Scoville*, 27 L.R.A. 179, 10 C. C. A. 479, 23 U. S. App. 506, 62 Fed. 730; *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594.

A push car operated on a railroad track has been held to be a dangerous agency in *Salisbury v. Erie R. Co.* 66 N. J. L. 233, 55 L.R.A. 578, 88 Am. St. Rep. 480, 50 Atl. 117, 10 Am. Neg. Rep. 584; and in *Danbeck v. New Jersey Traction Co.* 57 N. J. L. 463, 31 Atl. 1038, 5 Am. Neg. Cas. 41, a street car was held to be a "machine of highly dangerous character."

In a former decision of this cause by this court we said: "The owners of automobiles in this state are bound to observe statutory regulations of their use, and assume liability commensurate with the dangers to which the owners or their agents subject others in using the automobiles on the public highway. The principles of the common law do not permit the owner of an instrumentality that is not dangerous per se, but is peculiarly dangerous in its operation, to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use. The liability grows out of the obligation of the owner to have the vehicle, that is not inherently dangerous per se, but peculiarly dangerous in its use, properly operated when it is by his authority on the public highway. In view of the dangers incident to the operation of automobiles, and of the duties and obligations of the owners of motor vehicles under the statutes of the state, it could not be said that, on the facts of this case, no question was made for the jury to decide." *Anderson v. Southern Cotton Oil Co.* 73 Fla. 432, L.R.A. 1917E, 715, 74 So. 975.

—owner's liability for injury.

The distinction there drawn was that an automobile, like a locomotive or a trolley car, has no inherent elements of danger, but that it is peculiarly dangerous in its operation and use on the public highways.

Much confusion has resulted from the use by the courts and text-writers of a term so inadequate and unfit as "dangerous per se" in discussing the liability of the owner of an instrumentality that is peculiarly dangerous in its operation, who permits another to run it on the public streets and highways.

Negligence—
instrumentality
dangerous
per se.

Wild animals and high explosives are dangerous per se; that is, they may inflict injury without the immediate application of human aid or instrumentality. Neither a locomotive, a trolley car, nor an automobile is dangerous per se—by or through itself—in that neither can inflict injury to a person except by its use or operation. A locomotive in the roundhouse, a trolley car in the barn, an automobile in a garage, are almost as harmless as canary birds; but, in operation, they are dangerous instrumentalities, and the master who intrusts them to another to operate—the one, on its right of way; the others, on the public highways—cannot exonerate himself from liability for injury caused to others by the negligence of those to whom they are intrusted.

As said in *Barmore v. Vicksburg, S. & P. R. Co.* supra: "The servant is empowered by the master to discharge certain duties, and it is incumbent upon him to exercise the same care and attention which the law requires of the master; and if that care and attention be about the management and custody of dangerous appliances, the master cannot shift the responsibility connected with the custody of such instruments to the servant to whom they have been intrusted, and escape liability therefor. This rule

Master and
servant—
management of
dangerous
agency—
liability.

arises from the absolute duty which is owing to the public by those who employ in their business dangerous agencies or appliances, engines or instruments, liable, if negligently managed, to result in great damage to others."

We are not unmindful that a goodly number of courts lay down a different rule, but their conclusions are not persuasive, because they ignore the dangerous character of the automobile as operated on the public highways, and treat it as a machine at rest.

Huddy, on Automobiles, § 36, says: "It is believed to be a common opinion among many that the automobile constitutes a dangerous machine, and that the operation of the motor vehicle on the public thoroughfare is necessarily hazardous."

This, he says, "is a mistaken view." It is rather dogmatic to set up one's individual opinion against the "common opinion among many," on a subject on which the "many" are capable of forming an intelligent opinion. It is also difficult to understand why some courts, in deciding whether or not an automobile is a dangerous machine, which, after all, must be determined by common knowledge, based upon general experience, should announce an opinion at variance with "the common opinion among many."

A judicial opinion on established facts and well-known conditions, counter to the common opinion of the many on the same subject, is persuasive only to those who desire to accept the unreasonable and reject the obvious.

The quoted passage from Huddy is found in all the editions of his work, but the first edition contains the data upon which he bases his opinion that the automobile is "not a dangerous agency," that is omitted in all later editions. He says: "As bearing on this question, it has been stated by authority that out of a total of 3,482 deaths reported to the coroner's office in the city of Chicago for the year 1905,

only 5 were caused by automobiles. For every death caused by an automobile in the city of Chicago there were more than 70 deaths caused by railroad accidents." [pp. 15, 16.]

That was in 1905. In its weekly News-letter of March 22d the National Safety Council, an organization that is doing a vast work to prevent accidental injuries in the United States, gives what purports to be figures from reports from the coroner, showing fatal accidents in Cook county, as follows: In 1918, automobiles, 374, railroads, 318, and street cars, 146; in 1919, automobiles, 420, railroads 208, street cars, 132. Thus in 1918 there were 56 more deaths from automobiles than from railroads, and in 1919 there were 212 more deaths from automobile accidents than from railroads, and 33 more than from railroads and street cars combined. From 1905 to 1920 the number of deaths from railroad accidents diminished from about 350 to 209, while in the same period deaths from automobiles, increased from 5 to 420.

The United States Census Bureau in its bulletin published February 2, 1920, places the number of deaths in the United States in 1918 from "automobile accidents and injuries," at 7,525,—a close second to deaths from "railroad accidents and injuries," which, during the same period, were 8,610, and more than three times as many as those caused by "street car accidents," which were only 2,366.

The Census Bureau makes this comment on automobile accidents: "Deaths from automobile accidents and injuries in 1918 totaled 7,525, or 9.2 per 100,000 population. This rate has risen rapidly from year to year, which strongly suggests the need for better traffic regulations and better enforcement of those we now have."

The National Safety Council has this to say:

"The following three facts emphasize the seriousness of automobile hazards:

"1. In 1919 there were approxi-

mately one half as many people killed by this one machine alone as were killed accidentally in all industries, mines, and railroads.

"2. While the industrial hazards are coming under control and methods of prevention are pretty well standardized, accidental deaths on the streets are mounting by leaps and bounds, and very little has been done to date in the way of a organized effort to control this hazard.

"3. Whereas only a portion (possibly one fourth) of the total population in the United States is exposed to the hazards of industry, practically every man, woman, and child, the moment they leave their doors, are exposed to the automobile hazards."

"We say the automobile has become the most deadly machine in America, because the mortality report of the Census Bureau and statistics being received daily by the National Safety Council indicate that during recent years automobile accidents have resulted in approximately one half the number of deaths caused by industrial accidents of all sorts. In Chicago, 420 persons were killed in automobile accidents during 1919; in Cleveland, 136; in St. Louis, 97; in the borough of Manhattan, New York, 191 children under fifteen years of age were killed by automobiles, and in Greater New York, 677 persons were killed by automobiles in one year. In Rochester, New York, as many deaths were caused by automobile accidents as by street cars, railroads, and industrial accidents combined. Even more alarming than these statistics is the fact that, in almost every case, a comparison, year by year, of the number of automobile deaths and the number of automobiles in use, indicates that the deaths are increasing in almost exact mathematical ratio with the increase in number of automobiles."

However cleverly the courts may state the reasons why they think the automobile in operation on the streets and highways is not a dangerous instrumentality or agency,

these statistics afford a complete refutation.

In view of the greatly increased number of deaths from automobile accidents since Mr. Huddy, in his first edition, gave the statistics upon which he based his conclusion that the automobile in operation on the public highways is not a dangerous machine, his dictum loses whatever weight it might have had, and suggests the inquiry why he adheres to it.

Perhaps a reply to this, and to the distinction sought to be drawn between locomotives and automobiles as dangerous agencies, may be found in Mr. Babbitt's work on Motor Vehicles, § 322, where he naively says: "An examination of the cases of the last five years discloses that the increasing popularity of motor vehicles has had its effect on the courts, with the result that all the decisions of that period are unanimous that a motor vehicle is not in the class of dangerous agencies."

We question, however, his premises and his conclusion. What most of the courts hold is that it is not dangerous "per se," thus merely asserting the obvious, and begging the question by seeking to negative what no one asserts, for we are not dealing with the machine at rest, but in operation on the streets and highways.

Upon this proposition we quote from *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594: "An attempt has been made, in a very few illogically reasoned cases, to draw a distinction between instrumentalities 'dangerous in themselves' and those 'dangerous by reason of improper use,' and confine the master's liability to cases due to mismanagement of the former class alone. An analysis will show that the distinction is more imaginary than real, and too refined to be of any practical benefit as a method of determining legal responsibility. The argument has a degree of plausibility when limited to agencies inherently dangerous even when most carefully

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handled, such as dynamite and similar substances, as distinguished from those of like character, such as gasoline, naphtha, and the like,—only dangerous when proper precautions are not observed; but the sophistry of the argument becomes apparent, and refutes itself, when we come to the consideration of dangerous engines, machinery, or appliances. No appliance is 'dangerous of itself,' but practically every appliance may become 'dangerous by improper use.' Neither a locomotive, pile driver, electric or cable car, automobile, threshing machine, or team and wagon is 'dangerous of itself,' yet with practical unanimity the courts hold the master liable for damages caused thereby, even though the servant, who has the sole custody and control thereof, is at the time acting wilfully, wantonly, and in disobedience to his master's orders. And so, on the other hand, an ax, a crowbar, a scythe, and similar implements in daily use, are equally as deadly when improperly used; but no court would hold a master liable for the tortious act of his servant on the ground alone that he had intrusted the custody of such appliance to the servant. No appliance when at rest is 'dangerous in itself.' It is by operation alone that it becomes capable of causing injury. So, in our opinion, a better test, though probably not itself without exceptions, of the master's liability, would be whether the agency or appliance, the custody and control of which he committed to his servant's judgment and discretion, was 'dangerous in itself,' or liable to inflict serious injury to others, when operated in the customary method of use and while being devoted to the purposes for which it was designed. If so, the public safety demands that he shall be answerable for the exercise of his servant's judgment. We are not without eminent authority for this position: 'Whenever a master sends his servant out beyond his own eye and immediate control, in the custody of any species of prop-

erty of the master which, unless properly cared for, guarded, and used, is liable to work injury to third persons, it is necessarily a part of the duty which the master commits to the servant ~~so~~ to care for, guard, and use such property that it shall not work such injury.' 1 Thomp. Neg. § 589; Vicksburg & J. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; Nashville & C. R. Co. v. Starnes, 9 Heisk. 52, 24 Am. Rep. 296; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602; Salisbury v. Erie R. Co. 66 N. J. L. 233, 55 L.R.A. 578, 88 Am. St. Rep. 480, 50 Atl. 117, 10 Am. Neg. Rep. 584."

The Florida statutes require motor vehicles to be registered,—the application for registration to contain the name of the manufacturer, the style, type, and factory number of each vehicle, the character of motor power, and the amount of such motor power stated in figures of horse power, the name, age, residence, and business address of the owner of such vehicles, and a statement that he is over sixteen years of age. He is required to get from the comptroller two number plates, which shall be conspicuously displayed on the car. No person under fourteen years of age is permitted to operate or drive a motor vehicle, unless accompanied by a duly licensed chauffeur, or by the owner of the motor vehicle. Upon the sale of a registered motor vehicle, the comptroller must be notified of such sale. They are required to be equipped with adequate brakes in good working order. Signaling devices must be provided. Lights are required to be used at night, and the manner of their use regulated. The rate of speed that they may be operated within or without corporate limits is prescribed. Chauffeurs must be licensed, and they are required to pass an examination as to their qualifications, to wear a distinguishing badge, and a penalty is attached for the violation of the

It is idle to say that the legislature imposed all these restraints, regulations, and restrictions upon the use of automobiles if they were not dangerous agencies which the legislature felt it was its duty to regulate and restrain for the protection of the public.

As was said in *Ingraham v. Stockamore*, 68 Misc. Rep. 114, 118 N. Y. Supp. 399:

"It would seem, from these provisions in reference to the owners of automobiles and those who operate them, that the legislature regarded automobiles as dangerous machines, and that their owners should be under special liabilities for the manner in which they operate them. No such restrictions have ever been imposed on other methods of transportation on highways. It is absurd to say that an automobile is no more dangerous than a team of horses. The latter have been used time out of mind, and comparatively few accidents have occurred, and those mostly to the ones using the horses. During the few years that automobiles have been in use, fatal accidents have been of almost daily occurrence, and automobiles have come to be regarded in both city and country as a menace to people on the highway. Their rapidity and the stillness of their movements make them especially dangerous to pedestrians. Attempts have been made by law to limit their speed, but it has been impossible to enforce the law. No doubt the legislature had in mind these facts when making the provisions of the act. Such provisions, requiring the registration of the names of the owner and chauffeur and the number of each machine, can have but one purpose,—to enable identification of the persons responsible in case of accident.

"An automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used; and his liability should extend to its use by anyone

and not be responsible for the consequences." *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; *Com. v. Boyd*, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; *Weil v. Kreutzer*, 184 Ky. 563, 24 L.R.A.(N.S.) 557, 121 S. W. 471.

"While it is quite true a motor is not an outlaw, it must also be borne in mind that the driver is not the lord of the highway, but a man in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation." *Fisher v. Murphy*, 20 Ont. Week. Rep. 201, 3 Ont. Week. N. 150.

See also *Mattei v. Gillies*, 16 Ont. L. Rep. 558, 12 Ann. Cas. 970.

Laws similar to chapter 7275, Acts of Florida, have been sustained by the courts as a legitimate exercise of the police power to regulate agencies that are dangerous to the public.

Citations from a few will be enlightening:

"There can be no question of the right of the legislature, in the exercise of the police power, to regulate the driving of automobiles and motorcycles on the public ways of the commonwealth. They are capable of being driven, and are apt to be driven, at such a high rate of speed, and when not properly driven are so dangerous, as to make some regulation necessary, for the safety of other persons on the public ways. *Com. v. Boyd*, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255.

"The use of them introduces a new element of danger to ordinary travelers on the highways, as well as to those riding in the automobiles. In order to protect the public, great care should be exercised in the use of them. Statutory regulation of their speed while running on the highways is reasonable and proper for the promotion of the safety of the public. It is the duty of the legislature, in the exercise of the police power, to consider the

risks that arise from use of new inventions applying the forces of nature in previously unknown ways.

. . . In choosing his vehicle, everyone must consider whether it is of a kind which will put in peril those using the streets differently in a reasonable way." *Com. v. Kingsbury*, 199 Mass. 542, L.R.A. 1915E, 264, 127 Am. St. Rep. 513, 85 N. E. 848.

"The statute in controversy in the case at bar certainly applies to all drivers of automobiles without distinction, and is therefore general as to that class, and, for the reason that such horseless vehicles constitute a source of danger to travelers upon the highway, it cannot be said that the classification is not a reasonable one." *Christy v. Elliott*, *supra*.

"It is scarcely necessary to say that this gives the common council ample authority to enact ordinances which will tend to make streets safe for the traveling public. We may take judicial notice that many of these automobiles may be driven at a speed of at least 40 miles an hour. Driven by indifferent, careless, or incompetent operators, these vehicles may be a menace to the safety of the traveling public. Under its authority to regulate the use of the streets, the city may enact ordinances which will diminish this danger. . . . It is merely a justifiable exercise of the police power in the interest of the safety of the traveling public." *People v. Schneider*, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790.

"The purpose of the legislation is manifest. The legislature appreciated the danger to pedestrians, and to people lawfully using the highway with vehicles drawn by animals, from automobiles and motor vehicles. Many of these vehicles are capable of attaining a speed of more than a mile a minute, and weigh several tons. Their speed averages approximately the speed of the different classes of railroad trains operated by steam

power." *People v. MacWilliams*, 91 App. Div. 176, 86 N. Y. Supp. 357.

In this case it was contended that the statute was unconstitutional, because it exempted manufacturers and dealers having automobiles in stock from the operation of the law, thus discriminating against those who used them on the highways.

The constitutionality of the act was sustained on the theory that while it was necessary for the public safety to require registration of motor vehicles operated on the public highways, it was "unnecessary to require the registration of such vehicles as were held in stock, for sale or for repair, or on storage in automobile barns and stables." In other words, that an automobile standing in a warehouse or garage is not a dangerous agency,—that is, "dangerous per se,"—but when operated on the public highways it is a dangerous agency.

The courts seem to be unanimous on the proposition that, for the purpose of the exercise of the state's police power, the automobile in operation is a dangerous agency that requires stringent regulatory legislation in the interest of the public safety. Some courts, however, in suits for personal injuries caused by the same agencies, seem to apply a different rule, and hold that they are not dangerous contrivances from which the public is entitled to the protection that would be afforded by the application of the rule governing the liability of the owner of a dangerous agency who permits it to be used by another.

We cannot make that distinction. If the automobile operated upon the public highways is so dangerous to ^{Automobile—}statutory status. other users of the highways as to require its regulation and control under the police power, it is not divested of its dangerous character in an action for damages caused by the negligence of the operator, and it follows that

Highways—use
of motor
vehicles—police
power.

ous instrumentalities such as locomotives and trolley cars, should be applied to automobiles when operated on the highways.

The controlling facts in the instant case are undisputed. The car was being operated by an employee of the corporation, with the express or implied permission to use it. While attending to a purely personal matter, he negligently drove it against the plaintiff in error, thereby causing the injury complained of.

In intrusting the servant with this highly dangerous agency, the master put it in the servant's

Master and
servant—mis-
management of
dangerous
agency—
liability.

power to mismanage it, and as long as it was in his custody or control the master was liable for any injury which might be committed through his negligence. This is the doctrine of the common law as applied to a new instrumentality imminently dangerous to the persons using the public highways.

Under the doctrine of this case, we find no reversible error, and the judgment is affirmed.

We adopt the concurring opinion of Mr. Justice Whitfield.

Taylor and Whitfield, JJ., concur.

Ellis and West, JJ., dissent.

Whitfield, J., concurring:

The amended declaration herein alleges that the defendant's "automobile was being run and operated by its agent and servant in and upon the streets . . . with the permission of and by the authority of said defendant; . . . that while said plaintiff was riding on a motorcycle and proceeding with due care . . . said defendant's automobile being so run and operated by its agent and servant, and at a time and place and with the permission and authority of the defendant, as aforesaid, and within the scope of his authority as such

lessly and negligently ran, drove and operated said automobile, . . . that same violently came in contact with and did strike against, with great force and violence, the leg, foot, and ankle of plaintiff," etc.

In the absence of controlling statutes the principles of the common law in force in this state are applicable to the operation of vehicles on public highways.

The automobile or motor vehicle is an instrumentality of service, whose weight, speed, and mechanism make it peculiarly dangerous when in operation on public highways.

Among the principles of the common law that are designed to conserve the public safety are those that require the exercise of due care in the use on the public highways of instrumentalities that are peculiarly dangerous in their operation, and impose upon the owner of such an instrumentality liability to persons for injuries to them proximately caused by the negligent use of the instrumentality upon the public highways by anyone who has the authority or permission of the owner to use or operate it. These principles are applicable to the use of any instrumentality that may be produced by human skill, which materially increases the hazards of travel upon the public highways; and the liability of the owner is not limited to the negligence of an employee of the owner while acting within the scope of his employment, but extends to the negligence of anyone who uses such instrumentality upon the public highways with the authority or permission of the owner.

The amended declaration is manifestly drawn on this theory, and the charges of the court comport with this view of the issues and the evidence in the case.

The principles of the common law, when applicable, have the force of law, particularly where, as here, the common law of England is by

statute expressly incorporated into the laws of the state. A statute may be merely declaratory of the principles of the common law.

The application of the principles of the common law to this case is not contrary to, but is consistent with, statutory regulations of the use of motor vehicles on the public highways in this state.

Ellis, J., dissenting:

The declaration in this case, consisting of two counts, rests upon the theory that the Southern Cotton Oil Company, a corporation, defendant below, through its "agent and servant," negligently operated an automobile, owned by the defendant, upon the streets of Pensacola, so that the plaintiff was injured.

The first count alleges that the automobile was "being run and operated by its [the company's] agent and servant in and upon the streets of the city of Pensacola, county of Escambia, state of Florida, with the permission of and by the authority of said defendant, in transporting himself from his lunch in said city to his place of employment, to wit, the place of business of said defendant," and that while the automobile was being "so run and operated" by the defendant's agent and servant, "and at a time and place and with the permission and authority of the defendant as aforesaid, and within the scope of his authority as such agent and servant, to wit, in transporting himself back to the place of business of said defendant," he carelessly and negligently drove and operated the automobile so that the plaintiff was injured.

The second count alleges that the defendant, the owner of the automobile, "was by its agent and servant driving, operating, and conducting same on and upon the streets of the city of Pensacola, county and state aforesaid," and that while the plaintiff was riding a motorcycle at the intersection of Garden and Donelson streets in the

city, and proceeding with due care, the "defendant, by its agent and servant, so carelessly and negligently drove, managed, and operated said automobile" that the plaintiff was injured, etc.

The case was tried upon the general issue of not guilty, which denied the wrongful act alleged to have been committed by the defendant. See rule 71, Law Actions.

The facts in the case are undisputed and are set forth in the dissenting opinion in the first decision of this case. See *Anderson v. Southern Cotton Oil Co.* L.R.A. 1917E, 715, 73 Fla. 432, 74 So. 975.

Upon the second trial the evidence was much clearer that Barrow, the company's cashier, in using the automobile, was merely required to make daily trips to the city of Pensacola from the offices of the company, which were located some distance out on Palafox street, attend to the banking and shipping for the company, and, after getting lunch for himself, return to the company's place of business about 1 o'clock; that the trip for the young lady took him some distance away from the line of his route back to the offices of the company. In fact, in making this trip he was required to leave Palafox street, go out some distance on Garden street, and return to Palafox street to a point farther away from the offices than where he had eaten his lunch. After arriving at the young lady's house, he undertook an errand for her which carried him further away. Upon this latter trip the accident occurred.

The local manager of the company knew that Barrow had frequently before that time used the automobile to take the young lady to her work, but Barrow had never before undertaken in the automobile an extra or special mission for the young lady. Neither the local manager nor anyone else for the company had authorized Barrow to make such use of the machine in performing errands for the young

lady, or in indulging in his own inclination to be of service in taking her from her house or boarding place to her work.

Now the declaration being framed upon the theory that the wrongful act of the company's cashier, Barrow, casts upon the company liability for the injury, it becomes necessary to a recovery for the plaintiff to show that the wrongful act of Barrow was done in the course and within the scope of his employment as the company's agent. That issue was the one presented; the only one tried.

The majority opinion upholds the verdict, and judgment upon the theory that one who permits another to use an instrument dangerous in its operation is liable in damages for the negligent operation of such instrument, notwithstanding the user was engaged upon an independent errand of his own. But that is not the theory upon which the declaration was framed, nor the cause tried. That was not the case made by the pleadings, nor was it the principle upon which the charges given by the trial court to the jury were framed.

The view of the judge who tried this case seems, from the instructions given, to have been that, if the defendant's manager knew of Barrow's practice in using the automobile to take the young lady to her work, and acquiesced in such practice, then Barrow's departure from his line of duty on the day of the accident could not be considered as an abandonment of his employment, but that he was still acting in the defendant's interest and within the general scope of his authority.

The judgment should not be affirmed upon the theory that, the automobile being a dangerous instrument in operation, the defendant must be held liable for any injury resulting from carelessness on the part of one to whom it may have been intrusted, as a kind of tort-feasor, because no such case was presented to the court. There

should be a recovery only upon the principle of respondeat superior, because such is unmistakably the doctrine upon which the declaration rests. To hold otherwise is to reverse the doctrine, so often announced by this court, that the recovery by plaintiff must be upon the case made by the pleadings.

There may be cogent reasons why the legislature should impose upon the owners of automobiles the additional liability for injuries caused by the machine when carelessly operated by any person to whom the owner may have intrusted it for the former's pleasure, and not the owner's interest; but until the legislature, in the exercise of police power for the public safety, so declares, the court should not outstrip the lawmaking body in its effort to meet public opinion.

Nor do I think the judgment should be affirmed upon the theory announced by the trial court in the charge to which I have referred, because the evidence, in my opinion, establishes beyond peradventure of doubt that Barrow was upon an independent errand of his own, or, more accurately, an independent errand or business of the young lady in whose service he was then acting when the accident occurred.

West, J., concurs.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on December 16, 1920:

On an application for rehearing it is contended that the effect of the former opinion herein as the law of the case has been overlooked on this writ of error, and that this "court departed from the doctrine announced by it upon its former decision in this same case." In our former decision we applied the dangerous agency or instrumentality rule, and the defendant in error filed a petition for rehearing in which he said that "this court, in holding in the instant case that the dangerous instrumentality or agency rule applies to automobiles

in Florida, . . . overlooked the decisions of the courts establishing that an automobile is not a dangerous instrumentality or agency."

The greater part of the petition was devoted to the discussion of that as "the doctrine of the case," and we were asked to depart from it on rehearing. The petition for rehearing was denied. A judgment for the plaintiff below on another trial being affirmed by this court, a rehearing is now asked on the ground that this court "departed from the doctrine announced by it upon its former decision in this same case."

There was no departure from the doctrine of the first case. In both decisions we applied the rule that the superior must respond in damages for the negligent acts of persons to whom he intrusts instrumentalities that are dangerous per se, or dangerous in their use.

In the first petition for rehearing counsel complained that this court held that "the dangerous instrumentality or agency rule applies to automobiles in Florida." They now say that, in the last case wherein we adhered to that rule, this court "departed from the doctrine announced by it in its former decision in this same case." We call attention to this inconsistency, but refrain from making any comment on it.

Even if the declaration contains allegations that have reference to the doctrine of respondeat superior as applied to the relation of master and servant, the liability under such doctrine is not foreign to the rule of liability that one who authorizes and permits an instrumentality that is peculiarly dangerous in its operation to be used by another on the public highway is liable in damages for injuries to third persons, caused by the negligent operation of such instrumentality on the highway by one so authorized by the owner. If the plaintiff alleged and endeavored to prove more than was necessary to a recovery of damages, the unneces-

sary matters may be regarded as immaterial surplusage, where they are not repugnant to or destructive of a right of action that is in substance and legal effect alleged and assumed to be proven, as is the case here.

The former opinion herein clearly indicates this situation in the trial then reviewed, and the petition for rehearing then filed in effect complained of this pronouncement in the first opinion.

It is the province of the courts to determine whether an instrumentality of known qualities is so peculiarly dangerous in its operation as to invoke the principle of law that the owner thereof is liable for injuries to third persons proximately resulting from the negligent operation of such instrumentality by anyone using it with the authority of the owner; and when the court determines that the instrumentality is within the class and principle referred to, that phase of the case is concluded. The question, then, of liability vel non for the particular injury, depends upon an appreciation of the evidentiary matters and the principles of law applicable thereto. Error, if any, in determining the peculiarly dangerous character of the instrumentality, or in adjudicating liability in a particular case, may be remedied by permissible review proceedings.

The legal rules of liability for the authorized use of peculiarly dangerous instrumentalities are especially applicable to the negligent operation on the public highways of motor vehicles whose weight, speed, and mechanism render the negligent or inefficient use of them perilous to the public, who have a right to travel the highways without being subjected to undue dangers of injury by others. If a locomotive engine and a handcar are peculiarly dangerous when operated on a railroad track, certainly a motor car is peculiarly dangerous when operated on public highways. The declaration and the evidence

negligence in the authorized operation of a motor car on the streets.

Even if the allegations and proofs do not show a liability because of the negligence of the defendant's employee while engaged in the scope of his employment, both the allegations and the proofs do show liability for an injury caused by the negligent operation on the highway of an instrumentality that is peculiarly dangerous in its use, by the defendant's employee

permission given by the manager of the defendant corporation; the owner of the instrumentality having the control of its use. The liability arises for negligence within the scope of authority, if not also within the scope of employment. This appears in the former opinion.

Rehearing denied.

Browne, Ch. J., and Taylor and Whitfield, JJ., concur.

Ellis and West, JJ., dissent.

ANNOTATION.

Dangerous instrumentality doctrine as applied to automobile.

Generally.

While the reported case takes the opposite view, the decisions are almost unanimous in holding (*SOUTHERN COTTON OIL Co. v. ANDERSON*, ante, 255) that an automobile is not such a dangerous instrumentality as to render the owner thereof liable for an injury resulting from its operation, unless the machine is negligently operated by him or by some person for whose act he is responsible under the doctrine of respondeat superior.

Alabama.—*Parker v. Wilson* (1912) 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150; *Hester v. Hall* (1919) — Ala. App. —, 81 So. 361.

Georgia. — *Fielder v. Davison* (1913) 139 Ga. 509, 77 S. E. 618; *Lewis v. Amorous* (1907) 3 Ga. App. 50, 59 S. E. 338.

Illinois.—*Akin v. Page* (1919) 287 Ill. 420, 5 A.L.R. 216, 123 N. E. 30.

Indiana. — *McIntyre v. Orner* (1906) 166 Ind. 57, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 7 Ann. Cas. 1087; *Premier Motor Mfg. Co. v. Tilford* (1916) 61 Ind. App. 164, 111 N. E. 645; *Martin v. Lilly* (1919) 188 Ind. 139, 121 N. E. 443.

Iowa.—*Newbrand v. Kraft* (1915) 169 Iowa, 444, L.R.A.1915D, 691, 151 N. W. 455.

Kentucky. — *Tyler v. Stephan* (1915) 163 Ky. 770, 174 S. W. 790.

Maryland. — *Symington v. Sipes*

(1913) 121 Md. 313, 47 L.R.A.(N.S.) 662, 88 Atl. 134.

Michigan. — *Hartley v. Miller* (1911) 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; *Brinkman v. Zuckerman* (1916) 192 Mich. 624, 159 N. W. 316.

Minnesota. — *Slater v. Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Provo v. Conrad* (1915) 130 Minn. 412, 153 N. W. 753.

Missouri. — *Michael v. Pullman* (1919) — Mo. App. —, 215 S. W. 763; *Daily v. Maxwell* (1911) 152 Mo. App. 415, 133 S. W. 351.

New Hampshire. — *Danforth v. Fisher* (1908) 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535.

New York. — *Cunningham v. Castle* (1908) 127 App. Div. 580, 111 N. Y. Supp. 1057; *Vincent v. Crandall & G. Co.* (1909) 131 App. Div. 200, 115 N. Y. Supp. 600; *Towers v. Errington* (1912) 78 Misc. 297, 138 N. Y. Supp. 119; *Bogorad v. Dix* (1917) 176 App. Div. 774, 162 N. Y. Supp. 992; *Ingraham v. Stockamore* (1909) 63 Misc. 114, 118 N. Y. Supp. 399.

North Carolina.—*Linville v. Nessen* (1913) 162 N. C. 95, 77 N. E. 1096.

Oklahoma. — *McNeal v. McKain* (1912) 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Ford Motor Co. v.*

Livesay (1916) 61 Okla. 231, 160 Pac. 901.

Tennessee. — Goodman v. Wilson (1913) 129 Tenn. 464, 51 L.R.A.(N.S.) 1116, 166 S. W. 752; King v. Smythe (1918) 140 Tenn. 217, L.R.A.1918F, 293, 204 S. W. 290; Lynde v. Browning (1911) 2 Tenn. C. C. A. 262.

Texas.—Allen v. Bland (1914) — Tex. Civ. App. —, 168 S. W. 35.

Virginia.—Cohen v. Meador (1916). 119 Va. 429, 89 S. E. 876.

Washington. — Jones v. Hoge (1907) 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; Birch v. Abercrombie (1913) 74 Wash. 486, 50 L.R.A.(N.S.) 59, 183 Pac. 1020.

Wisconsin.—Steffen v. McNaughton (1910) 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227.

Canada. — Marshall v. Gowans (1911) 20 Ont. Week. Rep. 37.

"Automobiles are not to be regarded in the same category with locomotives, ferocious animals, dynamite, and other dangerous contrivances and agencies." Premier Motor Mfg. Co. v. Tilford (1916) 61 Ind. App. 164, 111 N. E. 645. See to the same effect, Jones v. Hoge (Wash.) supra.

So, in Daily v. Maxwell (Mo.) supra, it was said: "When carefully handled, it is not dangerous either to its passengers or to other persons using the public highways who are themselves in the exercise of reasonable care. Its great capacity and power endow it with dangerous possibilities, but human agency—wanton or negligent agency—must call them into play. It would seem paradoxical to say in one breath that an automobile is a lawful vehicle, and in the next that it is dangerous per se, as dynamite, or a locomotive, or a mad bull is dangerous. If it belonged to the latter class, the rules of the common law would not permit its presence on public highways for general use."

Similarly it was said in Lewis v. Amorous (Ga.) supra: "It is insisted in the argument that automobiles are to be classed with ferocious ani-

mals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While, by reason of the rate of pay allowed to judges in this state, few, if any, of them, have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like."

Where an automobile is out of repair so as to be unmanageable, it is such a dangerous instrumentality that it is negligence to allow its use on the highway; and the owner is liable for an injury caused by the operation of the car, though his agent, in charge thereof, is not negligent. Texas Co. v. Veloz (1913) — Tex. Civ. App. —, 162 S. W. 377. So, in Allen v. Schultz (1919) 107 Wash. 393, 6 A.L.R. 676, 181 Pac. 916, wherein it appeared that an accident resulted from a defect in the brake, the court said: "One who operates on the streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he may be called upon to make emergency stops, and it is negligence on his part not to keep the automobile in such condition that such stops are possible." But in Halverson v. Blosser (1917) 101 Kan. 683, L.R.A.1918B, 498, 168 Pac. 863, the court said: "Plaintiff further contends that the owner should be held liable for loaning a car with a broken muffler. Because of the absence of a muffler the automobile was more noisy in operation than it would have been if it had been provided with one. The extent of the noise depended on the manner of operating the car. Automobiles and motor trucks are now in common use,

and some are much more noisy than others. It is common knowledge that horses have become accustomed to the operation of motor vehicles and pay little attention to them, whether much or little noise is made in their operation. It can hardly be held that an automobile with a broken muffler or without one is an inherently dangerous agency, or that the owner of a car is liable for injuries sustained while the car without a muffler was being used by one to whom it was loaned for his own purposes."

It is a general rule in the law of negligence that the care to be exercised in the use of any instrumentality is proportionate to the possibilities of injury from its careless use; and in a number of cases the courts have referred to the automobile as a dangerous instrumentality in the sense that a high degree of care must be exercised by the person operating it. Thus, in *Moore v. Roddie* (1919) 106 Wash. 548, 180 Pac. 879, it was said that the automobile is a dangerous instrumentality "when driven upon the highways in a careless and negligent manner."

So, in *Parker v. Wilson* (1912) 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150, it was said obiter that an automobile is a machine of such "dangerous potentialities" that it is negligence for the owner to intrust it to an incompetent or inexperienced person.

Similarly, in *Patterson v. Wagner* (1919) 204 Mich. 593, 171 N. W. 356, it was said: "The duty and responsibility of those driving them should be, and is, proportioned to the possibilities and dangers attending the use upon the public highways of such an instrumentality of travel and transportation."

In *King v. Holliday* (1921) — S. C. —, 108 S. E. 186, an instruction was held correct, in an action against the owner and driver for personal injuries caused by an automobile, that, as a matter of law, if a person is traveling upon the highway and sees an object in the highway, especially if he is driving a dangerous machine, he must use caution and care and prudence, as a person of ordinary reason and prudence would use, so as to

avoid injury either to himself or to the person who is driving the car, or to the object on the highway, if it is capable of being injured.

In *Lynde v. Browning* (1911) 2 Tenn. C. C. A. 262, it was said: "We cannot shut our eyes to the fact that automobiles are in a manner dangerous, and that they are in a measure a menace to the traveling public. Bearing in mind the number of accidents occurring daily, and the narrow escapes that pedestrians have, and the positive discomfort suffered by many people by reason of the fear of collision from these noiseless but powerful agencies, we do not hesitate to say that the most stringent regulations should be applied to them, and that presumptions in cases of accident should be against rather than in favor of their owners. We do not hold that they are dangerous agencies in such a sense as to make the owners absolutely responsible for all damages occasioned by collision, in whose hands soever they may be. We do decide, however, that they are of such potency for harm as to warrant a very high degree of responsibility upon the owners, both as to their operation and in the selection of parties to whom they intrust them."

Likewise the court said, in *Weil v. Kreutzer* (1909) 134 Ky. 563, 24 L.R.A. (N.S.) 557, 121 S. W. 471: "The degree of care one must use always bears a direct ratio to the degree of injury which would probably be caused by negligence. When one comes through the highways of a city with a machine of such deadly force as an automobile, it is incumbent upon the driver to use great care that it be not driven against or over pedestrians. An automobile is nearly as deadly as, and much more dangerous than, a street car or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as great weight and more rapidity, can be turned as easily as can an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train."

The degree of care required was stated in *McFern v. Gardner* (1906) 121 Mo. App. 1, 97 S. W. 972, as follows: "The automobile is a modern invention, propelled by steam, electricity, or gasoline, and attains a very high rate of speed. It is of great weight, made very strong, and in a collision with an ordinary vehicle is capable of smashing it without serious damage to the machine itself; and while it has equal rights on the road with the ordinary vehicle, it is a sort of menace to the traveling public, and, on account of the danger to others incident to its operation upon public highways, the chauffeur in charge is bound to exercise care commensurate with the risk of injury to other vehicles and pedestrians on the road." See to the same effect, *Hall v. Compton* (1908) 130 Mo. App. 675, 108 S. W. 1122.

In *King v. Smythe* (1918) 140 Tenn. 217, L.R.A.1918F, 293, 204 S. W. 296, the court said: "It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and, when moving rapidly upon the streets of a populous city, it is dangerous to life and limb, and must be operated with care."

There is also a line of cases, referred to in the reported case (*SOUTHERN COTTON OIL Co. v. ANDERSON*, ante, 255), but deemed to be outside the scope of this annotation, wherein the courts have referred to the automobile as a dangerous instrumentality in sustaining special statutory regulations of the use of such vehicles.

Illustrations.

An automobile is not such a dangerous instrumentality that the owner thereof is liable for an accident occurring while he is operating the same, if he is guilty of no negligence in its operation. *Hester v. Hall* (1919) — Ala. App. —, 81 So. 361; *McIntyre v. Orner* (1906) 166 Ind. 57, 4 L.R.A.

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(N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 Ann. Cas. 1087; *Marshall v. Gowans* (1911) 20 Ont. Week. Rep. 37.

An automobile owner who, on leaving his car in a garage, does not chain it, is not liable for injuries caused by a stranger, who takes the car without the consent of the owner. *Lewis v. Amorous* (1907) 3 Ga. App. 50, 59 S. E. 338.

Neither is the owner of an automobile left standing in the street liable for injuries caused by its being started by boys. *Berman v. Schultz* (1903) 84 N. Y. Supp. 292; *Vincent v. Crandall & G. Co.* (1909) 131 App. Div. 200, 115 N. Y. Supp. 600.

The dangerous-instrumentality doctrine does not render a person liable for accidents resulting from the negligent use of an automobile by a co-owner (*Goodman v. Wilson* (1914) 129 Tenn. 464, 51 L.R.A.(N.S.) 116, 166 S. W. 752), or by a person renting the car (*Neubrand v. Kraft* (1915) 169 Iowa, 444, L.R.A.1915D, 691, 151 N. W. 455), or by a person borrowing the car (*Martin v. Lilly* (1919) 188 Ind. 139; 121 N. E. 443; *Hartley v. Miller* (1911) 165 Mich. 115, 33 L.R.A. (N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; *Michael v. Pulliam* (1919) — Mo. App. —, 215 S. W. 763).

By the weight of authority, an automobile is not such a dangerous instrumentality that an owner who permits his servant to use it on the servant's personal business is liable for an accident caused by the servant's negligence.

Georgia. — *Fielder v. Davison* (1913) 139 Ga. 509, 77 S. E. 618.

Indiana. — *Premier Motor Mfg. Co. v. Tilford* (1916) 61 Ind. App. 164, 111 N. E. 645.

Kentucky. — *Tyler v. Stephan* (1915) 163 Ky. 770, 174 S. W. 790.

Maryland. — *Symington v. Sipes* (1913) 121 Md. 313, 47 L.R.A.(N.S.) 662, 88 Atl. 134.

Michigan. — *Brinkman v. Zuckerman* (1916) 192 Mich. 624, 159 N. W. 316.

Minnesota. — *Slater v. Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Provo v. Conrad* (1915) 130 Minn. 412, 153 N. W. 753.

New Hampshire. — *Danforth v. Fisher* (1908) 75 N. H. 111, 21 L.R.A. (N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535.

New York.—*Cunningham v. Castle* (1918) 127 App. Div. 580, 111 N. Y. Supp. 1057; *Bogorad v. Dix* (1917) 176 App. Div. 774, 162 N. Y. Supp. 992, reversing (1916) 159 N. Y. Supp. 46. Compare *Ingraham v. Stockamore* (1909) 63 Misc. 114, 118 N. Y. Supp. 399.

Virginia.—*Cohen v. Meador* (1916) 119 Va. 429, 89 S. E. 876.

Washington.—*Jones v. Hoge* (1907) 47 Wash. 663, 14 L.R.A. (N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433.

Wisconsin.—*Steffen v. McNaughten* (1910) 142 Wis. 49, 26 L.R.A. (N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227.

However, in the reported case (*SOUTHERN COTTON OIL CO. v. ANDERSON*, ante, 255), the view is apparently taken that so great are the possibilities of injury from the operation of an automobile that an owner who allows his servant to use the machine on his personal business is liable for the negligence of the servant while so engaged. It is to be noted that this holding is opposed not only to the cases heretofore cited in which the dangerous-instrumentality doctrine was specifically invoked, but to the large number of cases, not within the scope of this discussion, wherein it is held generally that an automobile owner is not liable for an injury caused by the negligent driving of his servant in the course of a deviation from his employment.

"The relation between the owner of an automobile and the person employed by him to operate it is that of master and servant, and liability for injuries to third persons, caused by the negligence of the servant operating the same, differs in no essential respect from the rules and principles of law applicable to that relation. Efforts have been made to extend such rules of liability, by statute and judicial decisions, on the theory that the automobile is a dangerous instrumentality, requiring for the protection of the public a high degree of care in safeguarding its use. These efforts have not met with success, and

the courts are practically uniform in applying in such cases the law of master and servant." *Provo v. Conrad* (1915) 130 Minn. 412, 153 N. W. 753.

In like manner the dangerous-instrumentality rule does not subject a parent to liability for the acts of a child allowed to use the parent's automobile, the liability of the parent, if any, resting on agency, or on the "family purpose" doctrine.

Alabama.—*Parker v. Wilson* (1912) 179 Ala. 361, 43 L.R.A. (N.S.) 87, 60 So. 150.

Illinois.—*Akin v. Page* (1919) 287 Ill. 420, 5 A.L.R. 216, 123 N. E. 30.

Missouri.—*Daily v. Maxwell* (1911) 152 Mo. App. 415, 133 S. W. 351.

New York.—*Towers v. Errington* (1912) 78 Misc. 297, 138 N. Y. Supp. 119.

North Carolina.—*Linville v. Nissen* (1913) 162 N. C. 95, 77 S. E. 1096.

Oklahoma. — *McNeal v. McKain* (1912) 33 Okla. 449, 41 L.R.A. (N.S.) 775, 126 Pac. 742.

Tennessee.—*King v. Smythe* (1918) 140 Tenn. 217, L.R.A.1918F, 293, 204 S. W. 296; *Lynde v. Browning* (1911) 2 Tenn. C. C. A. 262.

Washington.—*Birch v. Abercrombie* (1913) 74 Wash. 486, 50 L.R.A. (N.S.) 59, 133 Pac. 1020.

But an automobile is so far dangerous that liability is on that ground imposed on a parent who permits its use by a child, known to be incompetent to drive it with due regard for the safety of the public. *Gardiner v. Solomon* (1917) 200 Ala. 115, L.R.A.1917F, 380, 75 So. 621; *Allen v. Bland* (1914) — Tex. Civ. App. —, 168 S. W. 35. In the case first cited it was said: "While automobiles are not inherently dangerous instrumentalities, and the owner thereof is not responsible for the negligent use of same, except upon the theory of the doctrine of respondeat superior, yet there is an exception if he intrusts it to one, though not an agent or servant, who is so incompetent as to the handling of same as to convert it into a dangerous instrumentality, and the incompetency is known to the owner when permitting the use of the vehicle." W. A. S.

FRANK J. RUNKLE, Respt.,
v.
SOUTHERN PACIFIC MILLING COMPANY, Appt.

California Supreme Court (Dept. No. 2) — January 24, 1921.

(— Cal. —, 195 Pac. 398.)

Warehouseman — liability for loss of property — negligence of servant.

1. A warehouseman is liable for destruction of property stored with him by fire resulting from the negligence of the one whom he placed in charge of the building.

[See note on this question beginning on page 280.]

Trial — question for court — negligence.

2. The question of negligence is one of law for the court only when the facts are not in any event or in any view of the case susceptible to the inference of negligence sought to be deduced therefrom.

[See 20 R. C. L. 166.]

— question for jury — sufficiency of fire-fighting apparatus.

3. Whether barrels of water without buckets, pyrene extinguishers, and a low-pressure water pipe over a sink, fulfil the duty of a public warehouseman to provide fire-fighting apparatus for the protection of property stored with him, is a question for the jury.

Warehouseman — duty to protect from fire — knowledge of customer.

4. Knowledge by the customer of the fire-fighting apparatus provided by a public warehouseman for the protection of property stored with him at the time he places property in the warehouse does not alter the rights and duties of the parties with respect to the protection to be afforded to the property.

Master and servant — warehouseman — scope of employment — entering building after hours.

5. One employed to have charge of a public warehouse and intrusted with a key to the property may be found to have been acting within the scope of his employment in entering the building after it has been closed for the day.

Warehouseman — negligence in employing drunken keeper.

6. A warehouseman may be found to be negligent with respect to property left with him for storage, in placing in charge of the building a man whom he knows drinks intoxicating liquor to excess, and who is intrusted with a key by which he can gain access to the building at any time.

Appeal — instructions — absence of error.

7. Upon the question of the negligence of a warehouseman in putting in charge of the warehouse a man known to be frequently under the influence of intoxicating liquor, it is not error to instruct that an ordinarily prudent employer would not retain in his employ a man who was known, or who should have been known, to be an habitual drunkard.

Definition — habitual drunkard.

8. An habitual drunkard, in the general sense and as commonly understood, is one who is addicted to the habit of drinking intoxicating liquors to excess, and who is commonly or frequently intoxicated and becomes so as often as the opportunity permits.

Evidence — burden of proof — care of warehouseman.

9. One seeking to hold a warehouseman liable for the loss of his property by the burning of the warehouse in which it was stored is not bound to show affirmatively what would constitute ordinary care on the part of defendant in the operation and management of the warehouse.

[See 27 R. C. L. 1003.]

APPEAL by defendant from a judgment of the Superior Court for Ventura County (Rogers, J.) in favor of plaintiff in an action brought to

have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles F. Blackstock, for appellant:

Under all of the facts and circumstances it was not established or shown that defendant was negligent, either in the manner it conducted its warehouse or in the employment and retention in its employ of the said Roy Thomas.

Smith v. Whittier, 95 Cal. 280, 30 Pac. 529; 29 Cyc. 427; Porter County v. Dombke, 94 Ind. 72; Salem-Bedford Stone Co. v. O'Brien, 12 Ind. App. 217, 40 N. E. 430; Philadelphia, W. & B. R. Co. v. Kerr, 25 Md. 521; Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336.

The burden of proving culpable negligence on the part of defendant was on the plaintiff.

Wilson v. Southern P. R. Co. 62 Cal. 172.

Defendant was not liable for any negligence on the part of Thomas, because, on the 25th day of December, 1918, he was not acting in the course of his employment.

Bank of California v. Western U. Teleg. Co. 52 Cal. 288; Story, Agency, § 452; Overacre v. Blake, 82 Cal. 77, 22 Pac. 979; Harlan v. St. Louis, K. C. & N. R. Co. 65 Mo. 22; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Doggett v. Richmond & D. R. Co. 78 N. C. 305; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; Gilman v. Noyes, 57 N. H. 627.

Mr. Robert M. Clarke, for respondent:

The verdict is sustained by the evidence and the motion for a nonsuit was properly overruled.

Cooley, Torts, Students' ed. pp. 32, 696 et seq.; Fox v. Oakland Consol. Street R. Co. 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; Wikberg v. Olsson Co. 138 Cal. 479, 71 Pac. 511; Anderson v. Los Angeles Transfer Co. 170 Cal. 66, 148 Pac. 212; Sierra Mill. Smelting & Min. Co. v. Hartford F. Ins. Co. 76 Cal. 235, 18 Pac. 267; Wilson v. Southern P. R. Co. 62 Cal. 164; Greenleaf v. Pacific Teleph. & Teleg. Co. — Cal. App. —, 185 Pac. 872; Cussen v. Southern California Sav. Bank, 133 Cal. 534, 85 Am. St. Rep. 221, 65 Pac. 1099.

Thomas was acting in the scope of his employment.

Percival v. National Drama Corp.

181 Cal. 631, 185 Pac. 972; Sample v. Round Mountain Citrus Farm Co. 29 Cal. App. 547, 156 Pac. 983; People v. Treadwell, 69 Cal. 226, 10 Pac. 502, 7 Am. Crim. Rep. 152; Bibb v. Bancroft, 3 Cal. Unrep. 151, 22 Pac. 484; Grosse-Becker v. Becker, 102 Cal. 226, 36 Pac. 433; Adams v. Wiesendanger, 27 Cal. App. 590, 150 Pac. 1016; Moore v. Pacific Coast Steel Co. 171 Cal. 489, 153 Pac. 912; Rahn v. Singer Mfg. Co. 26 Fed. 913; Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; Riordan v. Gas Consumers' Asso. 4 Cal. App. 639, 88 Pac. 809; Jessen v. Peterson, N. & Co. 18 Cal. App. 349, 123 Pac. 219; Noblesville & E. Gravel Road Co. v. Gause, 76 Ind. 142, 40 Am. Rep. 224.

Knowledge of the agent or superintendent is the knowledge of the principal.

Diller v. Northern California Power Co. 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; Chicago & A. R. Co. v. Sullivan, 63 Ill. 293; Williams v. Missouri P. R. Co. 109 Mo. 485, 18 S. W. 1098; Laning v. New York C. R. Co. 49 N. Y. 521, 10 Am. Rep. 417, 16 Am. Neg. Cas. 747.

Evidence of declarations made by such agent or superintendent relative to an employee's habit is competent to prove his knowledge.

Diller v. Northern California Power Co. supra; Huntingdon & B. T. R. & Coal Co. v. Decker, 84 Pa. 419; Chapman v. Erie R. Co. 55 N. Y. 579.

The habit for drunkenness, as the habit for any other trait, is proved by evidence of specific acts of intoxication.

Gier v. Los Angeles Consol. Electric R. Co. 108 Cal. 129, 41 Pac. 22; Young v. Fresno Flume & Irrig. Co. 24 Cal. App. 286, 141 Pac. 29; Worley v. Spreckels Bros. Commercial Co. 163 Cal. 60, 124 Pac. 697.

Whether the drinking habits of Thomas constituted habitual drunkenness was a question properly submitted to the jury.

Gallagher v. People, 120 Ill. 179, 11 N. E. 335; State ex rel. Atty. Gen. v. Robinson, 111 Ala. 482, 20 So. 30; Ludwick v. Com. 18 Pa. 172; State v. Pratt, 34 Vt. 323; Northwestern Mut. L. Ins. Co. v. Muskegon Nat. Bank, 122 U. S. 501, 30 L. ed. 1100, 7 Sup. Ct. Rep. 1221; Wigmore, Ev. § 96.

Lennon, J., delivered the opinion of the court:

The defendant appeals from a judgment entered upon the verdict of the jury in the sum of \$5,652.17 as damages for the destruction by fire, resulting from the defendant's negligence, of a lot of beans which were stored in the warehouse of the defendant at Santa Susanna, in Ventura county. Substantially stated, the pleaded facts of the plaintiff's case, in so far as material to the points presented on appeal, are these: The corporation defendant was doing a general storage business on and prior to the 25th day of December, 1918, and on that day the plaintiff had stored in the defendant's warehouse certain quantities of beans reasonably worth the sum of \$5,675.67. On the date last mentioned and prior thereto, the defendant failed generally to exercise ordinary and reasonable care and diligence for the protection and preservation against destruction by fire of the plaintiff's beans, which had been deposited and stored in the warehouse of the defendant, and was particularly negligent, in failing to provide a watchman or caretaker of its said warehouse other than one Roy Thomas, "who was at all times careless, negligent, reckless, and unfit to have charge of said public warehouse" and its contents, and on the said 25th day of December, 1918, said Thomas, then and there, being the servant of said defendant, entered the warehouse of the defendant in an intoxicated condition and negligently set fire thereto, causing the warehouse and its contents, including the plaintiff's beans, to be destroyed.

The jury's finding of negligence, implied from the verdict, is sufficiently supported by evidence. It is idle to discuss upon appeal to this court the weight of the evidence upon which the judgment rests, and, of course, it is only when the facts of a given case are not in any event or in any view of the case susceptible to the

inference of negligence sought to be deduced therefrom that the question of negligence becomes one of law for the sole consideration of the court, rather than one of fact for the determination of the jury. It is conceded, as indeed it must be, that by reason of the relationship of the parties arising out of the contract of bailment for hire and the provisions of § 21 of the Warehouse Receipts Act (Stat. 1909, p. 437), that the duty devolved upon the defendant to exercise such care in the safeguarding of the plaintiff's property as a reasonably careful owner of similar goods would exercise, and, failing in this, the defendant must be held in damages for the resulting loss. The evidence in the instant case shows, in response to the issue of negligence, substantially as follows: The defendant's warehouse was a wooden structure, 200 feet long and 74 feet wide, in which, in addition to general merchandise, gasolene and other inflammable and explosive substances were stored. Two barrels of water, without buckets at hand, were located at either end of the building, and these, with two small pyrene fire extinguishers and a three-quarter inch low-pressure water pipe leading from a neighbor's well and terminating with a faucet in a sink inside the warehouse, constituted the fire-fighting appliances provided by the defendant for the protection and preservation of the warehouse and its contents. Whether these fire-fighting appliances were ordinarily adequate and reasonably sufficient as a protection against loss and damage by fire under all of the circumstances, and considering particularly the situation of the warehouse, was clearly a question of fact for the jury to determine. The liability of the defendant as a bailee for hire was not lessened, and the plaintiff was not estopped from asserting such liability merely be-

—question for jury—sufficiency of fire-fighting apparatus.

Trial-question for court—negligence.

cause the plaintiff may have had knowledge as to the manner in which the defendant conducted its business at the time plaintiff stored his beans with the defendant. *Stevens v. Stewart-Warner Speedometer Corp.* 223 Mass. 44, 111 N. E. 771.

Upon the question of the particular negligence of the defendant in employing an unfit man to have charge of its warehouse, the record shows some evidence to the effect that the defendant, prior to and at the time of the fire, employed as a warehouseman one Roy Thomas, a person who was addicted to the use of intoxicating liquor and who got drunk to the knowledge of the agents of the defendant. Upon the latter phase of the case there was evidence to the effect that the agents of the defendant knew the failing of this man when they employed him. There is further evidence to show not only that this man was especially employed as the warehouseman, but had in fact acted in his capacity of warehouseman, and that he was at times in complete charge of the warehouse, and at all times had the key to the warehouse, although there was another person over him who was known as the "agent for the warehouse," who was agent at Santa Susanna and Moorpark and who was generally in charge of those warehouses, but he resided at Moorpark, some 10 miles from Santa Susanna and only occasionally visited the warehouse there. Another employee, a Mrs. Haigh, the bookkeeper, lived on a ranch about 1½ miles from the warehouse. Thomas was the only person residing usually in Santa Susanna who was in authority in the warehouse, and when the warehouse was open for business Thomas "seemed to be boss there. He wasn't doing anything but standing around and giving orders."

It is an undisputed fact in the case that Thomas was intoxicated

to the point of irresponsibility on the night of the fire, and that, prior to the discovery of the fire, he was seen, still intoxicated, going towards the warehouse, and while it was not shown by any direct evidence that he was in the warehouse until after the fire started, nevertheless, within the evidence adduced upon the whole case, there are to be found circumstances which unerringly point to the conclusion, and justified the jury in finding, that he was not only in the office of the warehouse where the fire originated and at the time it originated, but that he, while in a drunken stupor, was the cause of the fire. That Thomas was acting within the scope of his employment on the day and the evening of the fire, notwithstanding the fact that the warehouse was not open for business at that time, is fairly inferable from the evidence as a whole and in particular from that evidence which tended to show that Thomas was employed as "a warehouseman . . . to take charge of the warehouse" and was given a key thereto which he had at all times in his possession. Under these circumstances, we are not prepared to say that the jury was not justified in finding that when Thomas entered the warehouse on the evening of the fire he was acting within the scope of his employment. Thomas was the only agent of the corporation at Santa Susanna who had control of its property at the time of the fire or who could be said to be in charge of the warehouse, and it may well have been found that the duties of Thomas as warehouseman in charge of the warehouse extended beyond the hours ordinarily occupied for the public use of the warehouse, and it was not necessary for the plaintiff to prove that at the time of the fire Thomas was engaged in executing any particular business or specific command of his principal. If Thomas

Warehouseman
—duty to protect
from fire—
knowledge of
customer.

Master and
servant—ware-
houseman—scope
of employment—
entering build-
ing after hours.

(— Cal. —, 195 Pac. 398.)

at the time of the commission of the act which resulted in the fire was in the warehouse within the general scope of his employment and the injury and damage resulted

from his negligence, that is all that need be shown in order to charge the defendant with

liability for the damage. *Mulvehill v. Bates*, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; *Rahn v. Singer Mfg. Co. (C. C.)* 26 Fed. 912; *Riordan v. Gas Consumers' Asso.* 4 Cal. App. 639, 88 Pac. 809; *Jessen v. Peterson, N. & Co.* 18 Cal. App. 349, 123 Pac. 219. But, however that may be, the jury may well have found that the defendant was guilty of actionable negligence in the selection and employment of a man whose duties called for the

constant possession of a key to the warehouse, with the consequent right of access thereto at all times, and who, to the knowledge of defendant's agents, drank intoxicating liquors to excess, and who was in the habit of getting drunk. *Cussen v. Southern California Sav. Bank*, 133 Cal. 534, 85 Am. St. Rep. 221, 65 Pac. 1099. In short, the real question involved in the instant case is not so much one of the scope of Thomas's employment, but rather a question of the negligence of the defendant in the selection of an employee who it knew was not competent, by reason of his known drinking habits, to be placed in the care and charge of the defendant's warehouse and the property of the plaintiff therein.

No fault can be fairly found with the instruction of the trial court to the effect that an ordinarily prudent employer would not retain in its employ a man who was known, or who should have been known, to be an habitual drunkard. While there is no evidence showing that Thomas was an habitual drunkard in the sense that he got drunk so often and to such an extent as to incapacitate him from attending to

his business for a considerable portion of the time, nevertheless the evidence as a whole shows that Thomas frequently got drunk while employed at Santa Susanna, was drunk when he came there on or about November 20, was drunk on the occasion of the fire, and was observed to be drunk by the townspeople and under

the influence of liquor oftentimes when on duty in and at the warehouse. The habitual drunkenness referred to in the instruction was not used in a technical or limited sense, but in its general sense as distinguished from that habitual intemperance, for instance, which might be made the ground of an action in divorce. An "habitual drunkard" in the general sense and as commonly understood is one who is addicted to the habit of drinking intoxicating liquors to excess, and who is commonly or frequently intoxicated

and becomes so as often as an opportunity permits. *State v. Pratt*, 34 Vt. 323. As used in the instruction complained of, the phrase "habitual drunkard" needed no explanation. The jury, presumably, was competent to understand what is meant by language in common use. And whether the habits and conduct of the man Thomas, as shown by the evidence, were insufficient to stamp him as an habitual drunkard, was a question properly submitted to the jury under the allegations of the complaint, to the effect that Thomas was incompetent and unfit to have charge of the defendant's warehouse and to care for the plaintiff's property deposited therein. 3 Labatt, Mast. & S. § 1087 (185), p. 2875; *Probst v. Delamater*, 100 N. Y. 266, 271, 3 N. E. 184. Fairly construed, the instruction in question did not purport to tell the jury that they might come to a conclusion based upon their own individual opinion, without regard to the evidence, as to what a prudent warehouseman

Appeal
—instructions
—absence of
error.

Definition—
habitual
drunkard.

der the circumstances. The most that the instruction can be said to have done was to tell the jury that if the evidence in the case warranted a finding that an ordinarily prudent person would not employ a known habitual drunkard as a warehouseman, and that if it were further found that the defendant knowingly and imprudently did that very thing, the defendant was guilty of negligence and must respond in damages for the injury and loss proximately resulting to plaintiff as the result of the warehouseman's drunken negligence. So construed, the instruction clearly stated the law. 3 Labatt, Mast. & S. § 1087, p. 2875; Huntingdon & B. T. R. & Coal Co. v. Decker, 84 Pa. 419-424. While it was incumbent upon the plaintiff to sustain the burden of showing defendant's neg-

plaintiff's case to show affirmatively what would constitute ordinary care on the part of the defendant in the operation and management of its warehouse. That was a matter of defense, and in the absence of a showing in that behalf by the defendant it was within the province of the jury to determine from all of the evidence whether the defendant was negligent in the management of its business, or conducted it with the care and caution which would, considering the character of the business, ordinarily be required of a reasonably prudent person.

Evidence—
burden of proof
—care of
warehouseman.

The judgment is affirmed.

We concur: Wilbur, J.; Sloane, J.

ANNOTATION.

Liability of warehouseman for damage to or destruction of property by fire.

I. Scope and introduction, 280.

II. Liability in general:

- a. Statement of rules, 281.
- b. Special contracts in general, 284.
- c. Stipulations against liability, 285.
- d. Nature of place of storage in general, 286.
- e. Agreements as to fireproof warehouses, 287.
- f. Fires communicated from adjoining premises, 289.
- g. Negligence not contributing to fire in question, 290.

I. Scope and introduction.

The question of presumption and burden of proof where the subject of the bailment is destroyed or damaged by fire is treated in a note to Beck v. Wilkins-Ricks Co. 9 A.L.R. 559, and is therefore excluded from consideration herein.

The annotation also excludes cases dealing merely with the question of a warehouseman's liability for loss of the subject-matter of the bailment by fire in a place which is not the agreed

III. Removal in case of threatened fire, 291.

IV. Duty to insure, 293.

V. Particular circumstances:

- a. Warranting inference of negligence in general, 295.
- b. Not warranting inference of negligence in general, 298.
- c. Powder, 299.
- d. Watchman, 300.
- e. Grain, 301.

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or intended place of storage, this class of cases being discussed in a note appended to Scott Mayer Commission Co. v. Merchants' Grocery Co. 12 A.L.R. 1316, on the question of the liability of a bailee for loss of or injury to goods kept at a place other than that originally intended.

The note does not include in general cases on the question of liability of a bailee other than a warehouseman, for loss by fire, as, for example, cases on the question of liability of livery

stable or garage keepers, pledgees, factors, etc.

Cases on the question of a carrier's liability as warehouseman for loss of the property by fire are included unless they turn on some feature distinctive to carriers and not common to warehousemen generally.

The question whether a warehouseman's failure to comply with an agreement to ship property stored with it renders it liable for a loss thereof by fire which occurred after the time when the property should have been removed depends on a principle as to proximate cause which arises in other cases than those of loss by fire; and cases involving merely this question are not included herein. See, for example, *McLane, S. & Co. v. Botsford Elevator Co.* (1904) 136 Mich. 664, 112 Am. St. Rep. 884, 99 N. W. 875, 16 Am. Neg. Rep. 390, where the defendant's failure to reship grain from its elevators, as agreed, was held not to be the proximate cause of its loss by fire occurring after the time for removal, so that the warehouseman was not liable for the loss where the fire was purely accidental.

II. Liability in general.

a. Statement of rules.

The rule is well settled that, in the absence of statute or special contract, a warehouseman is not an insurer of the property against fire, but is responsible for loss or injury from this cause only in case of failure on his part to exercise due care. Practically all the cases cited in the note, directly or by implication, support this rule, but the following authorities are sufficient to show that it is well settled and has been extensively applied:

Alabama. — *Hatchett v. Gibson* (1848) 13 Ala. 587; *Jones v. Hatchett* (1848) 14 Ala. 743; *Seals v. Edmondson* (1882) 71 Ala. 509; *Lehman v. Pritchett* (1887) 84 Ala. 512, 4 So. 601.

Arkansas. — *St. Louis, I. M. & S. R. Co. v. Bone* (1889) 52 Ark. 26, 11 S. W. 968; *Kansas City, Ft. S. & M. R. Co. v. McGahey* (1897) 63 Ark. 344, 36 L.R.A. 781, 58 Am. St. Rep. 111, 38 S. W. 659; *Kansas City Southern R.*

Co. v. Thomas (1911) 97 Ark. 287, 133 S. W. 1030. See also *Little Rock & Ft. S. R. Co. v. Hunter* (1883) 42 Ark. 200 (recognizing rule).

California. — *Hirschfield v. Central P. R. Co.* (1880) 56 Cal. 484; *Reeder v. Wells, F. & Co.* (1910) 14 Cal. App. 790, 113 Pac. 342.

Colorado. — *Denver & R. G. R. Co. v. Johnson* (1920) — Colo. —, 193 Pac. 729.

Georgia. — *Brunswick Grocery Co. v. Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249, 32 S. E. 92; *Kight v. Wrightsville & T. R. Co.* (1906) 127 Ga. 204, 56 S. E. 363; *Southern R. Co. v. Rosenheim* (1907) 1 Ga. App. 766, 58 S. E. 81; *Netzow Mfg. Co. v. Southern R. Co.* (1909) 7 Ga. App. 163, 66 S. E. 399.

Illinois. — *Mayer v. Gersbacker* (1904) 207 Ill. 296, 69 N. E. 789; *St. John v. Illinois C. R. Co.* (1912) 168 Ill. App. 599. See also *Mostoller v. Dubois* (1890) 38 Ill. App. 644 (recognizing rule).

Indiana. — *New Albany & S. R. Co. v. Campbell* (1859) 12 Ind. 55; *Rice v. Nixon* (1884) 97 Ind. 97, 49 Am. Rep. 430; *Bottenberg v. Nixon* (1884) 97 Ind. 106; *Thompson v. Jordan* (1905) 164 Ind. 551; 73 N. E. 1087; *Drudge v. Leiter* (1898) 18 Ind. App. 694, 63 Am. St. Rep. 359, 49 N. E. 34; *McGrew v. Thayer* (1900) 24 Ind. App. 578, 57 N. E. 262.

Iowa. — *Denton v. Chicago, R. I. & P. R. Co.* (1879) 52 Iowa, 161, 35 Am. Rep. 263, 2 N. W. 1093; *Arthur v. Chicago, R. I. & P. R. Co.* (1883) 61 Iowa, 648, 17 N. W. 24.

Kansas. — *Moses v. Teetors* (1902) 64 Kan. 149, 57 L.R.A. 267, 67 Pac. 526, 11 Am. Neg. Rep. 423; *Locke v. Wiley* (1909) 81 Kan. 143, 24 L.R.A. (N.S.) 1117, 105 Pac. 11; *Missouri P. R. Co. v. Riggs* (1900) 10 Kan. App. 578, 62 Pac. 712.

Kentucky. — *Jeffersonville R. Co. v. Cleveland* (1867) 2 Bush, 468; *Louisville, C. & L. R. Co. v. Maham* (1871) 8 Bush, 184; *Lewis v. Louisville & N. R. Co.* (1909) 135 Ky. 361, 25 L.R.A. (N.S.) 938, 122 S. W. 184, 21 Ann. Cas. 527.

Louisiana. — *McCullom v. Porter* (1865) 17 La. Ann. 89; *Gibbons v.*

Yazoo & M. Valley R. Co. (1912) 130 La. 671, 58 So. 505.

Maryland.—United Fruit Co. v. New York & B. Transp. Co. (1906) 104 Md. 567, 8 L.R.A.(N.S.) 240, 65 Atl. 415, 10 Ann. Cas. 437.

Massachusetts.—Norway Plains Co. v. Boston & M. R. Co. (1854) 1 Gray, 263, 61 Am. Dec. 423; Aldrich v. Boston & W. R. Co. (1868) 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74; Barron v. Eldredge (1868) 100 Mass. 455, 1 Am. Rep. 126; Rice v. Hart (1875) 118 Mass. 201, 19 Am. Rep. 433.

Michigan.—Laffrey v. Grummond (1889) 74 Mich. 186, 3 L.R.A. 287, 16 Am. St. Rep. 624, 41 N. W. 894; Stapleton v. Grand Trunk R. Co. (1903) 133 Mich. 187, 94 N. W. 739; McLane, S. & Co. v. Botsford Elevator Co. (1904) 136 Mich. 664, 112 Am. St. Rep. 384, 99 N. W. 875, 16 Am. Neg. Rep. 390.

Minnesota.—See Rustad v. Great Northern R. Co. (1913) 122 Minn. 453, 142 N. W. 727, later appeal (1914) 127 Minn. 251, 149 N. W. 304.

Mississippi.—Merchants' Wharfboat Asso. v. Wood (1887) 64 Miss. 661, 60 Am. Rep. 76, 2 So. 76, later appeal in (1887) — Miss. —, 3 So. 248; Yazoo & M. Valley R. Co. v. Hughes (1908) 94 Miss. 242, 22 L.R.A.(N.S.) 975, 47 So. 662.

Missouri.—Gashweiler v. Wabash, St. L. & P. R. Co. (1884) 83 Mo. 112, 53 Am. Rep. 558; Levi v. Missouri, K. & T. R. Co. (1911) 157 Mo. App. 536, 138 S. W. 699; Dancinger v. Chicago, R. I. & P. R. Co. (1915) — Mo. App. —, 182 S. W. 120.

New York.—Roth v. Buffalo & State Line R. Co. (1866) 34 N. Y. 548, 90 Am. Dec. 734; Fenner v. Buffalo & State Line R. Co. (1871) 44 N. Y. 505, 4 Am. Rep. 709; Draper v. Delaware & H. Canal Co. (1889) 118 N. Y. 118, 23 N. E. 131. See also Hedges v. Hudson River R. Co. (1872) 49 N. Y. 223, reversing (1868) 6 Robt. 119; and Liberty Ins. Co. v. Central Vermont R. Co. (1897) 19 App. Div. 509, 46 N. Y. Supp. 576.

North Carolina. — Turrentine v. Wilmington & W. R. Co. (1888) 100 N. C. 375, 6 Am. St. Rep. 602, 6 S. E. 116; Lyman v. Southern R. Co. (1903)

132 N. C. 721, 44 S. E. 550. See also Bryan v. Fowler (1874) 70 N. C. 596.

Oklahoma.—Walker v. Eikleberry (1898) 7 Okla. 599, 54 Pac. 553.

Pennsylvania. — McCarty v. New York & E. R. Co. (1858) 30 Pa. 247; Tower v. Grocers Supply & Storage Co. (1893) 159 Pa. 106, 28 Atl. 229; Boyakine v. Sweeting (1914) 23 Pa. Dist. R. 245; Merritt v. Lehigh Valley R. Co. (1912) 49 Pa. Super. Ct. 219.

South Carolina.—Murphy v. Southern R. Co. (1907) 77 S. C. 76, 57 S. E. 664.

Tennessee.—Butler v. East Tennessee & V. R. Co. (1881) 8 Lea, 32; Lancaster Mills v. Merchants' Cottonpress & Storage Co. (1890) 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317; East Tennessee, V. & G. R. Co. v. Kelly (1892) 91 Tenn. 699, 17 L.R.A. 691, 30 Am. St. Rep. 902, 20 S. W. 312.

Texas.—Galveston, H. & S. A. R. Co. v. Smith (1891) 81 Tex. 479, 17 S. W. 133; Texas & P. R. Co. v. Morse (1883) 1 Tex. App. Civ. Cas. (White & W.) 179; Texas & P. R. Co. v. Capps (1883) 2 Tex. App. Civ. Cas. (Willson) 35; Texas & P. R. Co. v. Wever (1885) 3 Tex. App. Civ. Cas. (Willson) 85; Galveston, H. & S. A. R. Co. v. Smith (1893) — Tex. Civ. App. —, 24 S. W. 668; Thornton v. Daniel (1916) — Tex. Civ. App. —, 185 S. W. 585; American Exp. Co. v. Duncan (1917) — Tex. Civ. App. —, 193 S. W. 411. See also Hartford F. Ins. Co. v. Triplett (1920) — Tex. Civ. App. —, 223 S. W. 305.

Wisconsin.—Kronshage v. Chicago, M. & St. P. R. Co. (1878) 45 Wis. 500; Hoeger v. Chicago, M. & St. P. R. Co. (1885) 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435.

England.—Sidaways v. Todd (1818) 2 Starkie, 400; Chapman v. Great Western R. Co. (1880) L. R. 5 Q. B. Div. 278, 49 L. J. Q. B. N. S. 420, 42 L. T. N. S. 252, 28 Week. Rep. 566, 44 J. P. 363.

Canada.—Brown v. Canadian P. R. Co. (1886) 3 Manitoba L. R. 496.

The above rule, of course, applies to loss of the property in possession of the warehouseman from other causes than fire, and where there has been an injury from this cause the

rule has sometimes been stated more generally, as in *Walker v. Eikleberry* (Okla.) supra, where it was said: "The authorities are without conflict in support of the proposition that at the common law a warehouseman was not liable as an insurer of the goods deposited, but was only liable for negligence or want of ordinary care in keeping and caring for deposits; and if goods deposited were stolen or lost, there must be some evidence of negligence or want of ordinary care on the part of the warehouseman; some dereliction of duty on his part in relation to the goods in order to make him liable to the owner for their loss."

In discussing the degree of care required of a warehouseman where the property was destroyed by fire, the court in *Barron v. Eldredge* (1868) 100 Mass. 455, 1 Am. Rep. 126, said: "They [the warehousemen] cannot be charged for the loss, if in the custody of the property they exercised ordinary care. What constitutes such care is a question of fact to be judged of with reference to all the circumstances of the case. The nature and value of the property, its exposure to damage or loss, its proximity to danger from fire, the means employed to prevent or arrest the progress of fire, the location, character, and construction of the storehouse in which it was placed, are elements to be considered. The question of ordinary care is to be settled also in reference to the degree of care which other persons, engaged in similar business, are in the habit of bestowing on property similarly situated. And generally the care and vigilance required is that which men of ordinary prudence in the same business usually bestow on property placed in their custody, and similarly situated in its exposure to loss. What constitutes negligence in these cases is a question peculiarly proper for the determination of the jury."

In connection with the question of degree of care as dependent upon the value of the property, attention is called to *Hatchett v. Gibson* (1848) 13 Ala. 587, a case where cotton was burned in a warehouse. The court

said: "The dictates of common sense would seem to require that the warehouseman who receives cotton on deposit for a certain compensation should be equally careful in preserving the crop of one who makes but a single bale, as that of him who makes a hundred. In respect to each of such bailors, he is bound to ordinary diligence." The court regarded as not strictly in keeping with this rule an instruction that a warehouseman for hire is held to stricter diligence when the articles deposited with him are great, than if they are of small, value. Of course this point is one not distinctive to the class of cases under consideration.

The danger from fire against which the warehouseman must guard is not such merely as "might" occur, but is such as in the ordinary course of events probably would occur. *Merchants' Wharf-boat Asso. v. Smith* (1887) — Miss. —, 3 So. 249.

And it was held in *Merchants' Wharf-boat Asso. v. Smith* (Miss.) supra, an action against a warehouseman for loss of cotton by fire while in a yard to which the fire was communicated from an oil mill, that an instruction requested by the defendant should have been given, that the defendant was not liable for the loss unless the jury believed that from the evidence that a reasonably prudent man, having cotton similarly situated, would not have permitted his cotton to have remained in such a situation, because of apprehension that the oil mill would catch fire in the ordinary course of events, either from itself or surroundings, and that fire proceeding from it would probably cause his cotton to be destroyed.

It has been held that a warehouseman through whose negligence the property is destroyed by fire may be held liable to the owner for the loss, although he is not a party to the contract of bailment, but has received the goods through the wrongful delivery thereof to him by the original bailee, the question of his liability not depending on whether such delivery amounted to a conversion of the property by such bailee. *Thornton v.*

The question of a warehouseman's negligence, so as to render him liable for loss of the property by fire, is not, of course, to be determined by his knowledge or ignorance of the origin of the fire. *Dieterle v. Bekin* (1904) 143 Cal. 683, 77 Pac. 664.

b. Special contracts in general.

The question of the warehouseman's liability for a loss from fire may, of course, depend on the special terms of the contract of bailment. Frequently, however, cases involving this feature have involved other bailment relationships than that of warehouseman, or the loss has been from some other cause than fire. As to provisions in contract respecting insurance, see IV. *infra*. And as to contracts to store the property in a particular place, see the note above referred to, appended to *Scott-Mayer Commission Co. v. Merchants' Grocery Co.* 12 A.L.R. 1316, on the question of the liability of a bailee for loss of or injury to goods kept at a place other than that originally intended. See also II. e, *infra*, as to agreements for storage in a fireproof building.

It was held in *Pope v. Farmers' Union & Mill. Co.* (1900) 130 Cal. 139, 53 L.R.A. 673, 80 Am. St. Rep. 87, 62 Pac. 384, 8 Am. Neg. Rep. 364, that the destruction by an incendiary fire of wheat stored in a warehouse under a contract calling for its redelivery, "damage by the elements excepted," would not excuse the warehouseman from his obligation, since the exception of damage by the elements was equivalent to an exception of damages by the act of God. The court said: "By its written contract, defendant promised absolutely to return the wheat to plaintiff upon surrender of the certificate, 'damage by the elements excepted.' 'Damage by the elements' is the equivalent of the phrase 'act of God.' . . . As no effort was made by defendant to reform this contract in any way, it must stand, so far as this case is concerned, exactly as it was written; and, so construing it, it is open to but one interpretation,

return the wheat was absolute, unless it was prevented from so doing by the act of God. Under this construction of the contract, it was no defense for defendant to say, or to show, that the wheat was destroyed without negligence upon its part. It was incumbent upon it to show that the wheat was in fact destroyed or damaged by the elements. The evidence which it adduced tended merely to prove that the fire was of incendiary origin, and thus absolutely to negative the idea that the destruction of the grain was caused by the act of God."

It may be observed that the questions whether fire is an "element," and under what circumstances it may be so, within the meaning of stipulations in contracts referring to damages "by the elements," are broader than the present subject, and cannot be treated herein. The *Pope Case* (Cal.) *supra*, appears to be in line with the general rule that before an act can be considered the act of the elements within the meaning of a stipulation exonerating one from liability therefor, it must appear that no human agency intervened. This general question is discussed in a number of cases involving construction of leases, such as *Harris v. Corlies, Chapman & Drake* (1889) 40 Minn. 106, 2 L.R.A. 349, 41 N. W. 940; and *Van Wormer v. Crane* (1883) 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 586. In the latter it was held that damage by fire was damage by the elements within the meaning of a contract exempting from liability therefor, though human agency may have been used in some remote manner in producing the fire which finally caused the injury, where no negligence could be imputed.

Of course, one who stores goods may contract as an insurer of goods so as to render him liable for their loss by fire even without his negligence. On this point, attention is called to *Federal Chemical Co. v. Green* (1908) 33 Ky. L. Rep. 671, 110 S. W. 859, holding that such a contract arose on the part of one who expressly agreed to assume responsibility for loss of the goods for any cause, so that it was

error to make the question of liability for loss by fire turn on the question of care or negligence in protecting the property. This case, however, is one where goods were consigned apparently for sale on commissions, and does not strictly belong to the class of cases under annotation.

Also in *Thompson v. Thompson* (1899) 78 Minn. 379, 81 N. W. 204, 543, holding that a provision in a warehouse receipt, "This charge for storage shall cover loss by fire only," followed by an exception from liability for damage by the elements or act of God, should be construed as constituting a contract by the warehouseman of insurance of the property against fire, and so rendered him liable for its value upon destruction by such cause.

But a warehouseman was held not to have contracted as an insurer of the property under the circumstances disclosed in *Washington Shoe Mfg. Co. v. Dodwell Dock & Warehouse Co.* (1918) 95 Wash. 621, 164 Pac. 252. In this case the plaintiff was accustomed to use forms of bills of lading when shipping merchandise, whether the goods were to be delivered directly to the carrier or to an independent warehouseman, and upon the occasion in question the goods were listed upon one of these forms, which was presented to the defendant's (warehouseman's) checker, who signed the same and returned it to the plaintiff's drayman. It was held that the warehouseman was not an insurer of the goods against fire, as provided on the back of the standard form of bill of lading approved by the Interstate Commerce Commission, and intended to apply only to the relationship of carrier and shipper. The court took the view that the paper signed was understood and intended by the parties as nothing more than a receipt, and that the minds of the parties had not met upon the provision on the back of the form imposing the extraordinary liability of an insurer against fire.

c. Stipulations against liability.

Stipulations in contracts of storage exempting the warehouseman from

liability for a loss by fire have been held not to exempt him from liability for a loss due to his own negligence. *Gulf Compress Co. v. Harrington* (1909) 90 Ark. 256, 23 L.R.A.(N.S.) 1205, 119 S. W. 249; *Dieterle v. Bekin* (1904) 143 Cal. 683, 77 Pac. 664; *Glazer v. Hook* (1920) — Ind. App. —, 129 N. E. 249; *Lancaster Mills v. Merchants' Cottonpress & Storage Co.* (1890) 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317; *Exporters' & Traders' Compress & W. Co. v. Wills* (1918) — Tex. Civ. App. —, 204 S. W. 1056.

A stipulation in a warehouse receipt that the depositor takes the risk of loss or damage by fire, it was held in *Glazer v. Hook* (1920) — Ind. App. —, 129 N. E. 249, supra, should not be construed as a contract by the warehouseman against his own negligence, for such contracts, it was said, are invalid.

A provision in a warehouse receipt that the warehouseman "will not be responsible for loss or damage by fire or otherwise," was construed in *Exporters' & Traders' Compress & W. Co. v. Wills* (Tex.) supra, as not exempting the warehouseman from liability for loss of property by fire resulting from its own negligence. The court took the view that presumably the contract was written by the warehouseman, and therefore must be construed more strongly against him.

This rule finds support in *Lancaster Mills v. Merchants' Cottonpress & Storage Co.* (1890) 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317, supra, where cotton was delivered to a compress company by a shipper preparatory to shipment, under a bill of lading providing for compression before shipment, the delivery being regarded as a delivery to the carrier; and the court said that the exemption in the bill of lading with respect to loss by fire would be invalid as a protection against a loss by fire which was the result of the negligence of the carrier or of its agent before compression.

Although the loss was by water rather than fire, attention is called to *Inland Compress Co. v. Simmons*

262, 14 N. C. C. A. 379, an action against a compress and storage company for injury to cotton, in which the court held that the defendant was a bailee for hire, and, under the statute in that state, must exercise at least ordinary care for the preservation of the property intrusted to it; and that a contract executed by the company, which sought to relieve it from liability for loss by fire, flood, or other agency, unless caused by the wilful act or gross negligence of the company, was against the public policy of the state, and therefore void.

But it has been held that a warehouseman may by contract restrict his liability for loss of the property by such causes as fire, except as to a loss occurring through fraud or want of good faith. *Gashweiler v. Wabash, St. L. & P. R. Co.* (1884) 83 Mo. 112, 53 Am. Rep. 558, where the rule was applied in the case of a railroad company which held goods as warehousemen under a bill of lading which provided that the company should not be responsible for loss or damage to the goods from fire from any cause whatever.

And the doctrine that a wharfinger may by contract entirely discharge himself from liability for a loss by fire is supported by *Maving v. Todd* (1815) 4 Campb. (Eng.) 225, where the receipt for the goods contained the words, "not accountable for loss by fire." The loss was by an "accidental fire" upon the wharf. Counsel contended that although the defendants might on reasonable terms limit their liability for loss by fire, they could not in this manner get rid of it altogether. But in granting a nonsuit, Lord Ellenborough said: "I am likewise of opinion that a wharfinger by such a notice may entirely get rid of his liability for loss by fire. . . . Fire is such a terrible calamity that it is reasonable the mere depository of goods should be enabled to guard against it, and to throw the risk entirely upon the owners."

See also *Wells v. Porter* (Mo.) under *V. e, infra*.

The proposition that wooden warehouses roofed with shingles, when managed and controlled by prudent agents, may be lawful depositories for the storage of goods at railroad depots and other places, is declared in *Louisville & N. R. Co. v. Brownlee* (1879) 14 Bush (Ky.) 590.

That a depot building in a small town, and not exposed to any greater danger from fire than usually attended like places, was constructed of pine timber, with a shingle roof, was held in *Wald v. Louisville, E. & St. L. R. Co.* (1892) 92 Ky. 645, 18 S. W. 850, insufficient to show negligence, so as to render the railroad company as warehouseman liable for loss of baggage in the building by fire which consumed the building and its contents. See this case also under *V. b, infra*.

Where a warehouseman agreed to "store" the plaintiff's household goods, and kept them for two days and nights in a stable on a wagon, where they were consumed by fire, it was held that the rule requiring a warehouseman to use reasonable care was not fulfilled merely because the warehouseman had stored its own goods in another portion of the stable. *Levine v. D. Wolff & Co.* (1909) 78 N. J. L. 306, 138 Am. St. Rep. 617, 73 Atl. 73. The rule was said to be that if the bailee uses the same care in regard to the property bailed that he bestows upon his own, this is but evidence tending to show that he was not guilty of gross negligence, or is merely "an argument for his honesty."

It has been held in an action against a railroad company as warehouseman for loss of baggage by fire, that no inference of negligence may be drawn from the fact that the defendant was using as a warehouse a box car, at a village station in the country, there being no proof that the car was defective or less secure than ordinary frame depots in small towns. *Levi v. Missouri, K. & T. R. Co.* (1911) 157 Mo. App. 536, 138 S. W. 699.

An instruction that it was the defendant's duty to provide a "safe" depository was held erroneous in

Louisville & N. R. Co. v. Brownlee (Ky.) *supra*, an action against a railroad company whose duty was to use ordinary care in providing a depository for the plaintiff's tobacco, which was consumed by fire while awaiting shipment in a wooden depot warehouse. The court said: "To make it the duty of appellant's agents to provide a safe depository for appellees' tobacco was requiring them to store it in a place where it would be free from danger of any kind, and although the appellant's agents may have stored the tobacco in a place considered free from danger by prudent men engaged in like service, still, if it was not actually so, the jury were authorized to find for the appellees. In other words, if the depository of the appellees' tobacco was not actually safe, although so considered by prudent men engaged in such business, the storing it in such depository according to this instruction authorized the jury to find for the plaintiff on the ground of negligence in defendant's agents in storing the tobacco. Under this instruction the jury may have believed that they were authorized to find that no warehouse constructed of wood and covered with shingles was a safe depository for the tobacco of the appellees, and on that ground rendered a verdict for them, although abundant authority can be found in support of the position that wooden warehouses roofed with shingles, when managed and controlled by prudent agents, are considered lawful depositories for the storage of goods at railroad depots and other places."

See also *Chicago & A. R. Co. v. Scott* (Ill.) under *V. d. infra*, as to the duty to provide a watchman where the warehouse is especially exposed to fire.

c. Agreements as to fireproof warehouses.

A warehouseman is required to store the goods in a safe building, but not necessarily a fireproof building, in the absence of special contract. *Chicago & A. R. Co. v. Scott* (1866) 42 Ill. 182.

Where a warehouseman agreed to store cotton in a fireproof building, the mere fact that the bailor was in the building after a considerable part of the crop had been deposited there was held in *Hatchett v. Gibson* (1848) 13 Ala. 587, not material on the question of the warehouseman's duty to comply with the contract; for the bailor might not have discovered that the building was not fireproof, and there was no obligation upon him to ascertain that it did not comply with the contract.

Whether or not the bailor had consented to dispense with the requirement in the contract to store the goods in a fireproof warehouse was held a question for the jury, in *Hatchett v. Gibson* (Ala.) *supra*, it being held that if the bailor consented that the building need not be made fireproof, although the consent was without any additional consideration, it could not be withdrawn after a loss had actually occurred. The court said, also, that this consent might be given as well while the cotton was being delivered in the warehouse as before any part of it was taken thereto, and that the bailor might by his acts, as well as by his words, assent to the storing of the cotton in a house of material and structure different from that contemplated by the contract.

It was held also in *Hatchett v. Gibson* (Ala.) *supra*, that if the warehouseman sought the patronage of the owner of the property, and assured him that if he would store his cotton with him he would deposit it in a fireproof warehouse, and, confiding in such promise, the owner sent the goods, this amounted to a contract that they should be so kept, there being more than a mere representation, which in order to impose a legal liability must be not only false, but also fraudulent.

And in *Laux v. Bekins Van & Storage Co.* (1917) 177 Cal. 63, 169 Pac. 1012, it was held that an agreement to store goods in a fireproof warehouse, so as to render the warehouseman liable for the loss of the goods by fire, need not be proved to

have been made by express words or declarations, but that actions and words from which it could reasonably be implied were sufficient. And, in accordance with this rule, it was held in this case that representations in advertisements and statements made to the prospective customer, on which he relied in storing the goods with the defendant, were sufficient to show an agreement to store property in a fireproof warehouse.

So, representations by a warehouseman in its advertisements, stationery, and statements to a prospective customer, who relied thereon, believing that he was securing fireproof storage, that it had fireproof storage only, were held in *Kirstein v. Bekins Van & Storage Co.* (1915) 27 Cal. App. 586, 150 Pac. 999, sufficient to show an implied contract that the goods were to be stored in a fireproof building, so as to render the warehouseman liable for their loss by fire.

Representations that a warehouse was fireproof was held in *Gruel v. Yetter* (1899) 26 Misc. 851, 55 N. Y. Supp. 443, not a mere expression of opinion, but the representation of a fact which, if false, and made for the purpose of inducing one to store his goods in the warehouse, rendered the warehouseman liable for loss of the goods by fire to one who relied upon such representation. The decision is affirmed in (1899) 27 Misc. 494, 58 N. Y. Supp. 373.

To a similar effect is *Hickey v. Morrell* (1886) 102 N. Y. 454, 55 Am. Rep. 524, 7 N. E. 321, reversing (1882) 12 Daly, 482. In this case the warehouseman issued advertising circulars which contained the following statement: "These buildings have been erected at an immense cost, and no expense has been spared in supplying light, ventilation, and protection against the spread of fire, the exterior being fireproof and the interior being divided off by heavy brick walls, iron doors, and railings, appropriate and convenient in every way for the various kinds of articles to be stored." In an action to recover from the warehouseman for false representation, fraud, and deceit, where the ware-

house, with its contents, was destroyed by fire, which originated outside the building and was communicated to wooden window frames of the warehouse unprotected by outside shutters, the court said: "To say of a building that it is fireproof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fireproof buildings. To say of a certain portion of a building it is fireproof suggests a comparison between that portion and other parts of the building, not so characterized, and warrants the conclusion that it is of a different material."

We think, therefore, that the defendant must be regarded as stating a fact, and not as expressing a mere opinion, when he described the exterior—that is, the whole exterior—of his buildings as fireproof."

And under the doctrine of the case last cited, it was held in *Clifford v. Universal Storage, Warehouse, & Exp. Co.* (1907) 52 Misc. 595, 102 N. Y. Supp. 460, that there was sufficient evidence to present an issue for the jury as to whether a warehouseman had falsely and fraudulently represented the warehouse to be a fireproof building, and whether the plaintiff was thereby induced to store his goods therein, in view of testimony that the foreman, to whom the plaintiff was referred on application for storage, had stated, upon plaintiff's inquiry as to the condition of the building, that it was absolutely fireproof.

As to contracts to insure the property, see IV. *infra*.

That a warehouseman who agrees to store goods in a fireproof building, and instead stores them in a wooden building, where they are destroyed by fire, is liable for the loss, is held in *Vincent v. Rather* (1868) 31 Tex. 77, 98 Am. Dec. 516. See this case and others cited in the note above referred to, appended to *Scott-Mayer Commission Co. v. Merchants' Grocery Co.* 12 A.L.R. 1316, on the question of liability of a bailee for loss of or injury to goods kept in a place other than that originally intended.

And such cases as *Weigel v. W. C. Reebe & Bro. Co.* (1915) 192 Ill. App.

233, holding that a warehouseman who expressly contracts to store goods in a fireproof room in a warehouse, selected because of its supposed immunity from fire, and stores them instead in a room that is not of that character, thereby subjecting them to a risk not contemplated by the parties, is liable for the resulting loss by fire, come within the class of cases discussed in the note last referred to.

For fraud in misrepresenting a building in which the plaintiff's goods were destroyed by fire, to be fireproof, the warehouseman was held liable in *Dietz v. Yetter* (1898) 34 App. Div. 453, 54 N. Y. Supp. 258. In this case the warehouseman had three buildings, two of which were fireproof, and there was evidence that on the third building which was not fireproof, and also on the moving vans, the warehouseman advertised his storage facilities as fireproof. The court held that it was a question for the jury whether there was a "fireproof" sign on the building in which the goods were destroyed, and whether the representations on the defendant's vans related to that building, and held that the defendant was not prejudiced by instructions that the gist of the action was fraud, and that the representations by the defendant must have been with fraudulent intent, or that, if the jury found that the evidence was substantially inconsistent with any other theory than that the defendant intended to deceive, they might find that the representations were fraudulent, and that if they so found and the plaintiff relied thereon, believing the representations to be true, he might recover.

In *Cole v. Oglesby* (1858) 13 La. Ann. 371, the insertion of the words "fireproof warehouse" at the head of cotton receipts and advertisements was held not to constitute any part of the contract for the storage of goods, so as to render the warehouseman liable, on the destruction of the property by fire, because of a breach of contract in this regard. It was said: "The objects of such words and pictures are well understood by the public, and they deceive none but

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those not versed in the ways of the world; they are not viewed by the public as constituting a part of the contract between the advertiser and the one that gives the receipt, and those that deal with them. Although the insertion of 'fireproof warehouse' in receipts and advertisements would not alone suffice to be the basis of a contract between the parties to this suit, yet if defendant had made use of these words in his receipts and advertisements in bad faith, and had sought with them to create an impression in the mind of plaintiff that his warehouse was fireproof, and had used means other than the mere advertisement and receipt to impress plaintiff with this belief, then they might, under certain circumstances, be liable to compensate plaintiff for loss that he might have suffered on account of the warehouse not being fireproof. . . . As there is no proof of fraud or an attempt to deceive on the part of defendant, and as the words 'fireproof warehouse' constitute no part of the contract between the parties to this suit, plaintiff cannot recover."

An agreement to store cotton in a fireproof warehouse, it was held in *Jones v. Hatchett* (1848) 14 Ala. 743, did not necessarily require the warehouseman to provide fire appliances such as buckets and water for extinguishing fire, there being no custom among warehousemen to make this provision. And it was held accordingly that evidence that a warehouse of another party across the street was so equipped was properly excluded.

1. Fires communicated from adjoining premises.

The fact that a warehouseman takes proper precaution against fire on its own premises will not, as matter of law, relieve him from liability for loss by reason of a fire starting on, and communicating from, adjoining premises, not owned or occupied or controlled by him, which was so violent in character as to defy any resistance that could possibly be opposed to it, if the adjoining premises on which the fire originated were in a specially

hazardous condition because of their exposure to fire. *Judd v. New York & T. S. S. Co.* (1902) 54 C. C. A. 238, 117 Fed. 206, rehearing in (1904) 62 C. C. A. 515, 128 Fed. 7. In this case, where a steamship company stored cotton in its warehouse, awaiting shipment, it was held that, assuming that its own warehouse was properly safeguarded, this fact would not relieve it, as bailee, from liability for destruction of the property by fire communicated from an adjoining shed, which, because of the storage therein of highly inflammable material, its proximity to a railroad track, the absence of the watchman and of means of protection against fire, and the resorting thereto of loafers and tramps, rendered it especially liable to fire.

Where household goods were stored in a wooden building about a foot from a dilapidated frame livery barn, which contained large quantities of hay and other inflammable material, and a fire, originating in the barn, was communicated to the adjoining warehouse and destroyed the goods therein, the court in affirming a judgment for the plaintiff in an action against the warehouseman laid down the rule in *Wiley v. Locke* (1909) 81 Kan. 143, 24 L.R.A. (N.S.) 1117, 105 Pac. 11, that the warehouseman, while not required to provide a building secure against all danger from outside risks, is bound, under the rule requiring him to exercise reasonable care, to store the property in a building where it will not be exposed to unusual hazards from without. It was held that an instruction was not erroneous, under the circumstances of the case, that it was the duty of the warehouseman to furnish a building reasonably fit and safe for storage, and that if the building proved unsafe, and property stored therein was damaged or destroyed by fire, the warehouseman would be liable for the loss if he failed to exercise due and reasonable care in furnishing such a building; the objection being that the instruction was erroneous since the fire did not originate in the warehouse, and that the question whether the storage of goods in such close proximity to the

stable was due care was a question of fact for the jury.

g. Negligence not contributing to fire in question.

The fact that a warehouseman is negligent in exposing goods intrusted to his care to danger of fire from one source will not render him liable for loss of the goods by fire from another source from which he had no reason to anticipate danger. *Merchants' Wharfboat Asso. v. Wood* (1887) 64 Miss. 661, 60 Am. Rep. 76, 2 So. 76. In this case, where there was danger of fire to cotton stored in a crowded yard because of the proximity of railway tracks, the scattering of loose cotton where men were in the habit of smoking, and adjacent cabins occupied by laborers, it was held that negligence in exposing the goods to fire from these sources would not render the warehouseman liable for their loss by fire of a non-negligent origin, which started in an oil mill outside of the yard, and, because of an unusually high wind, was communicated to cotton in the yard by burning shingles from the mill. By way of illustration, the court said: "If a bailee should deposit the goods of the bailor near the walls of a building which were toppling and threatening to fall, and the wall should fall and injure the property, he should be answerable; for it was his duty to have avoided the danger. But if the dangerous buildings do not fall, and another building from which no danger could reasonably be anticipated unexpectedly fall and injure the goods, here he is not answerable, though the injury has resulted from a like cause,—the falling of a wall; for the wall which fell, fell not according to the ordinary probable course of events, but unexpectedly." A later appeal is reported in (1887) — Miss. —, 3 So. 248.

The same principle is applied in *Merchants' Wharfboat Asso. v. Smith* (1887) — Miss. —, 3 So. 249, and *Merchants' Wharf-Boat Asso. v. Livingston* (1887) — Miss. —, 3 So. 251, which were actions arising out of the same state of facts.

It was held in *Lancaster Mills v. Merchants' Cottonpress & Storage Co.*

(1890) 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317, that negligence of a compress company in exposing the under part of its building on one side so that it was more accessible to incendiaries and more liable to fire because of tramps would not render it liable for loss of cotton stored in the warehouse by fire, where it appeared that the fire originated on the top of bales of cotton within the warehouse, and had no connection with the defective portion of the building.

And a railroad company as a gratuitous bailee of wool belonging to the plaintiff and stored in its depot for the latter's accommodation was held not liable for loss of the property by fire of unknown origin which consumed the depot, in *Texas C. R. Co. v. Flanary* (1899) — Tex. Civ. App. —, 50 S. W. 726, the court holding that, as matter of law, the evidence was insufficient to warrant a finding of negligence, although there was evidence tending to show that the railway company permitted the floor of the depot building to become saturated with oil, and also permitted combustible material to be collected there, it not appearing that there was any connection between this conduct of the railway company and the origin of the fire.

See also *Gibbons v. Yazoo & M. Valley R. Co. (La.)* under V. d, *infra*.

III. Removal in case of threatened fire.

The warehouseman is, of course, bound to make every reasonable exertion to save the goods in the warehouse after fire has occurred. *Chicago & A. R. Co. v. Scott* (1866) 42 Ill. 132. In this case it was contended that the employees of the warehouseman who were present at the fire were induced to believe by alleged remarks of the fire department chief, which were contradicted by him, that the warehouse was safe, and that the more prudent course was to leave the goods undisturbed in the building. It was held, however, that the evidence was sufficient to sustain a verdict for the plaintiff for the loss, both on account of failure to store the goods in a proper building, and because of negli-

gence in failing to remove them after the fire occurred, where no effort was made to remove the property until the roof was on fire, rendering it very hazardous for one to enter the building, and the property (wool) was in sacks in plain view within a few feet of the door; all the facts showing that it was almost certain half an hour before the building caught fire that it would catch, and, because of its construction and the inflammable materials within it, would become a prey to the flames.

A railroad company holding baggage as bailee for hire may, of course, be liable for negligence either in storing property in an unsafe place or in failure of its employees, after discovering the fire, to exercise ordinary care to save it. *O. & N. R. Co. v. Newhoff* (1890) 12 Ky. L. Rep. 467 (abstract).

As somewhat analogous to the above cases, involving the question of the duty of a warehouseman to remove property in case of a threatened flood, see, among possibly other cases, *Prince & Co. v. St. Louis Cotton Compress Co.* (1905) 112 Mo. App. 49, 86 S. W. 878; *H. A. Johnson & Co. v. Springfield Ice & Refrigerating Co.* (1910) 143 Mo. App. 441, 127 S. W. 692.

But it has been held that a warehouseman who refuses to open the warehouse doors during a large conflagration which is approaching in the general direction of the building, in order to permit one whose property is stored therein, to remove it, does not necessarily show negligence on his part so as to render him liable for the loss of the goods by the fire, where there is reasonable ground for his belief that the warehouse will be safe, and that the opening of the doors would subject the property to greater danger because of the entrance of sparks and the likelihood of property being stolen by the crowd. *Turrentine v. Wilmington & W. R. Co.* (1888) 100 N. C. 375, 6 Am. St. Rep. 602, 6 S. E. 116. In this case the goods were stored in a brick warehouse with a slate roof; a high wind was blowing from the fire, not directly toward the warehouse, but in a diagonal direction

road company, was attempting during the greater part of the time of the fire to save other valuable property which it had in that vicinity, and to remove cars, some of which contained explosives, between the fire and the warehouse. It was held that it was not erroneous to exclude evidence as to what bystanders at the fire said with respect to the likelihood that the warehouse would be burned, and that it was not erroneous to refuse an instruction for the plaintiff that defendant was guilty of gross negligence if it refused or failed to open the warehouse and attempt to save the goods, or permit them to be saved, when the warehouse was in danger, the fire threatening, and there was good reason to apprehend destruction.

It was held in *Macklin v. Frazier* (1872) 9 Bush (Ky.) 3, that a bonded warehouseman was under a duty to remove whisky from the warehouse during a fire at night if the removal appeared reasonably necessary to save it from destruction, notwithstanding a statute providing that spirits should not be removed from any place of storage at any other time than after sunrise and before sunset, on penalty of forfeiture of such spirits and a fine of \$100 for each package removed. It was held also, however, that the warehouseman did not have the legal right to begin the removal of the whisky so long as he had reason to believe that the fire could and would be extinguished by the means at hand which were being used for that purpose without damage to it, and that a verdict against him for failing to remove the whisky would not be proper merely because he failed to act at a time when a reasonably prudent man, unrestrained by law, would have acted in removing it.

In several cases the question of the warehouseman's liability for failure to remove the goods from the warehouse when it was threatened by fire has turned on the question of the duty of the employees of the warehouseman who were present at the fire. It seems evident that the mere fact that servants of the warehouseman happen

pose an obligation on them under all circumstances to act, even if they might have saved the property.

Thus, in an action against a railroad company as warehousemen, for the loss of goods by fire in the nighttime, the only negligence charged being that of servants of the railroad company in not removing the goods from the freight house at the time of the fire, it was held in *Aldrich v. Boston & W. R. Co.* (1868) 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74, that the railroad company was not liable because certain of its employees, who were present at the fire, but were not on duty at the time, and were under no obligation to attend to the removal of goods, failed to remove them. The court said: "It appeared that different persons in the defendants' employment came upon the ground from time to time, and evidence was offered to show that with due care and diligence they might have saved the plaintiff's property. There was no evidence that the general agent who had charge of the freight house heard the alarm or was present at the fire; or that he was in any fault for not being there. . . . As the defendants furnished a suitable warehouse, properly secured, in which the goods were deposited, they had done their whole duty, until the time came when, upon reasonable notice of danger, an obligation should arise to remove them. . . . They were not chargeable with the negligence of any of their servants, unless it was negligence within the scope of the servants' employment. And a true test of this liability may be found in the question, whether any one of the defendants' servants who were present at the fire would be answerable to his employers for a neglect of his duty. The answer to this question, upon the evidence reported, seems to us perfectly plain. It was no part of the service for which either of them was engaged, to attend to the removal of goods from the freight house in case of a fire in the night. Neither of them was under any obligation, by reason of his employment, to arise in the night and be present at the fire."

Neither of them had any custody, or responsibility for the safety, of the goods at that time. If they were under no obligation to be present, their voluntary attendance imposed upon them no legal liability for mere omission to do anything when on the spot. It is a mere confusion of terms to say that the servants of the company were present and neglected to remove the goods. They were not then and there, in any legal sense, the servants of the company. Whatever they did was done by them as volunteers, as neighbors and citizens. They had the full control of their own time and labors. They had the right to choose for themselves whom they would assist and whose goods they would try to save; and, in making the choice, they in no manner implicated the railroad company, or assumed any of its obligations. As the clerks, brakeman, and baggage master, and superintendent of track repairs, were under no legal liability to the defendants for their omissions at the fire, it follows, therefore, that the defendants are not chargeable with their neglect, any more than with the neglect or inefficiency of any other persons who were there; and the whole foundation of the action fails."

The above case was distinguished in *Galveston, H. & S. A. R. Co. v. Smith* (1891) 81 Tex. 479, 17 S. W. 133, where, in an action against a railway company as warehouseman for loss of baggage by fire in the nighttime, it was held not erroneous to refuse to instruct the jury that "warehousemen are not responsible for neglect of their servants to rescue goods in the warehouse from destruction by fire in the night, when such servants are present but not in the course of their employment," the charge being inapplicable under the evidence, which, the court said, showed that the employees referred to, in attempting to extinguish the fire and rescue the property at the depot, were acting in the course of their employment, and for the defendant, and also were in charge of the buildings and their contents, though not actually present when the fire began.

IV. Duty to insure.

The warehouseman's liability for loss of the property by fire has turned in various cases on the question of his duty under the contract to insure the property.

Thus, in *Zorn v. Hannah* (1898) 106 Ga. 61, 31 S. E. 797, it was held that a mere statement in a warehouse receipt, "All cotton stored with us fully insured," would not alone constitute a contract between the parties, requiring the warehouseman to insure the cotton of his customers, so as to render him liable for the value of the same when destroyed by fire. To the same effect is *Atwater v. Hannah* (1902) 116 Ga. 745, 42 S. E. 1007.

But in *Schwartz v. Woodford Distilling Co.* (1912) 172 Ill. App. 67, it was held that a bailor has the right to rely upon the representation in a warehouse receipt that the property named therein is insured for the invoice amount against loss by fire, and that, upon destruction of the property by fire, the bailee is liable to indemnify the bailor to the extent of the invoice value of the property.

And in *S. E. Olson Co. v. Brady* (1899) 76 Minn. 8, 78 N. W. 864, it was held that a warehouse receipt which contained a condition exempting the warehousemen from liability for loss from various causes including loss by fire, but which contained also the words, "insured \$200, premium included in above rate of storage," should be construed as constituting an absolute agreement by the warehousemen to insure the goods to the amount of \$200, and so to render them liable to indemnify the owner against loss by fire.

A warehouseman was held liable for failure to insure cotton stored with it, in *Farmers' Ginnery & Mfg. Co. v. Thrasher* (1916) 144 Ga. 598, 87 S. E. 804, where the property was lost by fire, the court laying down the rule that if a warehouse company puts up in conspicuous places at and around its warehouse printed posters or notices, signed by it, to the effect that all cotton stored with it would be insured for its full value, as against loss by fire for thirty days after such

house, for a certain price per bale, which included insurance and other warehouse charges, such action constituted an offer to contract, and that a contract resulted between the warehouse company and persons who had knowledge thereof and acted upon it in the storage of cotton; that if any of the plaintiffs in the case saw and read such notices, and acted upon them in storing cotton with the warehouse company, and suffered loss from fire by reason of the failure of the company to insure the cotton for its full value, the company was liable for the value of the cotton so destroyed, less legitimate charges. It was held, also, that if a general custom existed on the part of warehousemen in a certain municipality to insure to its full value the cotton stored with them, patrons who stored cotton with one of such warehousemen, knowing of the custom and relying upon it, could assert a duty on the part of the warehousemen to insure the property.

As to implied contracts to store the property in fireproof warehouses, see *II. e, supra*.

In *Deming v. Merchants' Cotton-press & Storage Co.* (1891) 90 Tenn. 308, 13 L.R.A. 518, 17 S. W. 89, it was held that a cotton compress company which received cotton for compression and storage under a contract, either express or implied from usage, to insure the same to its full value for the owners' benefit, was liable to the latter for its full value, in case of its destruction by fire while, through the company's negligence, it remained uninsured, although the company was free from negligence in caring for it.

Although not involving apparently the liability of a warehouseman, attention is called to *Ela v. French* (1840) 11 N. H. 356, holding that one to whom books were consigned for sale on commission, who agreed to insure the same against loss by fire, but failed to do so, was liable for their value upon their destruction by fire. The question involved was as to the measure of damages, which was held to be the value of the books, since the contract should be construed as

value.
Contracts requiring a compress company with which cotton was left for compression to insure the property in good and solvent companies were held in *Lancaster Mills v. Merchants' Cotton-press & Storage Co.* (1890) 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317, not to render the company itself liable as an insurer.

See also, although not strictly involving the question of a warehouseman's liability, *Johnson v. Campbell* (1876) 120 Mass. 449, holding that a circular issued by a firm of commission merchants to manufacturers, inviting their patronage, which contained the statement, "All consignments will be covered by insurance as soon as received in store," did not import that the firm was to be an insurer of the goods against fire, but was merely a promise that they should be insured, and did not require that the insurance should be effected in the name of the consignor, or that the policy should be in his possession and control; so that the consignee's duty was fulfilled by insurance of the goods in companies which were solvent and in good standing until affected by the fire, although, because of insolvency due to the fire, only about 60 per cent of the loss was recovered.

In this connection attention is called also to *Smith American Organ Co. v. Abbott* (1892) 11 Pa. Co. Ct. 319, 1 Pa. Dist. R. 174, holding that a lessee of personal property who agrees to keep the same insured against loss by fire, and fails to take out insurance, cannot avoid liability in an action for the value of the property after it has been destroyed in a general conflagration, on the ground that the destruction was by act of God.

Although not an action for loss of or injury to goods by fire, but for the value of insurance which the plaintiff had paid to the warehouseman, instituted on the ground that the latter had failed to insure the property as he agreed, attention is called to *Henderson Warehouse Co. v. Brand* (1898) 105 Ga. 217, 31 S. E. 551, holding that performance of an agreement by the

warehouse company to take out a policy of insurance on cotton stored with it, in the name of the owner, to be identified in the policy of insurance by the owner's individual mark, was not shown by evidence that it covered all of the cotton in the warehouse, including that in question, with a general policy of insurance, payable to itself.

The question whether a warehouseman who represents to a prospective customer that all his goods in the warehouse are covered by general policies of insurance, in reliance on which the customer takes out no special insurance in his own name on goods so stored, is liable for proceeds of insurance, does not appear distinctive to cases of loss by fire or to warehousemen. Recovery against the warehouseman was allowed in *Souls v. Lowenthal* (1903) 40 Misc. 186, 81 N. Y. Supp. 622, which cites *Roberts v. Ely* (1889) 113 N. Y. 128, 20 N. E. 606, and *Gutman v. Rogers* (1890) 13 N. Y. Supp. 576, affirmed in (1891) 13 N. Y. Supp. 891, cases beyond the scope of the note.

In this connection, see *Sideways v. Todd* (1818) 2 Starkie (Eng.) 400, holding that if a wharfinger insured property of the plaintiff which he received for sale, charging a warehouse rent and a commission on the sales, and obtained its value from the insurers, after a loss by fire, he was liable for such proceeds.

V. Particular circumstances.

a. Warranting inference of negligence in general.

It was held in *Gulf Compress Co. v. Harrington* (1909) 90 Ark. 256, 23 L.R.A. (N.S.) 1205, 119 S. W. 249, that the owner of a warehouse for the storage of cotton, situated adjacent to a railway track, might be found negligent in permitting cracks in the building through which sparks might reach the cotton, and in keeping in the building large quantities of loose cotton, through which fire would spread rapidly, in close proximity to the property of the bailor.

And negligence on the part of the servants of a ginning company in fail-

ing to discover and extinguish a fire, which there was evidence tending to show originated through the entrance of a small particle of fire into a bale of cotton while it was being packed, the fire smoldering there for a time before breaking out, was held sufficiently shown to warrant recovery for the loss, in *Planters Cotton & Ginning Co. v. Hartford F. Ins. Co.* (1918) 132 Ark. 80, 200 S. W. 147.

It was held that the evidence showed a failure to store the property (wool) in a safe building, and a judgment for the plaintiff for loss by fire was affirmed, both on this ground and on that of negligence in failing to remove the goods after the fire occurred, where the warehouse was a wooden building near a feed mill, in which the fire originated, located in a lumber and wood yard, and surrounded by inflammable materials, and only an inefficient and incapable watchman was provided. *Chicago & A. R. Co. v. Scott* (1866) 42 Ill. 132.

It was held, also, that the question of negligence on the part of the warehouseman, so as to render it liable for loss of the property by fire, was one of fact for the jury—

— where it was found that the warehouseman was negligent in storing the goods in a building which was in danger of fire because, on the third floor, there was a paper-box factory which used kerosene lamps in the manufacture of boxes, although there was also a finding that the origin and cause of the fire were not known, since there was at least a probability that the fire occurred from the risk to which the property was negligently exposed, *Dieterle v. Bekin* (1904) 143 Cal. 683, 77 Pac. 664;

— where a steamship company, whose liability was that of warehouseman, placed a consignment of wool received by it for transportation in a wooden shed beside the dock, adjoining a frame shed of another company which was especially subject to fire because of its proximity to a railroad track, absence of fire protection and of a watchman, and the storage therein of highly inflammable material, and fire, originating in the latter shed, de-

tending to show that proximity to such a shed was dangerous even though the steamship company took proper precautions against fire on its own premises, *Judd v. New York & T. S. S. Co.* (1902) 54 C. C. A. 238, 117 Fed. 206, rehearing in (1904) 62 C. C. A. 515, 128 Fed. 7;

—where the cotton burned was stored in a crowded yard, in which there was a considerable quantity of cotton which had been sampled, the loose cotton drawn from the bales being scattered around where men were in the habit of smoking, and where the engines of the railroad ran in drawing cars into the yard, with near-by cabins occupied by laborers, and an oil mill and other buildings located within dangerous limits, *Merchants' Wharfbboat Asso. v. Wood* (1887) 64 Miss. 661, 60 Am. Rep. 76, 2 So. 76, a later appeal reported in (1887) — Miss. —, 3 So. 248;

—where it appeared that the goods were placed by a railway company in a depot warehouse, in a room in proximity to which was a stove which could only be regulated by opening the door, and that within from 3 to 6 feet of the stove, there was inflammable material, the question being one of fact as to whether the leaving of the door open in order to check the draft constituted lack of ordinary care, as was also the question whether the leaving of the stove door open in the proximity of the inflammable material was the cause of the fire, there being no other probable cause disclosed by the evidence, *Farmers' Mercantile Co. v. Northern P. R. Co.* (1914) 27 N. D. 302, 146 N. W. 556;

—where the property was burned in a wooden shed, with wooden foundations, situated near a railroad track, on which a wood-burning engine used for shifting purposes passed shortly before the fire broke out, it appearing that there was no watchman, that the weather was dry, and that the wind was in a direction to carry the fire from the engine toward the shed, *Barron v. Eldredge* (1868) 100 Mass. 455, 1 Am. Rep. 126.

But it was held, also, in *Barron v.*

dence was insufficient to warrant submission to the jury of the question of negligence as respects the loss of grain in an elevator, destroyed by the same fire, where the elevator was situated on a wharf extending into a river, at a distance of over 200 feet from the buildings which were burned on the shore, the intervening space being mostly covered with water, there being no evidence that the elevator was improperly constructed or insufficiently guarded.

The question of negligence on the part of the warehouseman, for loss of the property by fire, has been held, also, to be for the jury and a judgment for the plaintiff affirmed—

—where there was evidence of insufficient fire protection of a frame warehouse containing, in addition to general merchandise, gasoline and other inflammable and explosive substances, and that an incompetent keeper of the warehouse had been employed, who, while in a drunken stupor, was the cause of the fire, *RUNKLE v. SOUTHERN P. MILL CO.* (reported herewith) ante, 275;

—where it appeared that the fire originated in open bales of cotton belonging to the plaintiff, that these bales had been opened the day before but allowed to remain on the compress platform, that there was insufficient fire apparatus as a protection, and that the night watchman, had he been in his usual place and been supplied with proper fire appliances, might have discovered the fire in time to have saved a part, at least, of the cotton, *Wichita Valley R. Co. v. Golden* (1919) — Tex. Civ. App. —, 211 S. W. 465;

—where it appeared that the warehouseman took the plaintiff's goods to store, and kept them for two days and nights in a stable, upon a wagon, where fire consumed them, *Levine v. D. Wolff & Co.* (1909) 78 N. J. L. 306, 138 Am. St. Rep. 617, 73 Atl. 73;

—where the fire occurred while the warehouse was locked for the night, and at or very near the bedroom and office in the warehouse, in which the keeper, about an hour before, had been using a lighted lamp, although the

keeper testified that, before leaving the building, he blew out the light, *Wilson v. Southern P. R. Co.* (1882) 62 Cal. 164;

—where, in an action against a railway company as warehouseman for the loss of goods by fire while stored at its depot, it appeared that the fire was caused from sparks emitted from an engine which passed the depot at an unusual rate of speed, and, when immediately opposite cotton on the platform, discharged a large quantity of sparks, the cotton being discovered almost immediately to be on fire, which was communicated from it to the depot, *Texas & P. R. Co. v. Wever* (1885) 3 Tex. App. Civ. Cas. (Willson) 85.

It was held that the question of negligence of a railway company as warehouseman for loss of goods in its freight house, by a fire which consumed the building, should have been submitted to the jury, and that a nonsuit was erroneous, where there was evidence that the fire originated in close proximity to a stove in the office, which had been partitioned off in one corner of the warehouse, that the stove was out of repair, that on several occasions live coals had dropped therefrom to the floor, which showed indications of having been scorched and burned, and that a few months before the fire the floor in the office was discovered to be on fire, caused by burning coals dropped from the stove. *Grieve v. New York C. & H. R. R. Co.* (1898) 25 App. Div. 518, 49 N. Y. Supp. 949.

And in holding that a complaint was erroneously dismissed in an action against a warehouseman for negligence in failing to take proper care of the plaintiff's goods which were destroyed by fire, which consumed the warehouse, the court in *Clifford v. Universal Storage Warehouse & Exp. Co.* (1907) 52 Misc. 595, 102 N. Y. Supp. 460, stated that although the proof was meager, "there was evidence, from the situation found by the firemen in breaking in the doors and the testimony, that articles so readily combustible as old rags, burlaps, and excelsior were

stored in an old van near the elevator shaft, from which might have been inferred lack on the part of the bailee of the care which persons of ordinary prudence exercise in the management of their own property."

It was held, also, in *Martin v. Missouri P. R. Co.* (1893) 3 Tex. Civ. App. 133, 22 S. W. 195, that a compress company which received cotton for shipment, and placed it on a platform in close proximity to railway tracks, where it was consumed by fire, might be held liable for the loss on the ground of negligence, and that the court erroneously sustained its general demurrer and dismissed it from the suit.

The absence of automatic sprinklers in a building in which there is much inflammable matter may, it seems, give rise to an inference of negligence. *Cox v. Central Vermont R. Co.* (1898) 170 Mass. 129, 49 N. E. 97 (action for loss of grain in an elevator by fire). The language of the court is not entirely clear. In overruling exceptions by the defendant after a verdict for the plaintiff, the court stated that it could not say that the jury were not justified in finding that the watchman was incompetent, and continued as follows: "Neither can we say, as matter of law, that the jury was not justified in finding, if they did so find, that the absence of automatic sprinklers in a building in which so much inflammable matter was present was not, considering the extent to which they had been introduced, negligence on the part of the defendant, or that if the building had been equipped with them they might not have checked the fire, and ultimately have been serviceable in extinguishing it."

It was held that a verdict against a warehouseman as a gratuitous bailee for goods consumed by fire, in other words, a finding of gross negligence, was sustained by evidence that the warehouseman, a railroad company, within twenty or thirty minutes before the fire, had deposited on the ground, within about 30 inches of the depot platform, where the fire was first discovered, burning waste from an engine hot box, that a strong wind was

form, which connected with the warehouse, and that at this point under the platform, there was old waste, paper, and rubbish generally. *Whiting v. Chicago, M. & St. P. R. Co.* (1888) 5 Dak. 90, 37 N. W. 222.

b. Not warranting inference of negligence in general.

See also *Barron v. Eldredge* (Mass.) under V. a, *supra*.

It was held in *Wald v. Louisville, E. & St. L. R. Co.* (1892) 92 Ky. 645, 18 S. W. 850, that the evidence was insufficient to warrant a finding of negligence, so as to render a railroad company liable as warehouseman for loss of baggage in its depot by a fire which consumed the building and its contents, where it appeared that the depot building was in a small town, and not exposed to any greater danger from fire than usually attended like places, although it appeared that it was of pine timber, with a shingle roof, the fire occurring about 2 o'clock in the morning, when there was no employee of the railroad at the depot, and the only evidence as to the origin of the fire creating a possibility that a traction engine which had been unloaded at the depot in the evening, and which had been removed under its own steam about two hours before the fire was discovered, might have caused it, although there was no proof that sparks were emitted from the engine. It was unsuccessfully contended that there was sufficient evidence to warrant an inference of negligence on the part of the railroad employees in failing to guard against danger from the engine, when they should have been aware that preparations were being made to remove it.

And it was held that insufficient evidence of negligence to hold the railroad company liable as warehouseman for loss of baggage by fire, which consumed a box car used for storage purpose, was shown by the fact that oil-soaked waste was kept in the car, in the absence of any other evidence as to the existence of conditions likely to cause spontaneous combustion, although this was a circumstance

the cause of the fire. *Levi v. Missouri, K. & T. R. Co.* (1911) 157 Mo. App. 536, 138 S. W. 699.

The mere fact that, three or four hours after a fire in a warehouse has been apparently extinguished by the fire department, a second fire occurs, apparently originating from the inside of the building, which destroys the plaintiff's goods stored therein, has been held insufficient to show negligence on the part of the warehouseman in failing to use ordinary care to subdue the fire, and in permitting it to smolder and again break out. *Thornton v. Daniel* (1916) — *Tex. Civ. App.* —, 185 S. W. 585. It seems that even though there was evidence that the first fire might have been of a negligent origin, through the striking of a match by an employee in the midst of highly inflammable material, the warehouseman could not, according to the authority of this case, be held liable for loss of property by the second fire, without other evidence of negligence.

An instruction, in an action against a railroad company as warehouseman for loss of goods destroyed in a steamboat by fire, to the effect that if a lamp was negligently left burning in the office, the jury were at liberty to infer therefrom, without proof, that the fire originated from the lamp (the fire having occurred in the nighttime after all the company's agents had left), was held erroneous, in *Kronshage v. Chicago, M. & St. P. R. Co.* (1878) 45 Wis. 500. The court said: "It is not enough to show a negligent act which might or might not have caused the fire, but the plaintiff must satisfy the jury by sufficient evidence that it did cause it. The testimony tending to prove that the fire originated in the office might support a finding that it was caused by the burning lamp; but the infirmity in the instructions is, that they left the jury free to ignore the testimony which tended to prove that the fire originated in some other part of the building and from some other cause, and, from the mere fact that the lamp was negligently left burning, to find that the depot took fire therefrom. . . . The negligent

act of leaving the burning lamp in the office would not necessarily or inevitably cause the destruction of the building; and proof that it was negligently so left burning did not relieve the plaintiff from the burden of proving that the fire originated from it. For such error in the instructions, the judgment must be reversed."

Such questions as that in *Thornton v. Daniel* (1916) — *Tex. Civ. App.* —, 185 S. W. 585, in which it was held that the mere fact that goods in possession of a warehouseman are destroyed by fire does not of itself necessarily show negligence, are within the scope of the note above referred to in 9 A.L.R. 559, on presumption and burden of proof where the subject of the bailment is destroyed or damaged by fire. See especially pages 570, 571, of this note.

c. Powder.

The present annotation does not cover the general question of the liability of a warehouseman for loss or damage due to failure to take proper care of explosives. The cases which are cited at this point are included only for the reason that the question of the warehouseman's liability for loss of the subject-matter of the bailment by a fire was affected by the fact that there were explosives in the same warehouse or near by. So far as the cases involve the question as to what may constitute negligence in the storage or care of explosives, they are, of course, illustrative only.

The storage of a large quantity of gunpowder with other goods, in a wooden warehouse in a city, was held negligence as matter of law, in *White v. Colorado C. R. Co.* (1879) 5 Dill. 423, 3 McCrary, 559, Fed. Cas. No. 17,543, so as to render the warehouseman, a railroad company, liable for loss of the goods by fire, where the loss would not have occurred had not the fireman, because of the powder, been deterred from entering the warehouse to extinguish the fire. A writ of error to the United States Supreme Court was dismissed for want of jurisdiction in (1880) 101 U. S. 98, 25 L. ed. 860.

And the proposition that the storage

of powder in such close proximity to property held in storage by warehousemen as to prevent, through reasonable fear, firemen from extinguishing a fire which consumes the warehouse, is such negligence as renders the warehouseman liable for the loss of the goods, is supported also by *Hardman v. Montana Union R. Co.* (1897) 39 L.R.A. 300, 27 C. C. A. 407, 48 U. S. App. 570, 83 Fed. 88, where a car labeled "Powder" was permitted to stand in such close proximity to the railway company's warehouse in which the plaintiff's goods were stored as to deter firemen from attempting to extinguish a fire in a warehouse; and it was held that this conduct on the part of the railway company constituted negligence which would render it liable for the loss of the property in the warehouse by fire, although there was in fact no powder in the car.

But where goods were destroyed by fire in a railroad warehouse it was held that negligence on the part of the railroad company as warehouseman was not shown merely by evidence that there was in the warehouse, or in some cars near by, some explosives which might render it dangerous for the firemen to go into or near enough to the warehouse to stop the fire, it not appearing where the explosives were, nor of what they consisted, nor how long they had been in or near the warehouse, or that the firemen were deterred on this account. *Lyman v. Southern R. Co.* (1903) 132 N. C. 721, 44 S. E. 550.

And it was held in *Collins v. Alabama G. S. R. Co.* (1893) 104 Ala. 390, 16 So. 140, that a railroad company holding goods in its freight house as warehouseman was not liable for their loss by an explosion of gunpowder in the same building, due to a fire, where the origin of the fire was not proved, and the building was of iron, covered with tin, and carefully guarded; the court taking the view that the storage of gunpowder, amounting in this case to 1,200 pounds, was not of itself such evidence of negligence as entitled the plaintiff to recover for the loss. It was said that while the keeping of large quantities

of explosives in a building in a popular town or city might be a nuisance, yet the question whether it was such or not depended on the locality, the quantity of material stored, and the circumstances; and that negligence in keeping it or the manner of its keeping was necessary to impose a liability for damages caused by an accidental explosion or fire, which it was incumbent on the party affirming to prove.

d. Watchman.

It may not be improper to observe at this point that the question of a warehouseman's duty to maintain a watchman arises in other cases than those involving injuries to or loss of the property by fire, so that it is impossible within the limits of the present note to cover the question of a warehouseman's care or negligence in this respect; and, although the cases cited here are of value on the present subject, they should be regarded as illustrative only of a broader class of cases.

To guard against fire where the building in which the goods are stored is insecure and especially exposed to fire, a higher degree of vigilance on the part of the warehouseman is required than would otherwise be necessary, to provide watchmen. *Chicago & A. R. Co. v. Scott* (1866) 42 Ill. 132.

It was held in *Levi v. Missouri, K. & T. R. Co.* (1911) 157 Mo. App. 536, 138 S. W. 699, that a railroad company which used a box car in a small town as a freight depot was not liable for loss of baggage therein by fire in the nighttime, merely because it did not maintain a night watchman, since there was no duty on its part under the circumstances to maintain a watchman. The court said: "The station was in a respectable residence part of the town; there was no lawless element to contend against; and there was no more reason for saying that it was negligence for defendant to lock up the cars at night and leave them unguarded, than for saying that it was negligence for the merchants to leave their stores unguarded. Defendant observed the same precautions in the

care of the property of its patrons stored in the depot that it did with its own property, and there is no ground for the conclusion that it was negligent in the care of its own property. It may be that thieves broke into the depot and set the fire, or that the fire had some other incendiary origin, but there is no proof in the record that such occurrence was due to lack of ordinary care."

The proposition that absence of a watchman at a warehouse to guard against fire during the night is not necessarily of itself evidence sufficient to warrant a finding of negligence on the part of the warehouseman, so as to charge it for loss of the goods by fire, finds support in *Tower v. Grocers Supply & S. Co.* (1893) 159 Pa. 106, 28 Atl. 229.

And it was held in *Texas C. R. Co. v. Flanary* (1899) — Tex. Civ. App. —, 50 S. W. 726, that a railway company which, as a gratuitous bailee, for the plaintiff's accommodation, had agreed to keep wool belonging to him, was not negligent in failing to keep a watchman at the depot where the wool was stored, so as to render it liable for loss of the property by fire of unknown origin, which destroyed the building and its contents.

The failure of a railroad company to provide a night watchman, or to have someone sleep in its depot, in which the average value of property stored did not exceed \$500, was held in *Pike v. Chicago, M. & St. P. R. Co.* (1876) 40 Wis. 583, not to warrant a finding of negligence, so as to render the company liable as warehouseman for a loss of property stored therein by fire. To the same effect is *Kronshage v. Chicago, M. & St. P. R. Co.* (1876) 40 Wis. 587, an action for damages for a loss caused by the same fire. A later appeal in the last case is reported in (1878) 45 Wis. 500.

Such questions as that arising in *Cox v. Central Vermont R. Co.* (1898) 170 Mass. 129, 49 N. E. 97, as to whether evidence is admissible that several years before the fire a watchman employed by the warehouseman was in the habit of becoming intoxicated, when supplemented by evi-

dence that this habit continued down to the time of the fire, are not, of course, distinctive to the question under consideration. The court held in this case that such testimony was competent to show that the watchman was not a suitable person to be so employed, and that the warehouseman, by reasonable diligence, might have discovered this fact.

It was held, also, in *Cox v. Central Vermont R. Co.* (Mass.) supra, that there was sufficient evidence from which it could fairly be inferred that the watchman was intoxicated on the night of the fire, where there was testimony that about two hours before the fire he was seen in the office with his hat and shoes and coat off, the coat, with a cushion, being on the floor where he had apparently been lying down; that the fire was discovered by others before he saw it; and that one who went to the door of the office at the time of the fire had difficulty in arousing him,—when this evidence was considered in connection with that regarding his previous habits of intoxication.

Evidence that a watchman employed by a warehouseman was addicted to drink, without showing that his failing had any causal connection with a fire which caused a loss of goods stored in the warehouse, was held in *Gibbons v. Yazoo & M. Valley R. Co.* (1912) 130 La. 671, 58 So. 505, not sufficient to entitle the bailor to recover for loss of the goods.

See the reported case (*RUNKLE v. SOUTHERN P. MILL. Co.* ante, 275), where there was evidence that an incompetent keeper of the warehouse had been employed, and that he, while in a drunken stupor, was the cause of the fire.

c. Grain.

The question of the liability of a warehouseman of grain for its loss by fire has sometimes turned on the question of his status after he has commingled the grain and has disposed of a part, perhaps failing to keep on hand enough to satisfy all demands. The question is closely associated with that of the warehouseman's lia-

bility for conversion, which might arise whether there had been any fire or not. It is, therefore, not the purpose of the annotation to cover this class of cases, several being cited, however, by way of illustration.

If, at a time when there is not enough grain in the warehouse to satisfy full demand of all depositors, the warehouse and its contents are destroyed by fire without the fault of the warehouseman, while he would not be responsible for such loss, he would be responsible for the conversion of such a quantity of grain as he had sold which was not represented by that so destroyed. *Drudge v. Leiter* (1898) 18 Ind. App. 694, 63 Am. St. Rep. 359, 49 N. E. 34.

In *McGinn v. Butler* (1870) 31 Iowa, 160, where there was an alleged special contract to return grain stored with the defendant and sold by him, and there was evidence that the warehouseman had failed to deliver the grain when demanded before the fire, it was held no defense that the warehouse with its contents, including grain of the same quality and quantity as that of the plaintiff, was destroyed by fire.

For illustrative purposes, the case not being strictly one of warehouseman, attention is called to *Wells v. Porter* (1902) 169 Mo. 252, 92 Am. St. Rep. 637, 69 S. W. 282, where a miller indorsed on certificates entitling the depositor of wheat to a certain quantity of flour, a statement that he was not responsible for the deposit in case of fire, and it was held that there could be no recovery for a loss by fire whether the contract should be regarded as one of bailment or of sale.

See *Pope v. Farmers' Union & Mill Co.* (Cal.) under II. b, supra.

VI. Pleadings and evidence.

The present annotation does not consider the question of presumption and burden of proof where the subject of the bailment is destroyed or damaged by fire, this question being treated in the annotation following *Beck v. Wilkins-Ricks Co.* 9 A.L.R. 559.

An allegation in the petition, that

the destruction of the goods "was the result of want of ordinary care and diligence on the part of the defendant," was held in *Kight v. Wrightsville & P. R. Co.* (1906) 127 Ga. 204, 56 S. E. 363, subject to special demurrer, on the ground that it failed to set forth any act of negligence on the part of the warehouseman which occasioned a destruction of the plaintiff's goods, in the absence of an offer to cure the defect by amendment. The action was to recover from a railway company as warehouseman damages sustained by the plaintiff in consequence of the destruction of the goods by fire while stored in the defendant's warehouse. The court said the rule would be otherwise, under the Code, if the suit were one against a warehouseman for hire, for failure on demand to deliver goods stored with it by the plaintiff.

The nature and value of the property, its exposure to damage or loss, its proximity to danger from fire, the means employed to prevent or arrest the progress of the fire, the location, character, and construction of the warehouse, are all proper elements for consideration on the question whether the warehouseman exercised due care. *Barron v. Eldredge* (1868) 100 Mass. 455, 1 Am. Rep. 126.

And the character of the building provided for storage of the property, the nature of the business for which he permits a portion of the building to be used, and the precautions taken by him for the prevention of fire and for its extinguishment, are proper elements to be considered, on the question of a warehouseman's liability for loss of the property by fire. *Dieterle v. Bekin* (1904) 143 Cal. 683, 77 Pac. 664.

Where, in an action against a railroad company as warehouseman for the destruction of the plaintiff's goods by fire, there was evidence that the fire was first discovered in the depot platform, which connected with the warehouse, and that about half an hour before the discovery burning waste from an engine hot box had been deposited within about 30 inches of the platform, and that a strong

wind was blowing in the direction of the platform, it was held that evidence was admissible, on the question whether the warehouseman was guilty of gross negligence, of the condition of the ground about the platform, and that rubbish, old waste, and papers had been blown under it at that point by the wind. *Whiting v. Chicago, M. & St. P. R. Co.* (1888) 5 Dak. 90, 37 N. W. 322.

In an action against a railway company as warehouseman for the value of property destroyed by fire while in its possession, where the evidence showed that the fire originated in cotton stored on the platform of the warehouse, it was held that, for the purpose of showing negligence on the part of the warehouseman, evidence was admissible that other fires had recently originated in cotton similarly situated, since negligence on the part of the warehouseman may consist in leaving property unguarded, where it would be exposed to a danger from fire which an ordinarily prudent person would have anticipated under all the circumstances. *Netzwow Mfg. Co. v. Southern R. Co.* (1909) 7 Ga. App. 163, 66 S. E. 399.

That advertisements by a warehouse man to furnish "fireproof storage" are admissible, in an action for loss of goods stored with it on account of fire, in order to show a contract with a prospective customer who relied on such representations, for this kind of storage, see *Laux v. Bekins Van & Storage Co.* (1917) 177 Cal. 63, 169 Pac. 1012. Other cases cited under II. e, *supra*, would seem also to support this ruling.

It was held in *Levi v. Missouri, K. & T. R. Co.* (1911) 157 Mo. App. 536, 138 S. W. 699, that an opinion expressed by the station agent to the passenger on demand for his baggage, that the fire was by spontaneous combustion, was not admissible, since the opinion was purely speculative and conjectural. See this case also under V. b, *supra*.

And in an action against a warehouseman for loss of goods by fire, testimony of a witness who arrived about fifteen or twenty minutes after

the fire had started as to what certain persons, unknown to him, said about the origin of the fire, was held not a part of the *res gestæ* and otherwise incompetent, in *Lyman v. Southern R. Co.* (1903) 132 N. C. 721, 44 S. E. 550.

Evidence that the warehouseman had paid the claims of other parties whose goods were lost in the same fire and under similar circumstances was held inadmissible in *Turrentine v. Wilmington & W. R. Co.* (1888) 100 N. C. 375, 6 Am. St. Rep. 602, 6 S. E. 116. See also citation of this case under III. *supra*, to the effect that evidence of statements by bystanders as to the likelihood of the warehouse being burned was inadmissible.

In an action for loss of cotton by fire in a cotton yard of the defendant, it was held in *Merchants' Wharf-Boat Asso. v. Smith* (1887) — *Miss.* —, 3 So. 249, that evidence offered by the defendant was inadmissible as to the character for prudence of other persons who stored cotton in the yard at or about the time of the fire.

Where cotton stored with a warehouseman was burned on the night of December 25th, and it was shown that the city authorities had refused to prohibit the explosion of fireworks in the street during the Christmas holidays, evidence offered in this connection that the warehouseman, on the day before the fire, had taken out additional insurance for three days only on his own cotton in the warehouse, was held properly excluded, in an action against him for loss of the plaintiff's cotton by the fire. *Seals v. Edmondson* (1882) 71 Ala. 509. The court said: "If it be assumed that the defendant was induced to take additional insurance for three days, because of his apprehensiveness of increased danger from loss by fire during that period, we repeat, it is not by inquiring into his apprehension or fears that the existence of danger is to be ascertained. . . . The tendency of the evidence, if admitted, would have been the diversion of the attention of the jury from the main point and real issue in controversy, the degree of care the law enjoined upon the defendant, and whether he

had exercised it, into an inquiry as to the degree of care he exercised touching his own property."

As to admissibility of evidence that a near-by warehouse was equipped with buckets and water for extinguishing fire, see *Jones v. Hatchett* (Ala.) under II. e, *supra*.

See also *Cox v. Central Vermont R. Co.* (Mass.) under V. d, *supra*.

As to the sufficiency of the evidence to show negligence on the part of the warehouseman, see V., *supra*.

VII. *Statutes; miscellaneous.*

If a warehouseman negligently prevents the owner of the goods from removing them when he calls for that purpose, the warehouseman may, of course, be liable for loss of the goods by fire, even though it is accidental. This principle is supported by such cases as *Derosia v. Winona & St. P. R. Co.* (1872) 18 Minn. 133, Gil. 119, where, although the plaintiff called for his goods at the railroad warehouse before 4 o'clock in the afternoon, he did not remove them, because there was no one at the depot; and it was held that there was sufficient evidence for the jury on the question whether the loss of the goods by fire, even though accidental, was the result of negligence of the warehouseman. So far as railroad companies are concerned, however, this question is so intimately connected with that of the distinction between the company's liability as a carrier and as a warehouseman and the time when its liability as carrier ceases, that no attempt is made to cover this class of cases.

That a railroad company as warehouseman may be held liable for loss of goods by fire at destination if it negligently prevents their removal, the consignee in this instance being erroneously informed that the goods had not arrived, even though it is not chargeable with negligence as respects the fire itself, is held also, among possibly other cases, in *East Tennessee, V. & G. R. Co. v. Kelly* (1892) 91 Tenn. 699, 17 L.R.A. 691, 30 Am. St. Rep. 902, 20 S. W. 312.

Although not a case of warehouse-

man, attention is called to *Shaw v. Symmons* [1917] 1 K. B. (Eng.) 799, 86 L. J. K. B. N. S. 549, 117 L. T. N. S. 91, 33 Times L. R. 239, where publishers delivered to the defendants, who were bookbinders, books to bind, and it was held that because of a breach of the contract to deliver the same upon demand within a reasonable time after binding, the defendant was liable for loss of the property by fire, although the fire was without its negligence.

It was held that liability on the part of a railway company for goods destroyed by fire while in its possession as warehouseman was not imposed by the Oklahoma statute providing that any railroad company operating in the state "shall be liable for all damages which are sustained by fire originating from operating their road." *Walker v. Eikleberry* (1898) 7 Okla. 599, 54 Pac. 553. The court took the view that the statute did not refer to loss of property in regard to which the railway company occupied a contractual relation, either by express agreement or by implication of law, but was only intended to create a liability for property destroyed where the relation between the railroad company and the owner in reference thereto, and the liability of the railroad company therefor, was not otherwise regulated and determined by other provisions of law or contract.

To a similar effect, and cited in the above case, is *Bassett v. Connecticut River R. Co.* (1887) 145 Mass. 129, 1 Am. St. Rep. 443, 13 N. E. 370, where a statute making a railroad company responsible for loss by fire communicated from its engines, was held not to apply to goods destroyed by fire in the railroad company's freight house at destination, since the rights and liabilities of the parties were governed by contract and the statute was not intended to apply to cases of express or implied contracts.

It was apparently not necessary to decide in the last case whether the liability, if any, of the railroad company, was that of carrier or warehouseman. And it is obvious that the question of construction of such

statutes as that there considered may be presented in cases where the liability of the railroad company was that of a carrier, so that the principle on which these cases are decided extends apparently beyond the scope of the present note.

The Virginia Tobacco Inspection Law expressly provided that the commonwealth should make good losses for tobacco in case tobacco was lost by fire in a public warehouse which should "happen to be burned." *Auditor v. Dutter* (1831) 3 Leigh (Va.) 241, where the question was whether the particular warehouse had been discontinued under another provision of the statute, providing for discontinuance of warehouses if the warehouse did not receive a sufficient quantity of tobacco to pay inspectors' salaries and rents.

It was held in *Moore v. State* (1877) 47 Md. 467, 28 Am. Rep. 483, that the state was not liable for loss by fire of tobacco while in its warehouse, to which it had been brought for inspection as required by statute. In this case the legislature had authorized the bringing of the suit against the state in order to afford the owners of the property an opportunity to determine the state's liability. The decision, however, is on the ground that the state became in no sense a bailee of the property nor rendered itself responsible as a warehouseman, but was only exercising its sovereign authority to enact and enforce inspection laws.

In *Bunswick Grocery Co. v. Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249, 32 S. E. 92, it was held that a railroad company as warehouseman was not liable to the owner of goods for destruction of the same occasioned by fire resulting from the negligence of one employed by it, who was engaged in a separate business, was not subject to the immediate direction and control of the employer, but was in fact an independent contractor.

But a railroad company which delivered cotton to a warehouseman, at destination, because it did not have a suitable warehouse of its own, was

held liable in Wichita Valley R. Co. v. Golden (1919) — Tex. Civ. App. —, 211 S. W. 465, for loss of the cotton by fire due to the negligence of the

warehouseman, which, the court held, was the agent of the railroad company, and not an independent warehouseman.
R. E. H.

LOUISVILLE TRUST COMPANY, Trustee, etc., of Mary R. Oldham,
Deceased, Appt.,

v.

BOSTON INSURANCE COMPANY.

Kentucky Court of Appeals — December 10, 1920.

(Oldham's Trustee v. Boston Insurance Co. 189 Ky. 844, 226 S. W. 106.)

Executor and administrator — right to collect on fire insurance policy.

1. The personal representative of the insured is the proper party to collect for a loss under a fire insurance policy, occurring after insured's death, under a contract made by him while living, unless there is some statute or stipulation in the contract to the contrary.

[See note on this question beginning on page 310.]

Insurance — fire — nature of policy.

2. A fire insurance policy is a chose in action and does not partake of the nature of the property insured by it.

— right of personal representative to collect.

3. As between the beneficiaries of an estate and the personal representatives, a fire insurance policy on the property payable to insured and his legal representatives is personal property, and if loss occurs after the death of the insured the personal representative is entitled to collect the amount of loss unless a different purpose is plainly manifested by the terms of the policy.

[See 11 R. C. L. 111, 112.]

Executor and administrator — action by one of two — effect.

4. The collection of an insurance policy on property of decedent by one of two executors, without acting in conjunction with the coexecutor, does not destroy the legal effect of his action.

[See 11 R. C. L. 405, 406.]

— effect of settlement with court — continuance of authority.

5. Settlement by executors with the county court does not terminate their power or authority to continue to act as executors so long as they have duties to perform in that capacity.

[See 11 R. C. L. 103.]

APPEAL by plaintiff from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County, in favor of defendant in an action brought to recover the amount of insurance alleged to have been wrongfully paid by it to a personal representative of insured.
Affirmed.

The facts are stated in the opinion of the court.

Mr. R. A. McDowell, for appellant:

The words "legal representatives" referred to the successors of the original insured in the title to the property insured, and immediately upon her death the beneficiaries under the policy were fixed by her will.

18 Am. & Eng. Enc. Law, 2d ed. 813;
25 Cyc. 175; 1 Wood, Fire Ins. 2d ed.

16 A.L.R.—20.

713; Millard v. Beaumont, 194 Mo. App. 69, 185 S. W. 547; German Ins. Co. v. Read, 12 Ky. L. Rep. 371, 13 S. W. 1080, 14 S. W. 595; Richardson v. German Ins. Co. 89 Ky. 571, 8 L.R.A. 800, 13 S. W. 1.

If this action involved the right of Joseph A. Oldham, as life tenant, to charge the remaindermen with

amounts expended on improvements to the estate, he would not be able to sustain the claim.

Caldwell v. Jacob, 16 Ky. L. Rep. 21, 22 S. W. 436, 27 S. W. 86; *Nineteenth & J. Street Presby. Church v. Fithian*, 16 Ky. L. Rep. 581, 29 S. W. 143; *Culleton v. Keune*, 18 Ky. L. Rep. 1065, 39 S. W. 511; *Mayes v. Payne*, 22 Ky. L. Rep. 1465, 60 S. W. 710; *Henry v. Brown*, 99 Ky. 13, 34 S. W. 710; *Gray v. Soden*, 120 Ky. 277, 86 S. W. 515; *Wilson v. Hamilton*, 140 Ky. 327, 131 S. W. 32; *Scott v. Scott*, 183 Ky. 604, 210 S. W. 175; *Smith v. Richey*, 185 Ky. 516, 215 S. W. 429.

Messrs. F. M. Drake and Gordon & Laurent, for appellee:

The fire insurance policy was personal property.

32 Cyc. 669 (3); *Trimble v. Mt. Sterling*, 11 Ky. L. Rep. 727, 12 S. W. 1066; 32 Cyc. 671; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380, 52 N. E. 772; *Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159; 1 *Cooley, Ins. p. 84*; *Rowell v. Covenant Mut. Life Asso.* 84 Ill. App. 304; *Union Cent. L. Ins. Co. v. Woods*, 11 Ind. App. 325, 37 N. E. 180, 39 N. E. 205; *Kitts v. Massasoit Ins. Co.* 56 Barb. 177; *Wyman v. Wyman*, 26 N. Y. 253; *Barbour v. Larue*, 106 Ky. 546, 51 S. W. 5; *Morehead v. Mayfield*, 109 Ky. 51, 58 S. W. 473; 4 Cyc. 211, 213; *Dube v. Mascoma Mut. F. Ins. Co.* 64 N. H. 527, 1 L.R.A. 57, 15 Atl. 141; 3 *Williams, Exrs. p. 131*.

A sole legatee may appropriate personal assets of decedent.

Ewers v. White, 114 Mich. 266, 72 N. W. 184; 14 Cyc. 107; *Powell v. Pennock*, 181 Mich. 588, 148 N. W. 430.

Oldham, as executor, had the power to transfer the insurance policy of decedent.

Gibbs v. Flour City Nat. Bank, 86 Hun, 103, 34 N. Y. Supp. 195; 13 Cyc. 358; *Nance v. Gray*, 143 Ala. 234, 38 So. 916, 5 Ann. Cas. 55; *Chandler v. Chandler*, 87 Ala. 300, 6 So. 153; *Libby v. Mayberry*, 80 Me. 137, 13 Atl. 577.

An executor is "the insured" after death of original insured, because "legal representative" means personal representative.

Richards, Ins. 3d ed. § 331; 2 *May, Ins.* 4th ed. §§ 447B-452A; *Matthews v. American Cent. Ins. Co.* 154 N. Y. 449, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751; *Lawrence v. Ni-*

agara F. Ins. Co. 2 App. Div. 267, 37 N. Y. Supp. 811; 25 Cyc. 175, note 97, 176; *Clement, Fire Ins.* pp. 29, 30; *Cooley, Ins.* pp. 3696, 3698; *Joyce, Ins.* 2d ed. § 786; *Culbertson v. Cox*, 29 Minn. 309, 43 Am. Rep. 204, 13 N. W. 177; *Germania F. Ins. Co. v. Curran*, 8 Kan. 16; *Lappin v. Charter Oak F. & M. Ins. Co.* 58 Barb. 343; *Alford v. Consolidated F. & M. Ins. Co.* 88 Minn. 478, 93 N. W. 517; *Baldwin v. Pennsylvania F. Ins. Co.* 206 Pa. 248, 55 Atl. 970; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 44, 74 Am. St. Rep. 161, 55 N. E. 139; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Bennett v. Featherstone*, 110 Tenn. 27, 71 S. W. 589.

The repair of the property with proceeds of insurance has the same effect as payment to all parties in interest.

Huey v. Ewell, 22 Tex. Civ. App. 638, 55 S. W. 606; *Bennett v. Featherstone*, supra; *Brough v. Higgins*, 2 Gratt. 408; 4 *Cooley, Ins. p. 3689*; *Sanders v. Armstrong*, 22 Ky. L. Rep. 1789, 61 S. W. 700; *Wyman v. Wyman*, 26 N. Y. 253.

Thomas, J., delivered the opinion of the court:

Mary R. Oldham, wife of *Joseph A. Oldham*, owned a dwelling house on Edgeland avenue in the city of Louisville with some outbuildings situated on her lot. On the 10th day of April, 1915, she procured from the appellee and defendant below, *Boston Insurance Company*, a fire policy for the term of three years ending April 10, 1918. The defendant thereby insured *Mrs. Oldham* against loss from damage by fire to the extent of \$2,700 on her dwelling, \$500 on a two-story building used as a stable and servant's room, and \$300 on household and kitchen furniture. In November thereafter, *Mrs. Oldham* died testate, and in her will she gave to her husband all of her personal property and a life interest in the real estate covered by the policy, with remainder to others, and appointed as executors of her will her husband and one of the remaindermen, and they were likewise appointed by the will trustees thereunder. The two nominated executors qualified; but,

so far as this record discloses, the husband of the deceased seems to have been the only one who took an active part in performing the fiducial duties imposed by the appointment. On March 18, 1917, and while the policy was in force, a fire occurred, destroying the outbuilding, upon which there was \$500 insurance, and damaging the insured dwelling. Proof of loss was made by the husband and furnished to the company, and it paid him in settlement thereof the sum of \$630.60, and he soon thereafter repaired and restored the property at a cost, according to the competent evidence, of \$550, although it was shown that he stated the repairs cost him more than the amount of insurance collected; but the court held that his statements as to the amount expended were incompetent. On May 5, 1917, which was soon after the property was restored and repaired, the husband died. On November 7 following, at the instance of the remaindermen under the will of Mrs. Oldham, the appellant and plaintiff below, Louisville Trust Company, was appointed trustee under the will, and it brought this suit against defendant to recover the \$630.60 which it paid to Mr. Oldham, upon the ground that he had no right to collect it and that the payment to him was not a legal satisfaction of the claim. On February 7, 1916, at the instance of the husband, the policy was changed so as to cover only his interest in the insured property, and the defendant relied upon that fact, with other defenses, to defeat a recovery. Upon trial the court held that, since the policy gave the defendant the right to pay the loss or restore the property, the expenditure by the husband of the proven amount of \$550 for the latter purpose was a pro tanto satisfaction of the loss so far as the remaindermen were concerned, and that he had the right to change the policy as indicated, and judgment was rendered dismissing the petition, to reverse which plaintiff prosecutes this appeal.

The principal points urged against the propriety of the judgment are:

(1) That under the facts the remaindermen under the will of Mrs. Oldham—and being the only ones for whom the plaintiff is acting—were entitled to at least their pro rata part of the proceeds of the policy, and should have been paid their portion instead of it being paid to Mr. Oldham, the life tenant, executor, and sole legatee; and (2) that a life tenant cannot bind the remaindermen by improving the common property.

We may concede the correctness, as abstract principles of law, of the two points urged by counsel; but we are wholly unable to give them the effect which is sought to be made in this case. There is a wide difference in the law between who is *entitled* to the proceeds of a fire insurance policy, and the one who is *entitled to collect* a loss arising thereunder; and likewise there is a difference between the right of a life tenant to *improve* the property, and his right to *restore* it to its original condition with the proceeds of a fire policy. The law is well settled that a fire insurance policy is a chose in action, and does not

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nature of policy*

partake of the nature of the property insured by it, and, at least as between the beneficiaries of the estate (be they heirs, legatees, or devisees) and the personal representative of the estate, the policy is personal property, and, if a loss insured against occurs after the death of the insured, the personal representative is entitled to collect for it, either with or without suit, regardless of the fact that the beneficiaries of the estate would be entitled to the proceeds after the payment of debts, unless a different purpose is plainly manifested by the terms of the policy. 3 Williams, Exrs. p. 131; 4 Cooley, Briefs on Ins. pp. 3696, 3697; 2 May, Ins. § 447B; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 88; Haxall v. Shippen, 10 Leigh,

*—right of
personal
representative
to collect.*

536, 34 Am. Dec. 745; Wyman v. Prosser, 36 Barb. 368; Richards, Ins. 3d ed. § 331; and Richardson v. German Ins. Co. 89 Ky. 571, 8 L.R.A. 800, 13 S. W. 1. The latter case was a suit by the personal representative on a policy issued before his decedent's death, to recover for a loss occurring after the death of the insured, although others succeeded to the title of the insured to the destroyed property. The precise point involved here was not expressly decided, but it was impliedly so when this court sustained plaintiff's right to maintain the suit. This court held in Sanders v. Armstrong, 22 Ky. L. Rep. 1789, 61 S. W. 700, with reference to a fire insurance policy, that "insurance is a personal contract, and appertains to the person called the insured, and not to the thing which is subject to the risk against which he is protected by the contract of insurance. It is not a contract running with land, in case of real estate, nor running with the personalty, so to speak, in the case of a chattel."

Sustaining the above authorities and the statement from this court, the text in 14 R. C. L. p. 1365, says: "The general rule is that, between insurer and insured, a policy of fire insurance is a purely personal contract, by which the former agrees to indemnify the latter against any loss he may sustain by the destruction of his interest in the property insured. The contract does not attach to or run with the title to the insured property."

See also Shadgett v. Phillips & C. Co. 131 Ala. 478, 56 L.R.A. 461, 90 Am. St. Rep. 95, 31 So. 20, and Continental Ins. Co. v. Munns, 120 Ind. 30, 5 L.R.A. 430, 22 N. E. 78.

In the Kinnier Case, 28 Gratt. 88, the right of the personal representative of the insured to collect for a loss occurring after his death under facts quite similar to those we have here, was before the supreme court of the state of Virginia, and it was contended that the *heirs* of the insured were the only ones who had the right to collect the insurance; but the court held otherwise. In

that case, as in this (as we shall see), the insurance was made payable to the insured and his "legal representatives." The court held that "legal representatives," as used in the policy, must be given the same import as "*personal representatives*," i. e., executors or administrators. The opinion says: "It is contended that by the term 'legal representatives,' used in the declaration pursuing the tenor of the policy, the *heirs* at law of Alexander Kinnier were intended, so far as the insured building is concerned. I do not think this is the proper construction of the policy. The policy declared upon, and as set out, is a contract to indemnify Alexander Kinnier personally. The words 'legal representatives,' as used, are of the same import as the words '*executors*,' '*administrators*,' '*personal representatives*.' The policy as set out is a simple contract, and, upon the death of Alexander Kinnier, passed like his bonds, notes, and other choses in action, to his administratrix; and she only had a right of action upon it."

The text in May on Insurance, supra, says: "The executors are the only ones who can enforce a (fire) policy unless the heirs are named. The property passes to the heirs, but the policy is not attached to and does not run with the estate, and only the representatives of the assured can recover."

And in the note referred to in Williams on Executors, it is said: "So, an unexpired fire insurance policy, taken out by the deceased on real estate specifically devised, is part of the personal estate of the deceased."

To the same effect are the other cases supra, except the policy involved in some of them stipulated that the loss should be paid to the insured, his *executors*, *administrators*, etc. The common import and the ordinary signification of the phrase "legal representative" is equivalent to that of executor or administrator, i. e., "personal representative." Thus, in 25 Cyc. 176, the text says: "In the common use

of the words ('legal representative') and in its ordinary signification, a term equivalent to 'executor' or 'administrator.'"

See also Black's Law Dict. 2d ed. 1020, and Words & Phrases, 2d series, vol. 3, pp. 71-77.

The ordinary signification of the term is, however, subject to be controlled, like other legal terms, by the context of the instrument in which it is used, and, if that is such as to indicate a different meaning from the ordinary one, that meaning will be applied by the courts. In the policy sued on in this case it is stipulated that "wherever in this policy the word 'insured' occurs, it shall be held to include the *legal representatives* of the insured."

There is nothing in the context or the conditions under which the term is used to indicate a different significance or meaning than the ordinary one of "personal representative." So that we conclude that the parties, by the use of the words "legal representatives," meant "personal representatives," and that, if a loss occurred after the death of Mrs. Oldham (the insured), her executor or administrator would be empowered to collect therefor. Our Civil Code, § 732, subsections 17, 18, and 19, defines "personal representative," "real representative," and "representative;" but there is no statutory definition given there, or elsewhere, of the term "legal representative." So that we are not prevented by any statute from applying to the latter term its ordinary and usual significance.

Independently, however, of what other courts may have said upon the question as presented, we are thoroughly convinced that, under the general principles and reasoning of the law, the executor or administrator of the insured is the proper

Executor and administrator—right to collect on fire insurance policy.

person to collect for a loss under a fire policy occurring after insured's death under a contract

made by him while living, unless there is some statute or stipulation

in the policy to the contrary. If a decedent dies the owner of an unmatured note, it is admitted by everyone that its proceeds would be assets in the hands of the personal representative, primarily for the payment of debts, and secondarily for distribution between those entitled thereto; and that the personal representative is the only one authorized to collect the note when it matures. An insurance policy, as we have seen, is no less a chose in action than the note in the supposed case. The only difference is that the note is a *certain* asset and in the course of time becomes collectable, while the fire policy is only a *conditional* or *contingent* asset, which becomes an actual one only upon the happening of the event insured against. But, when that event happens, the chose in action becomes as absolute as a note and necessarily collectable by the same person. As to how the person who collects it shall apply the proceeds no more affects his right to make the collection than does the same question with reference to his disposition of the proceeds of the note. If, in this case, Mrs. Oldham had been indebted more than the amount of her personal property, who would question the right of her creditors to appropriate the proceeds of this insurance to the satisfaction of their debts? Manifestly, they would be entitled to have such proceeds applied in payment thereof, and the only person legally authorized to do that was the personal representative, Mr. Oldham. The fact that he collected the insurance without

—action by one of two—effect.

acting in conjunction with his coexecutor cannot destroy the legal effect of his action, for it is undeniably true that one coexecutor may act in discharging his trust independently of the other one. Schouler, Exrs. 3d ed. § 400; 11 R. C. L. p. 405; 18 Cyc. 1330, 1331; Hord v. Lee, 4 T. B. Mon. 36; and Bryan v. Thompson, 7 J. J. Marsh, 586.

The fact that the executors had

made a settlement with the county court did not terminate their power or authority to continue to act as executors as long as they had duties to perform in that capacity. It is frequently the case that such fiduciaries make settlements from time to time without affecting their authority to continue to act in the future. Our conclusion upon the whole case, and under the concrete facts presented, is that the husband, in his capacity of executor

—effect of
settlement
with court—
continuance
of authority.

of his wife's will, not only had the authority to collect the insurance which is the subject-matter of this litigation, but it was his duty to do so, and that under the terms of the policy he, as executor, was the only one from whom the company could get a legal acquittance. It necessarily results from this conclusion that the judgment appealed from was correct, although based upon different reasons, which, in view of our conclusion, we need not consider.

Wherefore the judgment is affirmed.

ANNOTATION.

Rights and liabilities arising from loss after death of insured under policy of property insurance.

- I. Scope of note, 310.
- II. Effect on policy of death of insured, 310.
- III. Effect on policy of acts subsequent to death of insured, 311.
- IV. Who may sue on policy, 312.
- V. Persons entitled to proceeds, 313.

I. Scope of note.

This note discusses the rights and liabilities arising from a loss after the death of the insured, under a policy of "property insurance," that term being construed to include policies of fire, tornado, hurricane, and cyclone insurance. The note excludes those cases where a liability has accrued under a renewal, or a new policy of insurance taken out on property in the name of the estate, or an heir, or personal representative subsequent to the death of the owner of the property.

II. Effect on policy of death of insured.

The cases are in accord in holding that a policy of insurance on property is not terminated by the death of the insured, in the absence of an express provision to that effect in the policy, the ruling being ordinarily put on the ground that, since insurance policies usually contain explicit provisions as to termination or forfeiture, no additional grounds therefor will be implied.

Arkansas. — *Planters' Mut. Ins. Asso. v. Dewberry* (1901) 69 Ark. 295, 86 Am. St. Rep. 195, 62 S. W. 1047.

Illinois.—*Forest City Ins. Co. v. Hardesty* (1899) 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139.

Indiana.—*Pfister v. Gerwig* (1890) 122 Ind. 567, 23 N. E. 1041.

Kentucky.—*Richardson v. German Ins. Co.* (1890) 89 Ky. 571, 8 L.R.A. 800, 13 S. W. 1.

Missouri. — *Trabue v. Dwelling House Ins. Co.* (1894) 121 Mo. 75, 23 L.R.A. 719, 42 Am. St. Rep. 523, 25 S. W. 848, modifying (1892) 49 Mo. App. 331.

New Hampshire.—*Burbank v. Rockingham Mut. F. Ins. Co.* (1852) 24 N. H. 550, 57 Am. Dec. 300.

Virginia.—*Georgia Home Ins. Co. v. Kinnier* (1876) 28 Gratt. 88.

Thus, in *Richardson v. German Ins. Co.* (Ky.) *supra*, the policy of fire insurance in suit provided that the policy should be void if any change took place in the title, use, occupation, or possession of the property. After the death of the insured a loss occurred, and the insurance company defended an action on the policy on the ground that the policy became void and of no effect on the death of the insured. The court held that the company was liable in the absence of a specific provision in the policy for a forfeiture.

See to the same effect *Planters' Mut. Ins. Asso. v. Dewberry* (Ark.) *supra*.

And see *Forest City Ins. Co. v. Hardesty* (Ill.) supra, wherein the court said: "It would seem to be unjust and inequitable that a forfeiture should be enforced because of an act for which the assured is not responsible, and which is in no way his fault. It would be proper to hold the assured responsible for any act of forfeiture which is within his control. There is no claim, here, that the death which caused the change of title was the result of suicide, or of any improper conduct on the part of the assured."

A provision in a fire insurance policy that the policy shall be void if the property is transferred without the consent of the insurance company does not cover a transfer by operation of law, resulting from the death of the insured. *Pfister v. Gerwig* (Ind.) supra. See to the same effect, *Georgia Home Ins. Co. v. Kinnier* (Va.) supra.

And where the charter of an insurer provided that its policy should become void if the property insured should be "alienated by sale or otherwise," it was held that the death of the insured before a loss by fire did not work an alienation of the property so as to prevent the administrator from recovering on the policy. *Burbank v. Rockingham Mut. F. Ins. Co.* (N. H.) supra, wherein the court said: "Alienation differs from descent, in this, that alienation is effected by the voluntary act of the owner of the property, while descent is the legal consequence of the decease of the owner, and is not changed by any previous act or volition of the owner."

III. *Effect on policy of acts subsequent to death of insured.*

Since the rights under a policy of insurance on property pass with the property on the death of the insured, acts of his heirs or personal representatives after his death will have the same effect on the policy as if done by the insured in his lifetime.

Thus, in *Planters' Mut. Ins. Asso. v. Dewberry* (1901) 69 Ark. 295, 86 Am. St. Rep. 195, 62 S. W. 1047, it appeared that an insurance policy provided that, if any change took place in

the occupation, possession, etc., of the property insured, the policy would become void. After the death of the insured, but prior to the loss by fire, the property was rented to tenants without the consent of the insurer. In an action on the policy after a loss by fire, it was held that there was such a change in the occupation and possession as to relieve the company from liability on the policy.

Where a policy provides that it shall be void if any change of title in the insured property shall take place before or after the death of the insured, the policy becomes void where there is a complete change of title in the property without the consent of the insurance company, after the death of the insured and before a loss by fire; and no recovery can be had thereon. *Lappin v. Charter Oak F. & M. Ins. Co.* (1870) 58 Barb. (N. Y.) 325.

So, in the case of *Trabue v. Dwelling House Ins. Co.* (1894) 121 Mo. 75, 23 L.R.A. 719, 42 Am. St. Rep. 523, 25 S. W. 848, it appeared that the policy of insurance provided that it should be void if any change, except the death of the insured, should take place in the title or possession of the property insured. After the death of the insured, the property was set aside to the widow by a partition proceeding. It was held that this was such a change of title as to avoid the policy.

Likewise, in *Hine v. Woolworth* (1883) 93 N. Y. 75, 45 Am. Rep. 176, the policy in suit provided that if the interest of the insured in the insured property should be changed in any manner, "whether by act of insured or by operation of law," without the consent of the insurer, the policy should be void. The insured died intestate, and his widow and children remained on the premises insured until a loss by fire occurred. The court held that the company was not liable, as there was such a change of title as to avoid the policy.

See to the same effect, *Sherwood v. Agricultural Ins. Co.* (1878) 73 N. Y. 447, 29 Am. Rep. 180.

And see *Miller v. German Ins. Co.*

(1894) 54 Ill. App. 53, wherein a like conclusion was reached under a similar state of facts.

It was held in *Matthews v. American Cent. Ins. Co.* (1897) 154 N. Y. 449, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751, that an insurance company would not be liable on a policy of fire insurance, where a loss occurred after the death of the insured, and where notice and proof of loss were not given within the time required by the policy, and no sufficient excuse for the delay was shown.

So, it has been held that the failure of the heirs, after the death of the insured, to pay a premium on a policy of tornado insurance, caused the policy to lapse and prevented a recovery in case of a loss. *Coil v. Continental Ins. Co.* (1913) 169 Mo. App. 634, 155 S. W. 872. And see *Continental Ins. Co. v. Daly* (1885) 33 Kan. 601, 7 Pac. 158, wherein the same rule was applied to a policy of fire insurance, under a similar state of facts.

Likewise, in *Sauner v. Phoenix Ins. Co.* (1890) 41 Mo. App. 480, it appeared that a policy of fire insurance was taken out on a dwelling house, and the insured gave his note for the premium on condition that if the note was not paid at maturity the policy would cease to be in force. The insured died before the note became due. By request of the heirs of the insured, it was indorsed on the policy that the property was owned by them, and that if a loss occurred, it would be payable to them as their interest appeared. The note was not paid at maturity, and a loss occurred soon afterwards. It was held that it was the duty of the heirs to pay the note at maturity, and, they not having done so, the company was discharged from its liability on the policy.

IV. Who may sue on policy.

It is generally held that the legal representative of the estate is the proper person to bring an action against the insurance company for the proceeds of an insurance policy, where a loss occurs after the death of the insured.

Alabama.—See *Norwich Union F.*

Ins. Co. v. Prude (1906) 145 Ala. 297, 40 So. 322, 8 Ann. Cas. 121.

Illinois.—*Forest City Ins. Co. v. Hardesty* (1899) 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139.

Kansas.—*Germania F. Ins. Co. v. Curran* (1871) 8 Kan. 9; *German Ins. Co. v. Wright* (1897) 6 Kan. App. 611, 49 Pac. 704.

Kentucky.—*LOUISVILLE TRUST Co. v. BOSTON INS. Co.* (reported herewith), ante, 305.

Missouri.—*Coil v. Continental Ins. Co.* (1913) 169 Mo. App. 634, 155 S. W. 872.

New York.—*Wyman v. Wyman* (1863) 26 N. Y. 253; *Lawrence v. Niagara F. Ins. Co.* (1896) 2 App. Div. 267, 37 N. Y. Supp. 811, affirmed in (1897) 154 N. Y. 752, 49 N. E. 1099. See *Lappin v. Charter Oak F. & M. Ins. Co.* (1870) 58 Barb. 325.

Virginia.—*Georgia Home Ins. Co. v. Kinnier* (1876) 28 Gratt. 88.

Thus, in *Germania F. Ins. Co. v. Curran* (Kan.) supra, it was held that the administrator was the proper party to bring an action to recover for a loss against an insurance company which had insured property of the intestate prior to his death, where the policy stipulated to make good any loss "to assured, his executors, administrators, and assigns."

See also *German Ins. Co. v. Wright* (Kan.) supra, wherein, under similar facts, it was held that the executrix of the estate was the proper party to maintain an action upon the policy of insurance. See to the same effect, *Lawrence v. Niagara F. Ins. Co.* (1896) 2 App. Div. 267, 37 N. Y. Supp. 811, affirmed in (1897) 154 N. Y. 752, 49 N. E. 1099. *Coil v. Continental Ins. Co.* (Mo.) supra. And see the reported case (*LOUISVILLE TRUST Co. v. BOSTON INS. Co.* ante, 305).

A transferee of a devisee of certain real property, which is insured against loss by fire, may recover on the policy where the loss occurs subsequent to the death of the insured, and after the property and policy are transferred to the transferee, the consent of the insurance company to the transfer being indorsed on the policy.

Grant v. Eliot & K. Mut. F. Ins. Co. (1883) 75 Me. 202.

V. Persons entitled to proceeds.

It seems to be the general rule that the proceeds of a policy of insurance on property take the place of the property, in case of a loss after the death of the insured, and go to the persons who would have taken the property, subject to the same charges and liabilities which would have attached to the property. See the cases cited throughout this subdivision.

Thus, in case of insurance on the property of an intestate, if a loss occurs after his death the proceeds of the insurance go to his heirs.

In Wyman v. Wyman (1863) 26 N. Y. 253, modifying (1862) 36 Barb. 368, it was held that, where a loss occurs by fire after the death of the insured, the proceeds of the insurance policy, being realty, pass to the heirs at law, and not to the administrator, subject, however, to dower and debts which are entitled by law to be paid out of such assets.

In Harrison v. Harrison (1833) 4 Leigh (Va.) 371, it was held that the sureties on an administrator's bond could not be held liable to the heirs of the insured for the proceeds of a fire insurance policy, where the loss occurred after the death of the insured, and the proceeds of the insurance were received by the administrator, as the money so received belonged to the heirs, and not to the intestate's estate.

So, in the case of Re Kane (1902) 38 Misc. 276, 77 N. Y. Supp. 874, it was held that where a loss by fire occurred subsequent to the death of the insured,—an infant, who died intestate without lawful descendants,—the proceeds of the insurance belonged to the father, as the realty, immediately on the infant's death, descended to the father.

In Mildmay v. Folgham (1797) 3 Ves. Jr. 471, 30 Eng. Reprint, 1111, it appeared that a partnership had been formed between several persons for the purpose of insuring each other's property, and they mutually agreed to answer for any loss by fire that any

one of them might incur. One of the rules of the society provided that the interest of any member who died should survive to his executors, etc., unless assigned to his heirs. A loss occurred by fire after the death of one of the persons so insured, and, in an action by his heirs to recover the amount of the loss, it was held that the proceeds survived to the executors, as the society was a mere partnership, and it was impossible to make a partnership for the insured and his heirs.

Where insured property is given for life with a remainder over, and a loss occurs after the death of the insured, the proceeds of the insurance go to the tenant for life, and then to the remainderman. Thus, in Graham v. Roberts (1851) 43 N. C. (8 Ired.) 99, it was held that the life tenant of insured premises was entitled to the use of the proceeds of the policy of fire insurance, where the loss occurred after the death of the insured, and that on the death of the life tenant, the principal should be paid to the remainderman. See to the same effect, Clyburn v. Reynolds (1889) 31 S. C. 91, 9 S. E. 973. So, in Haxall v. Shippen (1839) 10 Leigh (Va.) 536, 34 Am. Dec. 745, it appeared that, after a loss, the life tenant executed a bond for the repayment of the proceeds of the insurance at the termination of the life estate, to the remaindermen. The life tenant used the insurance money for the purpose of replacing the building that was destroyed by the fire. In an action by the husband of one of the remaindermen, at the termination of the life estate, to enforce the provisions of the bond, the action was defended on the ground that the money had been expended for the purpose of replacing the building which was destroyed. In holding that an action on the bond could be maintained, the court said: "To say that the daughters shall not have the money, but shall have the buildings in satisfaction of it, is to contradict the bond. To contradict the bond, which follows the decree, is to controvert the decree; and this cannot now be done, even by appeal,

and much less when thus assailed collaterally only. That decree, therefore, I conceive, is conclusive upon the question of the plaintiff's claim to have the money, for the purpose of rebuilding at the joint charge of the life owner and those in remainder."

In *Millard v. Beaumont* (1916) 194 Mo. App. 69, 185 S. W. 547; it appeared that a policy of fire insurance made no provision in regard to the loss being paid to the administrator or executor of the insured. After the death of the insured the property was destroyed by fire. The insured left a will by which she devised and bequeathed to a nephew the house, household furniture, etc., which was insured, for his natural life, with the remainder to his heirs. In an action for the proceeds the nephew contended that he was entitled to the whole amount paid by the insurance company. The court said: "It is clear . . . that plaintiff is not entitled to the entire fund in question, but only such part of it as corresponds to his life estate in the property destroyed. The remaindermen, defendants, have a corresponding interest."

It was also held in *Millard v. Beaumont* (Mo.) *supra*, that the life tenant was entitled under the Revised Statutes 1909, § 8499, to a commutation of his interest in the proceeds of the policy, a remainder of the fund to be awarded to his bodily heirs.

In *Culbertson v. Cox* (1882) 29 Minn. 309, 43 Am. Rep. 204, 13 N. W. 177, it appeared that the intestate, prior to his death, insured his dwelling house against loss by fire for himself and his personal representatives. After his death, and while the widow continued to occupy the dwelling house as a homestead, which under the law she was entitled to do for her natural life, it was destroyed by fire. It was held that the administrator of the estate held the proceeds of the policy as trustee for the widow, creditors, and heirs, and, as the widow was entitled to hold the real estate during her natural life, she was entitled to a life use of the proceeds of the insurance policy. In *Dix v. German*

Ins. Co. (1896) 65 Mo. App. 34, on an action by a husband on a policy of insurance issued to his wife on a dwelling house, with loss payable to the one entitled under the law to the dwelling house, it was held that, the loss having occurred after the death of the wife, the husband was entitled to recover the proceeds, as he was entitled to the dwelling house as tenant by the curtesy.

Like any other property passing by devise or descent, the proceeds of an insurance policy on property destroyed or damaged after the death of the insured may be liable to the claims of creditors of the insured.

Thus, it was held in *Nichols's Appeal* (*Nichols v. Day*) (1889) 128 Pa. 428, 5 L.R.A. 597, 18 Atl. 333, that the proceeds of an insurance policy, resulting from a loss by fire after the death of the insured, were applicable to the claims of creditors, where the estate of the insured was insolvent.

So, it was held in *Mapes v. Coffin* (1835) 5 Paige (N. Y.) 296, that a creditor who had levied execution on personal property insured against loss by fire, after the death of the insured but prior to a loss by fire, was entitled to priority of payment out of the proceeds of the insurance over subsequent judgment creditors. In *National Bank v. Bond* (1891) 89 Tenn. 462, 14 S. W. 1078, it was held that the creditors of the owner of a two-thirds interest in insured property could maintain an action against the owner of the other one-third interest to compel him to account for two thirds of the proceeds of an insurance policy, where a loss by fire occurred after the death of the owner of the two-thirds interest, the owner of the one-third interest having previously obtained a decree for two thirds of the amount of premiums which he had paid for the insurance since the death of the other joint owner.

In *Quarles v. Clayton* (1899) 87 Tenn. 308, 3 L.R.A. 170, 10 S. W. 505, it appeared that a wife, by virtue of a contract agreement with her husband, took a life estate in certain property and waived her right to dower. The husband procured a pol-

icy of insurance on the dwelling house situated on the life estate, which contained a provision that it should be void if any change took place in the title of the property, except by succession, by reason of the death of the insured. After the death of the husband, and while the widow was in possession of the life estate, the dwelling house

was destroyed by fire. In an action by the widow against the administrator claiming a life interest in the proceeds of the policy, it was held that she took the premises by purchase instead of by succession, and the destruction of the dwelling house after the husband's death was not an injury for which his estate or heirs were responsible. L. W. B.

E. M. CLARK, Plff. in Err.,
v.
JOHN C. DUNCANSON.

Oklahoma Supreme Court—September 7, 1920.

(79 Okla. 180, 192 Pac. 806.)

Limitation of actions — counterclaim — assailing tax deed.

1. Plaintiff commenced an action within twelve months from the recording of his tax deed, to quiet title; he made the former owner a party defendant; the defendant, after the expiration of twelve months from the recording of the tax deed, filed an answer, entitling the same "Answer and cross petition," in which he assailed on several grounds the validity of the tax sale and tax deed, and prayed judgment against the plaintiff for possession and damages. Held, that the so-called cross petition is a counterclaim, within the meaning of § 4746, Rev. Laws 1910, and within the clause therein declaring that a "counterclaim shall not be barred by the Statute of Limitations until the claim of the plaintiff is so barred."

[See note on this question beginning on page 326.]

Tax — duty to notify taxpayer of amount due.

2. The provisions of the act of the legislature approved March 22, 1911 (Sess. Laws 1910-11, p. 263), declaring that it shall be the duty of the county treasurer on or before November 1, to notify by mail, postage prepaid, each taxpayer whose name appears on his record of the amount of his taxes, and when the same will become due and delinquent, is mandatory, and the absence of such notice nullifies the sale of the taxpayer's land for taxes and penalty.

Cloud — duty to establish title.

3. The plaintiff in an action to quiet title to land must allege and prove that he is the owner of either the legal title or the complete equitable title. Unless plaintiff has the title, it is immaterial to him what title defendant claims.

[See 5 R. C. L. 646.]

Limitation of actions — land sold for taxes.

4. Under § 7419, Rev. Laws 1910, providing that "no action shall be commenced by the holder of the tax deed or the former owner . . . to recover possession of the land which has been sold and conveyed for non-payment of taxes, or to avoid such deed, unless such action shall be commenced within one year after the recording of such deed," neither party can successfully maintain against a plea of such Statute of Limitation, an action not commenced within one year after the recording of the tax deed.

— effect of bringing suit.

5. Section 7419, Rev. Laws 1910, contemplates that if either the former owner or the tax deed purchaser desires to litigate the validity of the tax deed, and one or the other of them commences an action, either to recover possession of the land or to quiet

title, and in such action the plaintiff's petition clearly tenders to the defendant the validity of the tax deed as the issue in the case, and such suit is commenced within one year from the recording of the tax deed, the Statute of Limitation stops running against all defenses which may be interposed by the defendant.

— application to defense.

6. Statutes of limitations apply generally to actions, and not defenses. Held, that where the plaintiff is in possession claiming title under a tax deed, and commences an action against the former owner within

twelve months after the recording of his tax deed, to quiet title, the former owner may challenge the validity of the tax deed by answer filed more than twelve months after the tax deed was recorded.

[See 17 R. C. L. 745.]

Definition — "subject of action."

7. The "subject of the action" within the meaning of the statute permitting counterclaim of matters connected with the subject of the action denotes the plaintiff's principal primary right to enforce or maintain his action or controversy.

[See 24 R. C. L. 853.]

ERROR to the District Court for Pawnee County (Linn, J.) to review a judgment in favor of defendant in an action brought to quiet title to certain land. *Affirmed.*

Statement by Ramsey, J.:

Plaintiff in error, as plaintiff below, commenced this action on November 3, 1915, against defendant in error, defendant below, to quiet his title to 80 acres of land, and alleges that he is the owner of the legal and equitable title to the land described; that he is, and had been for more than a year prior thereto, in the quiet and peaceful possession of the 80 acres involved, "under and by virtue of a certain tax deed," a copy of which is attached as exhibit A. Plaintiff also alleges that the defendant claims some estate or interest in the land adverse to the plaintiff under a certain real-estate mortgage, the exact nature of which is unknown to him, but is known to defendant, but that the mortgage under which defendant claims is not a valid lien by reason of the foreclosure proceedings, etc. Plaintiff prays that he be adjudged the absolute owner in fee of the legal and equitable title to the land, and that defendant be forever barred and enjoined from setting up or making any claim to any title, right, interest, or estate in said land, and that his (plaintiff's) title be quieted against the defendant's claims. Plaintiff's tax deed was executed by the county treasurer on February 18, 1915, and recorded February 19, 1915. It will thus be

seen that plaintiff commenced his action in about nine months after the registration of his tax deed. The record does not show when service of process was obtained upon defendant, nor when he filed any pleadings other than his answer and cross petition filed on September 6, 1916, more than one year after the registration of plaintiff's tax deed. Defendant in his answer and cross petition pleads a general denial and avers that he is the owner of the 80 acres covered by the tax deed, as purchaser at a mortgage foreclosure sale made May 25, 1910. Defendant also assails the validity of the tax deed upon several grounds, one of which is this: That the county treasurer did not notify defendant by mail, postage prepaid, of the amount of his taxes, and when the same would become due and delinquent, as required by the act of the legislature approved March 22, 1911 (Sess. Laws 1910-11, p. 263), and that the sale is void because the treasurer added 18 per cent penalty, and sold the land for the taxes, plus the penalty.

Messrs. Clark & Armstrong, for plaintiff in error:

The deed being regular in form and not being attacked from anything appearing upon its face, even if there were irregularities proved under the

cross petition (which there were not), it would not avail the defendant, because more than one year had elapsed between the filing of the tax deed for record and the filing of the cross petition.

O'Keefe v. Dillenbeck, 15 Okla. 437, 83 Pac. 540; Toby v. Allen, 3 Kan. 399; Nedde v. Neddo, 56 Kan. 507, 44 Pac. 1; Richards v. Tarr, 42 Kan. 547, 22 Pac. 557.

Defendant, being out of possession and seeking affirmative relief in the nature of ejectment, must recover upon the strength of his own title rather than the weakness of that of his opponent.

Hurst v. Sawyer, 2 Okla. 470, 37 Pac. 817; Robertson v. Vancleave, 129 Ind. 217, 15 L.R.A. 68, 26 N. E. 899, 29 N. E. 781; 24 Cyc. 49.

Messrs. Thurman S. Hurst and Redmond S. Cole, for defendant in error:

The tax deed was void because it did not show on its face a sale of the property by the treasurer at the place provided by law.

Weeks v. Merkle, 6 Okla. 714, 52 Pac. 929; Davenport v. Wolf, 59 Okla. 92, 158 Pac. 382; Spalding v. Hill, 47 Okla. 621, 149 Pac. 1133; Lowenstein v. Sexton, 18 Okla. 332, 90 Pac. 410; Eldridge v. Robertson, 19 Okla. 165, 92 Pac. 156; Kramer v. Smith, 23 Okla. 381, 100 Pac. 532; Blanchard v. Reed, — Okla. —, 168 Pac. 664; Hankratt v. Hamil, 10 Okla. 219, 61 Pac. 1050; Wade v. Crouch, 14 Okla. 593, 78 Pac. 91; Keller v. Hawk, 19 Okla. 407, 91 Pac. 778.

It was void because it did not show on its face any right in plaintiff to demand a deed.

Wilson v. Wood, 10 Okla. 279, 61 Pac. 1045; Weeks v. Merkle, 6 Okla. 714, 52 Pac. 929; Keller v. Hawk, 19 Okla. 407, 91 Pac. 778.

It was also void because the county treasurer was without jurisdiction to issue the same.

Trimmer v. State, 43 Okla. 152, 141 Pac. 784; State ex rel. Oklahoma City Times Co. v. Baker, 43 Okla. 646, 143 Pac. 668; St. Louis & S. F. R. Co. v. Amend, 44 Okla. 602, 145 Pac. 1117; Alexander v. Gordon, 41 C. C. A. 232, 101 Fed. 91; Cordray v. Cordray, 19 Okla. 36, 91 Pac. 781; Lewis v. Lewis, 15 Kan. 193; O'Rear v. Lazarus, 8 Colo. 608, 9 Pac. 621; Dawson v. Anderson, 38 Okla. 167, 132 Pac. 666; Morton v. Morton, 16 Colo. 358, 27

Pac. 718; Harris v. Morris, 8 Cal. App. 151, 84 Pac. 678; Roberts v. Roberts, 3 Colo. App. 6, 31 Pac. 941; Taylor v. Brobst, 4 G. Greene, 534; State ex rel. Boyd v. Superior Ct. 6 Wash. 352, 33 Pac. 827; Gay v. Ulrichs, 136 App. Div. 809, 121 N. Y. Supp. 726; Moore Realty Co. v. Carr, 61 Or. 34, 120 Pac. 742; Anderson v. Anderson, 229 Ill. 538, 82 N. E. 311; Johnson v. Canty, 162 Cal. 391, 123 Pac. 263.

Plaintiff is not entitled to recover, because he failed to show the land was advertised and sold as by law provided.

Harris v. Mason, 120 Tenn. 668, 25 L.R.A.(N.S.) 1011, 115 S. W. 1146; Alexander v. Gordon, 41 C. C. A. 228, 101 Fed. 91.

The deed being void on its face, and there being no proper service on the defendant, and the presumption that the land was advertised and sold as by the law provided being negated, the Statutes of Limitation could not and did not commence to run against the defendant.

Lowenstein v. Sexton, 18 Okla. 332, 90 Pac. 410; Keller v. Hawk, supra; Hill v. Spalding, 47 Okla. 621, 149 Pac. 1133; Sweigla v. Gates, 9 N. D. 538, 84 N. W. 481.

Ramsey, J., delivered the opinion of the court:

We will dispose of the points argued in inverse order:

1. The 80 acres were sold on November 4, 1912, for the 1911 taxes plus "penalty, interest, and costs, due and unpaid thereon and delinquent on said real estate," as recited in the tax deed itself. The county treasurer bid the land in for \$12.47, and certificate of purchase was issued, bearing that date, which plaintiff subsequently acquired, and on which he obtained his tax deed. The provision in the act of the legislature approved March 22, 1911 (Sess. Laws 1910-11, p. 263), declaring that it shall be the duty of the county treasurer, on or before November 1st, to notify by mail, postage prepaid, each taxpayer whose name appears on his record of the amount of his taxes, and when the same will become due and delinquent, is manda-

tory, and the absence of such notice nullifies the sale of the taxpayer's land for taxes and penalty. The sale of a tract of land for a legal tax, plus an illegal penalty, is no foundation for a tax deed, and upon a showing of such facts a tax deed issued on such sale will be canceled and set aside. *Williams v. McGill*, — Okla. —, 169 Pac. 1074; *2 Cooley, Taxn.* 3d ed. pp. 954 and 958; *Miller v. State*, — Okla. —, 173 Pac. 67; *Trimmer v. State*, 43 Okla. 152, 141 Pac. 784; *State ex rel. Oklahoma City Times Co. v. Baker*, 43 Okla. 646, 143 Pac. 668; *City Nat. Bank v. Gayle*, 55 Okla. 301, 155 Pac. 552. The notice required by said Act of March 22, 1911, was not given. Defendant claims the tax deed is void on its face, but we pass over that question without discussion or decision, and for the purpose of this case we assume, without deciding, that it is not void on its face.

2. Plaintiff filed a reply to defendant's answer and cross petition, setting up the Statute of Limitations of one year contained in § 7419, Rev. Laws 1910, and contends that, inasmuch as defendant did not file his answer and cross petition until after the expiration of one year from the recording of the tax deed, the cause of action set up in his cross petition is barred by said Statute of Limitations. Plaintiff contends that the cross petition is in effect the commencement of a new suit, and, not having been commenced within one year from the registration of the tax deed, it is barred, although set up as a defense to plaintiff's action to establish title under his tax deed, commenced within about nine months after the tax deed was recorded. Defendant contends that his answer and cross petition constitute a counterclaim, and under § 4746, Rev. Laws 1910, is not barred by the Statute of Limitations until the plaintiff's claim is likewise barred. Under § 4927, Rev. Laws, 1910, as amended by the act of the legislature approved January 25, 1911 (Sess.

Laws 1910–11, p. 25), the plaintiff commenced this action for the purpose of determining the "adverse estate or interest" defendant had in the land. Plaintiff alleges in his petition that he is the owner of the legal and equitable title, and bases his claim of title on the tax deed exhibited with his petition. Plaintiff therefore bases his right to a judgment on two things, to wit: (a) Possession; and (b) title under the tax deed. He therefore presented to the defendant the clear-cut issue as to whether or not he (plaintiff) obtained title under the tax deed. Unless plaintiff has title, he has no title to quiet. In an action to quiet title, the plaintiff must allege and prove that he is the owner of either the legal title or the complete equitable title. Whether the defendant has any title is immaterial to the plaintiff, unless the plaintiff has title. Plaintiff must recover on the strength of his own title, and not on the want of title in the defendant. 17 Enc. Pl. & Pr. pp. 326 to 331; *Mason v. Gates*, 82 Ark. 294, 102 S. W. 190; *Spalding v. Hill*, 47 Okla. 621, 149 Pac. 1133; *Clark v. Holmes*, 31 Okla. 164, 120 Pac. 642, Ann. Cas. 1913D, 385; *Lewis v. Clements*, 21 Okla. 167, 95 Pac. 769; *Blanchard v. Reed*, — Okla. —, 168 Pac. 665. At the time plaintiff commenced this action, defendant had a good defense, as shown by the ruling in the first paragraph of this opinion. Did he lose that, by failing to answer until after the expiration of the one year's time within which to commence an action to recover possession of the land sold under the tax sale? Section 7419, Rev. Laws 1910, provides that "no action shall be commenced by the holder of the tax deed or the former owner . . . to recover possession of the land which has been sold and conveyed by deed for nonpayment of taxes, or to avoid such deed, unless such action shall be commenced within one year after the recording of such deed."

Tax-duty to
notify taxpayer
of amount due.

Cloud-duty to
establish title.

That statute bars a suit not commenced within one year by the holder of the tax deed, or by the "former owner" to

Limitation of
actions—land
sold for taxes.

recover possession, or by the former owner to avoid such tax deed. Neither party can successfully maintain against that Statute of Limitations such an action not commenced within one year after the recording of the tax deed. The defendant did not commence this action, but the plaintiff commenced it within the year, and when the plaintiff commenced the action within the year, he tendered to the defendant the clear-cut issue as to whether or not his tax deed was valid, and, having presented that issue to the defendant within a year from the recording of the deed, the defendant had a right to meet the issue and litigate the validity of the deed, although the defendant may not have filed his answer or pleading until after the end of the year. What that statute contemplates is that, if either of the parties desires to litigate the validity of

—effect of
bringing suit.

the tax deed, one or the other of them must commence the action within one year after the recording of the deed. The purpose of a statute of limitation is to put titles in repose. Section 7419 is a Statute of Limitation, evidencing the purpose to cut off actions involving the validity of the tax deed, unless the action is commenced by one or the other of the parties within twelve months after the deed is recorded. It is therefore our conclusion that, if either party (that is, the owner of the land prior to the tax deed, or the holder of the tax deed) commences an action to recover possession or to avoid the

—application
to defense.

tax deed within twelve months from the recording of the deed, the running of the statute is arrested as to the defendant (that is, the other party). This construction fully satisfies the purpose of the

statute, and is in harmony with the settled rule that the Statute of Limitations does not run against a mere defense.

Short statutes of limitations, barring actions to recover land sold for taxes, are not construed with that liberality exhibited towards the general statutes of limitations. 2 Cooley, Taxn. 3d ed. pp. 1066 and 1088. The Statute of Limitations applies to actions, and not defenses. Thus, in *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 510, 59 Pac. 296, the court held that the defense based on the allegation that the contract relied upon by plaintiff was obtained by fraud was not barred by the Statute of Limitations, prescribing the time in which actions must be commenced for fraud or mistake. The court said: "It is also true that, where a party seeks relief upon the ground of fraud or mistake, the action must be commenced within three years after the discovery of the facts constituting the fraud or mistake; but a different case is presented where the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid or to enforce its executory terms, and is thus himself asking affirmative relief. The three-year Statute of Limitations does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and, when enforcement is sought against him, excuse himself from performance by proof of the fraud. Of course, in such a case, he incurs the risk of defeat by the intervention of the rights of innocent parties."

In *State ex rel. American Freehold-Land Mortg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321, the plaintiff commenced an action in mandamus to compel the mayor and city

council to levy a tax in an amount sufficient to pay relator's claims. The relator showed that certain paving contracts were made with the city, that warrants were issued, that the city refused to pay them, and that judgments were taken against the city, which the city also refused to pay or levy a tax to pay. The city pleaded that the judgments were obtained by fraud, but the Statute of Limitations had run against the city's remedy to set aside the judgments for fraud. The court held that so long as the cause of action survived, the equitable defenses thereto also survived, and that, although the defendant's cause of action on account of fraud was barred by the Statute of Limitations, the relator's judgment did not become, by age alone, immune from the infirmities under which it originated. See also *Weakley v. Meriwether*, 156 Ky. 304, 160 S. W. 1055; 2 Wood, Limitations, 4th ed. §§ 282, 284a to 284b, inclusive; *Snow v. Gallup*, 57 Tex. Civ. App. 572, 123 S. W. 222; *Nelson v. San Antonio Traction Co.* — Tex. Civ. App. —, 142 S. W. 146; *Blackshear v. Dekle*, 120 Ga. 766, 48 S. E. 311; *Hall v. O'Connell*, 51 Or. 225, 94 Pac. 564.

In *Butler v. Carpenter*, 163 Mo. 597, 63 S. W. 823, the plaintiffs commenced an ejectment action, in answer to which defendant alleged that twenty years prior thereto the land was purchased by plaintiffs' ancestor under an agreement by which defendant paid half the consideration; said ancestor taking the title in trust for defendant, to the extent of an undivided one-half interest. Plaintiffs filed a demurrer to the answer on the ground that the defendant's alleged equitable title was outlawed and barred by the Statute of Limitations. The defendant not only pleaded his equitable title as a defense, but closed his answer with a prayer for a decree divesting plaintiff of one half of the legal title, and awarding same to defendant. The court said: "The third ground of de-

murrer, 'That defendant's alleged equitable title is stale and barred by the Statute of Limitations,' may also be disposed of by the simple suggestion that the sole purpose of the Statute of Limitations, by its very language, is to bar actions, and not to suppress or deny matters of defense, whether equitable or legal, and that, too, when, as in this case, the equitable defense is accompanied by a prayer for affirmative relief. The purpose of the statute is to quiet the assertion of old, stale, and antiquated demands, but it has never been thought that its intended object was to go further, and to deny a just and meritorious defense, whether the facts of that defense had their birth in the first, tenth, or twentieth year before the call for the assertion of those facts was made necessary by some hostile claim, demand, or proceeding. A ground of defense never becomes stale or barred by the Statute of Limitations, but grows in strength and force as the limitation period against a right of action widens. The Statute of Limitations may be used by a defendant as a shield for his protection or defense, but is never to be turned upon him as a sword with which to compass his defeat."

The judgment of the trial court in sustaining the demurrer to the defendant's answer was reversed by the supreme court, and the case remanded for a trial on the facts.

A careful consideration of § 7419, Rev. Laws 1910, convinces us that the legislature did not intend to cut off defenses not made within a year after the recording of the tax deed. Considering § 7419 in the light of the authorities cited and rules therein announced, it clearly appears that all the legislature intended was to bar litigation over tax titles, unless an action to recover the land or avoid the tax deed is commenced by one or the other of the parties; that is, the holder of the tax deed, or the owner of the land, within one year from the recording of the tax deed.

If the defenses to an action to quiet title commenced by the holder of the tax deed are not barred by the Statute of Limitations, it seems clear that a mere judgment dismissing plaintiff's suit, and not awarding defendant possession, thus leaving plaintiff in possession, renders nugatory the very defenses the law holds to be good. Thus, we would have the law saying to a defendant: "Your defenses are good, they are not barred by the Statute of Limitations, and from your defenses it appears plaintiff has no valid title, and while I find you have the title and plaintiff has no title, I can do nothing except leave the plaintiff in possession."

This would be to keep the word of promise to the ear, while breaking it to the hope. It was not necessary for the defendant to ask for cross relief in order to defeat the plaintiff. See 17 Enc. Pl. & Pr. 354. In actions to quiet title or of ejectment, the title can be determined upon the petition and answer without a cross petition, unless the defendant seeks to enforce some equitable right. 6 Standard Proc. 300; Bacon v. Rice, 14 Idaho, 107, 93 Pac. 511; Johnson v. Taylor, 150 Cal. 201, 10 L.R.A.(N.S.) 818, 119 Am. St. Rep. 181, 88 Pac. 903.

3. But the defendant's answer and cross petition are a counter-

~~claim~~—
answering tax deed.

claim within the meaning of § 4746, Rev. Laws 1910, providing that a "counterclaim shall not be barred by the Statutes of Limitations until the claim of the plaintiffs is so barred." While the Code of Civil Procedure was intended to simplify pleading and practice, it fell far short of making itself entirely clear as to what it means to include in the term "counterclaim." We will not review the authorities defining counterclaim as used in the Code of Civil Procedure, because, like the charms of Cleopatra, "age cannot wither her nor custom stale her [their] infinite variety. If the affirmative relief asked by defendant be against

16 A.L.R.—21.

the plaintiff, and arises (1) out of the contract, (2) or the transaction set forth in plaintiff's petition as the foundation of his claim, or (3) connected with the subject of the action, it is a counterclaim, and not barred by the Statute of Limitations, unless the plaintiff's claim is also barred. The third subdivision of § 4745, Rev. Laws 1910, authorizes the defendant to set forth in his answer as many grounds of defense, counterclaim, set-off, and for relief, as he may have, irrespective of whether they be denominated legal or equitable, or both. We think the new matter by way of defense and cross petition set up by defendant in this case is clearly "connected with the subject of the action," and therefore falls within the meaning of counterclaim as used in § 4746, Rev. Laws 1910. We agree with Pomeroy that the "subject of the action" denotes the plaintiff's principal

Definition—
subject of action.

primary right to enforce or maintain his action or controversy. The primary right here is the title, if any, acquired by plaintiff under the tax deed, and he puts that forth in his petition as his primary right to have and to hold the possession and title to the land. If we treat the land as the "subject of the action," the defendant's defense, his claim of title, is certainly as closely "connected with the subject of the action" (that is, the land) as plaintiff's tax deed is "connected with the subject of the action" (that is, the land). The whole litigation revolves around the validity of plaintiff's tax title, and not around defendant's title. See Pom. Code Rem. 4th ed. §§ 647, 651.

In Gillenwaters v. Campbell, 142 Ind. 529, 41 N. E. 1041, plaintiff commenced an action to quiet title, to which the defendant filed an answer and cross petition, alleging that he was the owner of and entitled to the immediate possession of the land, and that plaintiff, without right, was in possession. Defendant prayed for possession and dam-

ages, which the court held was a counterclaim properly pleaded with a general denial. The Indiana supreme court said: "Tested as a cross demand for possession and damages, it must be determined whether the relief demanded 'is any matter arising out of or connected with the cause of action,' as required by the Code (Rev. Stat. 1894, § 353 [Rev. Stat. 1881, § 350]), for, as said in *Standley v. Northwestern Mut. L. Ins. Co.* 95 Ind. 254: "There must be some legal or equitable connection between the matters pleaded as a counterclaim and the matters alleged in the original complaint." The matters pleaded 'might be the subject of an action in favor of the appellant, but could not properly be considered as tending 'to reduce the plaintiff's claim.' The question returns, therefore: Are the matters pleaded 'connected with the cause of action' alleged in the complaint? They relate to the same land. They depend upon the ownership, by the plaintiff or the defendant, of the land. The cause of action pleaded in the complaint and that alleged in the first paragraph of cross complaint have such intimate legal connection as permitted them to have been united in one action, if such causes concurred in the same person. Rev. Stat. 1894, § 279 [Rev. Stat. 1881, § 278.] It is the policy of the law that, when litigation must be resorted to for the adjustment of disputed rights, every question logically connected with such disputed rights shall be determined and put at rest in one action. We conclude, therefore, that the appellant might properly demand at least the possession of the land, the title to which was put in issue by the complaint. If he had sought, in this paragraph, to quiet his title as against the appellee, he certainly would have been permitted, in connection with that demand, to seek possession and damages. Instead of a prayer to quiet title, he alleged his ownership and demanded pos-

session and damages. This, we think, he had a right to do."

In *Eagan v. Mahoney*, — Colo. App. —, 134 Pac. 156, the court held that a cross complaint by one defendant against another, asking for the removal of a cloud on the title to the land, is a counterclaim under the Code of Civil Procedure. The court said: "Counsel's claim that the defendant Mahoney's cross bill or cross complaint cannot be sustained as a cause of action against the defendant Eagan, for the purpose of quieting title as against him, because the same is not defensive, and therefore not a counterclaim such as the Code provides, cannot be upheld. The counterclaim or cross complaint mentioned in §§ 56 and 57, Mills's Anno. Code, is equivalent to a cross bill in equity practice. *Allen v. Tritch*, 5 Colo. 222, 225; *Travelers' Ins. Co. v. Redfield*, 6 Colo. App. 190, 40 Pac. 195. And we think it cannot be successfully asserted that, under the circumstances of this case, the cross bill is not 'connected with the subject of the action.' The fact that the affirmative relief sought by this cross complaint is in the nature of an original bill, seeking the court's aid beyond the purposes of defense, to the original complaint, does not take the plea out of the provisions of the Code concerning counterclaims. *Crisman v. Heiderer*, 5 Colo. 589, 594. The relief prayed for in the cross complaint was necessary to a complete determination of the matters in litigation, and the plea was therefore permissible, even as against a codefendant in the action. *Derbyshire v. Jones*, 94 Va. 140, 142, 26 S. E. 416; *Whittemore v. Patten* (C. C.) 84 Fed. 51, 56; *Perkins Oil Co. v. Eberhart*, 107 Tenn. 409, 64 S. W. 765; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 455."

See also *Taylor v. Wilson*, 182 Ky. 592, 206 S. W. 865; *Woodruff v. Garner*, 27 Ind. 4, 89 Am. Dec. 477; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776; *General Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288;

McCormick Harvester Mach. Co. v. Hill, 104 Mo. App. 544, 79 S. W. 745.

Cross petitions are analogous to and based on the old equitable principles governing ordinary cross bills. 6 Standard Proc. 296. The cross bill under the old equity practice was a mode of defense ancillary to the original suit, and the original bill and cross petition constitute but one cause. 6 Standard Proc. 261. The Code of Civil Procedure in this state makes no reference to cross petitions, but they are authorized by §§ 4745 and 4746, Rev. Laws 1910. It does not matter whether it is called cross petition, cross complaint, or counterclaim (Taylor v. Wilson, 182 Ky. 592, 206 S. W. 865), if it is a counterclaim within the meaning of § 4746, Rev. Laws 1910, the running of the Statute of Limitations is arrested by the commencement of the plaintiff's action (Cooper v. Gibson, — Okla. —, 170 Pac. 221; Mowatt v. Shidler, — Okla. —, 168 Pac. 1169; Stauffer v. Campbell, 30 Okla. 76, 118 Pac. 391; McKay v. Hall, 30 Okla. 773, 39 L.R.A.(N.S.) 658, 120 Pac. 1108; Advance Thresher Co. v. Doak, 36 Okla. 532, 129 Pac. 736). The statutory declaration in § 4746, Rev. Laws 1910, that such set-off or counterclaim shall not be barred by the Statutes of Limitations until

the claim of the plaintiff is barred, is confirmatory of the general rule in the absence of such statutory provision. See 2 Wood, Limitations, 4th ed. § 284. In O'Keefe v. Dillenbeck, 15 Okla. 437, 83 Pac. 540, relied upon by plaintiff, it does not appear that the plaintiff commenced his action before the Statute of Limitations had barred the cause of actions set up by defendant in his cross petition. We have examined the Kansas cases cited by plaintiff, and find ourselves unwilling to apply the rule therein announced to this case.

It is unnecessary to pass upon the other points raised by defendant against the validity of the tax deed.

The judgment of the trial court is affirmed.

Rainey, Ch. J., Harrison, Vice Ch. J., and Kane, Johnson, and Pitchford, JJ., concur.

Petition for rehearing denied.

NOTE.

The availability of a claim barred by limitation as the subject of set-off, counterclaim, recoupment, or cross bill is treated in the annotation following HUGGINS v. SMITH (reported herewith) post, 326.

R. H. HUGGINS, Appt.,

v.

C. C. SMITH, Impleaded, etc.

Arkansas Supreme Court — December 1, 1919.

(141 Ark. 87, 216 S. W. 1.)

Limitation of actions — effect on use of right as counterclaim.

1. A counterclaim for fraud in misrepresenting the value of a stock of goods is available as a defense to an action on a note given for the purchase price, even though it is barred by the Statute of Limitations when it is filed.

[See note on this question beginning on page 326.]

Evidence — guaranty of invoice value of stock.

2. In an action upon a promissory note given for part of the purchase

price of a stock of goods, where the defense is breach of guaranty of the invoice value of the stock, evidence of representations by plaintiff as to

chased another interest in the stock is admissible as corroborative of defendant's testimony that at the time the note was given the plaintiff guaranteed that the stock had not been reduced more than a specified amount below such former invoice value, where the cross bill tendered the issue as to whether or not such guaranty was made.

Appeal — effect of verdict.

3. A verdict will be sustained on appeal, if there is any substantial legal evidence to support it.

[See 2 R. C. L. 193, 194.]

of action accrues — fraud.
4. The action for damages for fraud in misrepresenting the invoice value of a stock of goods sold accrues when the fraud is discovered.

[See 17 R. C. L. 856.]

— right to affirmative judgment.

5. That a claim barred by the Statute of Limitations is available as a counterclaim in an action by the one liable thereon, in favor of its holder, does not entitle the holder to affirmative judgment against the debtor for the balance after satisfying his claim.

[See 24 R. C. L. 838.]

APPEAL by plaintiff from a decree of the Circuit Court for Perry County (Hendricks, J.) in favor of defendant Smith in an action on a promissory note given for the balance alleged to be due on the purchase of an interest in a drug store business. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Calvin Sellers, for appellant:

As a counterclaim defendant's cause of action was barred, and it could only be treated as an offset to whatever amount the plaintiff should recover.

State v. Arkansas Brick Mfg. Co. 98 Ark. 125, 33 L.R.A.(N.S.) 376, 135 S. W. 843; Smith v. Glover, 135 Ark. 534, 205 S. W. 891; Coats v. Milner, 134 Ark. 311, 203 S. W. 701.

Messrs. J. H. Bowen and John L. Hill, for appellee:

The evidence was amply sufficient to support the verdict.

Mallory v. Brademyer, 76 Ark. 538, 89 S. W. 551; Hodges v. Bayley, 102 Ark. 200, 143 S. W. 92; Merchants' Exch. Co. v. Sanders, 74 Ark. 16, 84 S. W. 786, 4 Ann. Cas. 955.

The court was correct in its declaration of the law, and in its refusal to reduce defendant's recovery of the counterclaim on which he had a right to recover, for the reason that it was not barred by the Statute of Limitation.

22 Am. & Eng. Enc. Law, pp. 371, 381; Brumble v. Brown, 71 N. C. 513; Stillwell v. Bertrand, 22 Ark. 376.

Humphreys, J., delivered the opinion of the court:

Appellant instituted suit against appellees on the 14th day of August, 1917, in the Perry circuit court, to recover \$300 and interest at the rate of 10 per cent per annum from November 15, 1914, on a promissory

note executed on the latter date by appellees for a balance due on the purchase price of appellant's one-half interest in a drug store owned by appellant and appellee C. C. Smith, as partners, at the time of the sale and purchase of said interest.

Appellees answered, admitting the execution of the note, but denying liability on the ground that appellant had guaranteed the stock and fixtures would invoice \$3,000, whereas they only invoiced \$2,200, making a difference of \$800, which amount was pleaded as a counterclaim against appellant.

Appellant filed a reply, denying any guaranty as to the invoice value of the stock, and pleading the Statute of Limitations against recovery on the counterclaim.

The cause was submitted to a jury upon the pleadings, instructions of the court, and evidence. The jury returned a verdict against appellees on the note for \$300 and interest at the rate of 10 per cent per annum from maturity, and against appellant for \$700 on the counterclaim. A difference was struck, and judgment rendered against appellant in favor of appellee C. C. Smith, for \$306, from which judgment an appeal has been duly prosecuted to this court.

Appellant and J. J. Hunter owned as equal partners a drug store in the town of Casa. On the 1st day of May, 1914, appellee C. C. Smith purchased Hunter's interest for \$1,100. Over the objection of appellant, said appellee was permitted to testify that appellant induced him to buy Hunter's interest by showing him an entry of date January 6, 1916, in the books of the former partnership, to the effect that the stock invoiced \$3,615.10, and stating that, after the invoice, more goods had been put in than sold out of the stock. The business was continued by the new firm, with appellant as the principal manager, and appellee C. C. Smith as helper on Saturdays and rainy days, and occasionally when his farm duties would permit, until November 15th of the same year, at which time appellant sold appellee his one-half interest in the assets of the partnership for \$300 cash, and a note signed by appellees for \$300, due January 1, 1916, with interest at the rate of 10 per cent per annum, with the understanding that appellee C. C. Smith should pay the indebtedness of the firm. Appellee C. C. Smith testified that the note bore interest from maturity, and that appellant guaranteed the stock had not been reduced more than \$500 below the invoice of \$3,615.10, entered in the former partnership book of date January 6, 1914. Appellant testified that the note bore interest from date, and that he made no representation or guaranty as to the invoice value of the stock. Soon after the execution of the note, it was lost, found, and given to appellee C. C. Smith, who carried it in his pocket until nearly worn out, and then destroyed it. Appellant demanded the note from appellee C. C. Smith, who refused to give it to him. On December 27, 1915, appellant sent said appellee a statement, demanding payment of the note and thirteen months' interest, to which said appellee replied that he did not owe the note. He made no specific denial of the correctness of the interest demanded.

Ralph McBride testified that a short time after the sale appellant, in the presence of himself and others, said either that he had guaranteed, or would guarantee, it to invoice about \$3,000; that when Smith was asked what the stock would invoice, his reply was, "Search me." The stock invoiced \$2,200.

It is insisted that the court erred in permitting appellee to testify that appellant represented the invoice value of the stock at \$3,615.10 to him, when he purchased Hunter's interest. The contention is made that the statement was incompetent because not pleaded as matter of damages in the counterclaim. We think it competent as a circumstance tending to corroborate the testimony of appellee to the effect that appellant guaranteed the stock had not been diminished more than \$500 below the invoice of \$3,615.10. The cross bill clearly tendered the issue of whether such a guaranty was made by appellant, and we think the evidence tended to establish the issue.

Evidence—
guaranty of
invoice value
of stock.

It is next insisted that the verdict sustaining the counterclaim to the extent of \$700 is not supported by the evidence. Appellee testified that appellant induced him to make the purchase upon the guaranty that the stock would invoice about \$3,100. His testimony was corroborated in a measure by that of Ralph McBride. The weight and effect of the evidence are a question within the exclusive province of the jury. On appeal the verdict of a jury will be sustained if there is any substantial legal evidence to support it. The evidence just detailed, in our opinion, is sufficient to sustain the verdict.

Appeal—effect
of verdict.

Lastly, it is contended that the counterclaim was barred by the Statute of Limitations, and that it was error to render judgment over against appellant for \$306. The damages resulting from the guaranty accrued immediately upon the discovery of the shortage in the in-

voice value, which was ascertained shortly after the sale, on the 15th day of November, 1914, and a claim for it was not asserted until December 14, 1917, at the time appellees filed their cross bill. More than three years had elapsed from the accrual of the cause of action before suit was instituted thereon, so the counterclaim, by way of cross bill, in so far as it sought a judgment over against appellant, must be treated as an independent suit. The cause of action for a judgment over was therefore barred when the cross bill was filed. This suit was instituted, however, on the 31st day of August, 1917, about 2½ months before the statutory bar attached. The counterclaim was good for defensive purposes, even if the statutory bar had attached when the cross bill was filed. It was said in the case of *State v. Arkansas Brick & Mfg. Co.* 98 Ark. 125, 33 L.R.A. (N.S.) 376, 135 S. W. 843, that "a breach by the plaintiff, though barred as an independent cause of action, continues to exist for defensive purposes available to the defendant so long as the plaintiff may sue upon any breach by defendant."

At the time the decision was rendered from which the above quotation is taken, the law restricted the matter in a counterclaim to that which arose out of the contract or transaction sued upon, and that ac-

counts for the use of the word "breach" in the quotation. Since the passage of Act No. 267, Acts of the Legislature of 1917, amending § 6099 of Kirby's Digest, that restriction is eliminated, and counterclaims may consist of any matter arising either out of contract or tort, whether it arose out of the contract or transaction sued upon or not. *Coats v. Milner*, 134 Ark. 311, 203 S. W. 701; *Smith v. Glover*, 135 Ark. 531, 205 S. W. 891. So, a counterclaim arising out of tort, even if barred by the Statute of Limitations, may be used by way of recoupment against a suit for the recovery of money. It was error, therefore, for the court to render judgment over against appellant for any sum, as the counterclaim was barred when the cross bill was filed, and also error not to grant the demand made by appellant to reduce the amount of the counterclaim recovered against appellant to the amount recovered by appellee C. C. Smith against him. The counterclaim was available for recoupment only. For that purpose, it existed as long as appellant's cause of action existed.

For the error indicated, the decree is reversed, and decree is directed here, reducing the amount of the counterclaim to the amount of recovery by appellant against appellees, with direction that the costs be adjudged against appellees.

ANNOTATION.

Claim barred by limitation as subject of set-off, counterclaim, recoupment, or cross bill.

- I. Introductory, 327.
- II. Set-off, counterclaim, or cross bill:
 - a. In absence of statute:
 1. Rule stated, 328.
 2. Application of rule, 329.
 - b. Under statute:
 1. Barred claim held available:
 - (a) Illinois, 331.
 - (b) Indiana, 332.
 - (c) Iowa, 333.

- II. b, 1—continued.
 - (d) Kansas, 335.
 - (e) Mississippi, 335.
 - (f) New Mexico, 336.
 - (g) Oklahoma, 336.
 - (h) Utah, 337.
 2. Barred claim held unavailable:
 - (a) Arkansas, 337.
 - (b) Georgia, 338.
 - (c) Maine, 338.

II. b, 2—continued.

- (d) Massachusetts, 338.
- (e) Michigan, 338.
- (f) New Jersey, 339.
- (g) New York, 339.

III. Recoupment, 339.

I. *Introductory.*

This annotation is designed to review only cases involving the right to use as set-off, counterclaim, or recoupment a claim barred by a general statute of limitations. Hence, the note does not deal with the question whether a claim thus sought to be asserted is actually barred, nor does it consider claims barred by a special statute of nonclaim. Defenses, generally, are expressly excluded, the defense of recoupment alone being included.

Set-off, counterclaim, and cross bill have been treated together, and separately from recoupment. "Set-off and counterclaim are generally used interchangeably, although by some statutes the term 'set-off' implies a right even broader than counterclaim, it being provided that any counterclaim or demand may be used as such. Usually, however, they are both defined as any claim or demand arising out of debt, duty, or contract existing at the time of the commencement of the action, and matured at the time of their offer as a set-off or counterclaim. Recoupment differs from set-off mainly in that the claim must grow out of the very same transaction which furnishes the plaintiff's cause of action, and, being in the nature of a claim of right to reduce the amount demanded, can be had only to an extent sufficient to satisfy the plaintiff's claim. In other words, recoupment goes to the justice of the plaintiff's claim, and no affirmative judgment can be had thereon, while set-off is not necessarily confined to the justice of such particular claim, and an affirmative judgment may be had for any amount to which the defendant establishes his right, over and above the amount to which the plaintiff has proved he is entitled. Again, recoupment has no regard to whether the claim be liquidated or unliquidated; it is not dependent on any statutory regulation, but is controlled

IV. Set-off against heir or legatee:

- a. View that barred claim is available, 341.
- b. View that barred claim is unavailable, 342.

by the principles of the common law. A set-off must arise from contract, and can be used only in an action founded on contract; while recoupment may spring from a wrong, provided it arises out of the transaction set forth in the petition. With these distinctions in mind, it would seem that in a particular case the classification of the claim of a defendant as a set-off, or as in recoupment, might be easily made, but it is sometimes difficult to discriminate set-off from reduction or recoupment. The former bears so close an analogy to both of the latter, and is often so mingled with them by the facts of the case, as to render it difficult to determine in which form the opposing demand should be brought against the plaintiff's claim. In states where set-off and counterclaim are provided for by separate acts, counterclaim and recoupment are alike in the sense that each must grow out of, or be connected with, the transaction upon which the plaintiff sues. The term 'recoupment' is often used as synonymous with reduction, and, like reduction, it is of necessity limited to the amount of the plaintiff's claim. The distinctions between counterclaim, recoupment, and set-off are no longer of much importance in the Code states, since, under most of the Codes, both set-off and recoupment are embraced in counterclaim. But the defensive character of the plea of recoupment is a common-law right which the Code makers could not have intended to abolish, or in any wise impair. The whole spirit and plan of the Codes were to liberalize the procedure, and to extend, instead of curtailing, remedial rights." 24 R. C. L. pp. 794 et seq.

Recoupment, therefore, is important, even under the Code practice, in that it is available as a defense, although, as an affirmative cause of action, it may be barred by the Statute of Limitations. As was said in *State v. Arkan-*

125, 33 L.R.A. (N.S.) 376, 135 S. W. 843, a case involving a counterclaim: "The law of recoupment requires some consideration, and a distinguishing of it from the idea usually conveyed by the word 'counterclaim.' Counterclaim and recoupment are alike in the sense that each must grow out of, or be connected with, the transaction upon which the plaintiff sues. Recoupment was allowed at common law, . . . but a counterclaim was not. Recoupment was considered a defense, and, prior to the adoption of the Code, if the defendant's cross demand against the plaintiff exceeded the plaintiff's demand, the defendant could use his demand in recoupment only by sustaining a loss of the excess. Hence, prior to the Code, the defendant could recover on his cross demand, to the full extent, only by an independent action. The Code, to prevent a multiplicity of suits, provided for the counterclaim, and that the defendant might recover on it, in the same suit, any balance that the plaintiff owed him over and above the plaintiff's demand. The counterclaim thus became an affirmative cross action, which ordinarily will cover all purposes of recoupment, but not always. A right left to the defendant to be worked out through the doctrine of recoupment, which could not be had through a counterclaim, is to use defensively a cause of action which, as a counterclaim, would be barred by lapse of time. A counterclaim must be an existing cause of action, but recoupment is a right to reduce the plaintiff's claim, and this right exists as long as the plaintiff's cause of action exists. A breach by the plaintiff, though barred as an independent cause of action, continues to exist for defensive purposes available to the defendant, so long as the plaintiff may sue upon any breach by defendant." In the foregoing case it was held that, while the Code has substituted counterclaim in most cases for the defense of recoupment, nevertheless express warrant for recoupment is found in the right to plead "new matter constituting a defense."

a. In absence of statute.

1. Rule stated.

In the absence of an express statute, a demand of a defendant, whether pleaded by way of set-off, counterclaim, or cross bill, is regarded as an affirmative action, and therefore, unlike a matter of pure defense, is subject to the operation of the Statute of Limitations, and is unavailable if barred.

United States.—Weidenfeld v. Pacific Improv. Co. (1920) 267 Fed. 699.

Alabama.—Shaw v. Yarbrough (1842) 3 Ala. 588; Harwell v. Steel (1850) 17 Ala. 372.

California.—Curtiss v. Sprague (1874) 49 Cal. 301; Moore v. Gould (1907) 151 Cal. 723, 91 Pac. 616. See also Bliss v. Sneath (1898) 119 Cal. 526, 51 Pac. 848.

Connecticut.—Alsop v. Nichols (1832) 9 Conn. 357; Gorham v. Bulkley (1881) 49 Conn. 91. See also Beecher v. Baldwin (1887) 55 Conn. 419, 3 Am. St. Rep. 57, 12 Atl. 401.

Idaho.—Wonnacott v. Kootenai County (1919) 32 Idaho, 343, 182 Pac. 353.

Kentucky.—Williams v. Gilchrist (1813) 3 Bibb, 49; Gilchrist v. Williams (1821) 3 A. K. Marsh. 235. See also Banks v. Coyle (1820) 2 A. K. Marsh. 564.

Maryland.—Webster v. Byrnes (1870) 32 Md. 86; Sprogle v. Allen (1873) 38 Md. 331.

Minnesota.—See Meinert v. Bottcher (1895) 60 Minn. 204, 62 N. W. 276.

Missouri.—Turnbull v. Watkins (1876) 2 Mo. App. 235; Cogswell v. Freudenau (1902) 93 Mo. App. 482, 67 S. W. 744; Chapman v. Hogg (1909) 135 Mo. App. 654, 116 S. W. 492.

New Hampshire.—Chandler v. Drew (1834) 6 N. H. 469, 26 Am. Dec. 704.

Ohio.—Irwin v. Garretson (1871) 1 Cin. Sup. Ct. Rep. 533.

Pennsylvania.—Jacks v. Moore (1794) 1 Yeates, 391; Crist v. Garner (1830) 2 Penn. & W. 251; Levering v. Rittenhouse (1839) 4 Whart. 130; Hinkley v. Walters (1839) 8 Watts, 260, later appeal in (1840) 9 Watts,

179; *King v. Coulter* (1853) 2 Grant, Cas. 77; *Taylor v. Gould* (1868) 57 Pa. 152; *Gilmore v. Reed* (1874) 76 Pa. 462; *Verrier v. Guillou* (1881) 97 Pa. 63; *Seitzinger v. Alspach* (1886) 2 Sadler, 359, 4 Atl. 203; *Morrison v. Warner* (1901) 200 Pa. 315, 49 Atl. 983; *State Hospital v. Philadelphia County* (1903) 205 Pa. 336, 54 Atl. 1032; *Woodland Oil Co. v. A. M. Byers & Co.* (1909) 223 Pa. 241, 132 Am. St. Rep. 737, 72 Atl. 518; *Rhone v. Keystone Coal Co.* (1915) 250 Pa. 336, 95 Atl. 530; *Enterline v. Miller* (1905) 27 Pa. Super. Ct. 463. See also *Coulter v. Repplier* (1850) 15 Pa. 208; *Sieger v. Sieger* (1904) 209 Pa. 65, 58 Atl. 140.

South Carolina.—*Turnbull v. Strohecker* (1827) 15 S. C. L. (4 M'Cord) 210; *Holley v. Rabb* (1859) 46 S. C. L. (12 Rich.) 185; *Bank of Columbia v. Gadsden* (1899) 56 S. C. 313, 33 S. E. 575, 34 S. E. 411.

South Dakota.—*First Nat. Bank v. McCarthy* (1904) 18 S. D. 218, 100 N. W. 14.

Tennessee.—*Stone v. Duncan* (1858) 1 Head, 103.

Texas.—*Holliman v. Rogers* (1851) 6 Tex. 91; *Ft. Smith v. Fairbanks, M. & Co.* (1907) 101 Tex. 24, 102 S. W. 908, affirming (1907) — Tex. Civ. App. —, 99 S. W. 705; *Campbell v. Park* (1895) 11 Tex. Civ. App. 455, 33 S. W. 754; *Cameron v. Williams* (1918) — Tex. Civ. App. —, 203 S. W. 928; *Nelson v. Gulf, C. & S. F. R. Co.* (1919) — Tex. Civ. App. —, 214 S. W. 366. See also *Walker v. Fearhake* (1899) 22 Tex. Civ. App. 61, 52 S. W. 629; *Nelson v. San Antonio Traction Co.* (1915) 107 Tex. 180, 175 S. W. 434, reversing (1911) — Tex. Civ. App. —, 142 S. W. 146.

Vermont.—*Parker v. National L. Ins. Co.* (1888) 61 Vt. 65, 17 Atl. 724.

Virginia. — *Trimyer v. Pollard* (1849) 5 Gratt. 460; *Sexton v. C. Aultman & Co.* (1895) 92 Va. 20, 22 S. E. 838.

Washington.—*Rubin v. Lucerne & A. C. R. Co.* (1915) 87 Wash. 198, 151 Pac. 500.

England.—*Remington v. Stephens* (1735) 2 Strange. 1271, 93 Eng. Reprint, 1175. See also *Hicks v. Hicks*

(1802) 3 East, 16, 102 Eng. Reprint, 502.

3. Application of rule.

Action on bond.

In *Jacks v. Moore* (1794) 1 Yeates (Pa.) 391, an action of debt on a bond, a set-off, alleging services performed by the defendant's son during his minority, was held unavailable because barred by limitations.

Action for rent.

In *Bliss v. Sneath* (1898) 119 Cal. 526, 51 Pac. 848, an action for rent, it was said: "A judgment in favor of a counterclaim which appears on its face to be barred by the statute will be affirmed if the statute is not invoked as a defense, upon the same principles that a judgment upon a similar complaint will be affirmed in the absence of pleading the statute."

Action for money had and received.

In *Alsop v. Nichols* (1832) 9 Conn. 357, it was held that a barred claim for goods sold and delivered was unavailable as a set-off in an action of debt for money had and received.

See also *Hicks v. Hicks* (1802) 3 East, 16, 102 Eng. Reprint, 502, an action for money had and received to recover consideration money for an annuity which was set aside because of its defective registry, wherein it was held that the defendant might set off barred payments, unless the plaintiff pleaded the Statute of Limitations.

And in *Parker v. National L. Ins. Co.* (1888) 61 Vt. 65, 17 Atl. 724, it was held that a debt, barred by the Statute of Limitations, was unavailable in an action for the recovery of usurious payments.

Action on open account.

A barred claim is unavailable as a set-off in an action on an open account. *Shaw v. Yarbrough* (1842) 3 Ala. 538; *Webster v. Byrnes* (1870) 32 Md. 86; *Sprogle v. Allen* (1873) 38 Md. 331; *Coulter v. Repplier* (1850) 15 Pa. 208; *Turnbull v. Strohecker* (1827) 15 S. C. L. (4 M'Cord) 210.

Action on bill or note.

In an action on a bill or note a claim which is barred by limitations

may not be asserted by way of counterclaim or set-off.

United States.—Weidenfeld v. Pacific Improv. Co. (1920) 267 Fed. 699.

Alabama.—Harwell v. Steel (1850) 17 Ala. 372.

California.—Curtiss v. Sprague (1874) 49 Cal. 301.

Kentucky.—Banks v. Coyle (1820) 2 A. K. Marsh. 564.

Missouri.—Chapman v. Hogg (1909) 135 Mo. App. 654, 116 S. W. 492.

New Hampshire.—Chandler v. Drew (1834) 6 N. H. 469, 26 Am. Dec. 704.

Ohio.—Irwin v. Garretson (1871) 1 Cin. Sup. Ct. Rep. 533.

Pennsylvania.—Hinkley v. Walters (1839) 8 Watts, 260, (1840) 9 Watts, 179; King v. Coulter (1853) 2 Grant, Cas. 77.

South Carolina.—Holley v. Rabb (1859) 46 S. C. L. (12 Rich.) 185.

Tennessee.—Stone v. Duncan (1858) 1 Head, 103.

Texas.—Holliman v. Rogers (1851) 6 Tex. 91; Cameron v. Williams (1818) — Tex. Civ. App. —, 203 S. W. 928; Nelson v. Gulf, C. & S. F. R. Co. (1919) — Tex. Civ. App. —, 214 S. W. 366; Campbell v. Park (1895) 11 Tex. Civ. App. 455, 33 S. W. 754; Walker v. Fearhake (1899) 22 Tex. Civ. App. 61, 52 S. W. 629.

Virginia.—Trimyer v. Pollard (1849) 5 Gratt. 460; Sexton v. C. Aultman & Co. (1895) 92 Va. 20, 22 S. E. 838.

Action on contract for services or the like.

In *Wonnacott v. Kootenai County* (1919) 32 Idaho, 343, 182 Pac. 353, it was held that a barred claim for money due to a county as interest for the detention of taxes was unavailable against the plaintiff, in an action against the county for services rendered.

And in *Rubin v. Lucerne & A. C. R. Co.* (1915) 87 Wash. 198, 151 Pac. 500, it was held that a set-off, alleging the defective performance of work, was unavailable in an action to recover wages, where the right of action for the defective performance was barred.

Likewise, in *Seitzinger v. Alspach* (1886) 2 Sadler (Pa.) 359, 4 Atl. 203, a claim for rent, barred by the Statute of Limitations, was held to be un-

available in an action for work done and materials furnished.

To the same effect, see *Enterline v. Miller* (1905) 27 Pa. Super. Ct. 463, wherein a set-off alleging damages for unskilfulness was held to be unavailable, in an action by an attorney to recover for professional services, the claim for damages being barred.

In *Nelson v. San Antonio Traction Co.* (1915) 107 Tex. 180, 175 S. W. 434, an action to recover the contract price of services rendered and to foreclose a mechanic's lien, a set-off for repairs was held to be unavailable, the Statute of Limitations having run against it.

In *State Hospital v. Philadelphia County* (1903) 205 Pa. 336, 54 Atl. 1032, an action to recover for the treatment and care of insane persons of Philadelphia county, the defendants alleged that the plaintiffs had previously collected an amount in excess of the plaintiff's claims. It appeared that limitations had run against the alleged set-off. The court said: "The reasons assigned by the county why the Statute of Limitations is not a bar to its claim are wholly untenable, and cannot avail to defeat a recovery in this action. Its claim, as we have seen, is for moneys alleged to have been paid to the plaintiffs in excess of the amount due for the care and treatment of its indigent insane. Regarding the overpayments as having been made either under a mistake of fact or by reason of the fraud of the plaintiffs, and conceding that the county had a right to the return of the money, the proper action would unquestionably have been *assumpsit*, in which, it is settled, the statute may be pleaded in bar of the claim. If, therefore, instead of attempting to enforce this claim by way of set-off, or having it applied to its indebtedness to the plaintiffs, the county had brought an action against the trustees to recover the amount of overpayments, the statute could have been successfully pleaded. The same right to invoke the application of the statute exists here."

Action for breach of warranty.

In *Woodland Oil Co. v. A. M. Byers & Co.* (1909) 223 Pa. 241, 132 Am. St. Rep. 737, 72 Atl. 518, the court said:

"As the present action was brought to recover for a breach of warranty as to the quality of the goods sold and delivered, we reach without hesitation the conclusion that the cause of action must be deemed to have accrued when the defective casing was delivered; and as this was more than six years prior to the bringing of this action, the plaintiff was too late, and the Statute of Limitations is a complete bar to the successful urging of his claim. The counterclaim for the price of the pipe, which was made by way of set-off by the defendant, was also barred by the statute. That the statute applies to a claim of set-off has been consistently maintained by this court."

Action to foreclose mortgage.

In an action to foreclose a mortgage, claims against the mortgagee which are barred by limitations may not be set off against the debt secured by the mortgage. *Moore v. Gould* (1907) 151 Cal. 723, 91 Pac. 616; *Meinert v. Bottcher* (1895) 60 Minn. 204, 62 N. W. 276; *Morrison v. Warner* (1901) 200 Pa. 315, 49 Atl. 983; *Rhone v. Keystone Coal Co.* (1915) 250 Pa. 336, 95 Atl. 530; *Bank of Columbia v. Gadsden* (1899) 56 S. C. 313, 33 S. E. 575.

In *First Nat. Bank v. McCarthy* (1904) 18 S. D. 218, 100 N. W. 14, it was held that the Statute of Limitations applies as well to a counterclaim for usurious interest, urged in an action to foreclose a mortgage, as to an independent action for its recovery.

So, in *Gorham v. Bulkley* (1881) 49 Conn. 91, distinguishing *Berrigan v. Pearsall* (1878) 46 Conn. 274, set out *infra*, subd. IV., it was held that a claim for the purchase price of the plaintiff's interest in a business, barred by the Statute of Limitations, was unavailable as a set-off against a bill for foreclosure.

Settlement of partnership accounts.

In *Cogswell v. Freudenau* (1902) 93 Mo. App. 482, 67 S. W. 744, it was held that a surviving partner, in settling the partnership's affairs, could not set off a claim for the payment of partnership debts made by him individually, which were barred by the Statute of Limitations.

b. Under statute.

1. Barred claim held available.

(a) Illinois.

In Illinois, by the terms of a statute, a defendant may plead a set-off or counterclaim barred by the Statute of Limitations, while held and owned by him, to any action the cause of which was owned by the plaintiff or person under whom he claims before such set-off or counterclaim was so barred, and not otherwise. Rev. Stat. chap. 83, § 17.

Thus, in *Sherman v. Sherman* (1889) 36 Ill. App. 482, it was held that a barred counterclaim for the use of dower lands was available to reduce a claim against the estate. And in *Neville v. Brock* (1900) 91 Ill. App. 140, it was held that a counterclaim for services rendered was available, although barred by the Statute of Limitations.

However, in *Grossfeld & R. Co. v. Zuckerman* (1915) 192 Ill. App. 90, it was held, according to the abstract of the decision, that "in an action on a written evidence of indebtedness commenced more than five years after its date, set-offs to which defendant claims to have been entitled at the date the instrument was executed are barred.

Where the defendant avails himself of the right to set off barred claims, the plaintiff has the corresponding right to set off any barred claims that he may have against the defendant. *Brown v. Miller* (1890) 38 Ill. App. 262, wherein the court said: "When a defendant avails himself of § 17, by pleading a set-off or counterclaim that is barred, he opens up on both sides the barred claims between himself and the plaintiff; that as to such set-off or counterclaim the plaintiff is to be regarded as coming within the meaning of the word defendant, as used in the two sections, and as such has the rights of a defendant in meeting and offsetting such set-off or counterclaim of the defendant."

And where the defendant's set-off or counterclaim exceeds the plaintiff's claim, he may recover such excess notwithstanding the bar of the

statute, *Steere v. Brownell* (1888) 124 Ill. 27, 15 N. E. 26, wherein the court said: "Section 17, chapter 83 (Limitations) of the Revised Statutes . . . is as follows: 'A defendant may plead a set-off or counterclaim barred by the Statute of Limitations, while held and owned by him, to any action the cause of which was owned by the plaintiff or person under whom he claims before such set-off or counterclaim was so barred, and not otherwise.' . . .

The 30th section of the Practice Act, giving the right of set-off, is as follows: "The defendant in any action brought upon any contract or agreement, either express or implied, having claims or demands against the plaintiff in such action, may plead the same or give notice thereof under the general issue, or under the plea of payment; and the same, or such part thereof as the defendant shall prove on trial, shall be set off and allowed against the plaintiff's demand, and a verdict shall be given for the balance due. And if it shall appear that the plaintiff is indebted to the defendant, the jury shall find a verdict for the defendant, and certify to the court the amount so found; and the court shall give judgment in favor of such defendant, with the costs of his defense.

. . . By the section of the Practice Act, the right of the defendant to plead set-off or counterclaim, and to recover over as to any excess, is clearly given. Now, if these two sections are read together, as parts of one law, as they must be, it will be observed that the right given in the cases specified in § 17 is as broad as that given by the 30th section of the Practice Act, and is without limitation, except that the defendant must have been the holder and owner of his claim at the time it became barred, and that the plaintiff, or those under whom he claims, must then have held and owned the plaintiff's claim. The one section provides that in all cases where set-off is pleaded, and it appears in probf that the set-off exceeds the plaintiff's claim as proved, judgment shall be rendered over for the defendant for such excess. By the other section, the right to plead set-off

without any limitation as to result, in the cases within the purview of such section, is also given, and it is apparent, we think, that all the incidents of the right given by the 30th section pass to the defendant when he brings himself within the cases specified in the 17th section of the Limitation Act, and that therefore, in such case, the right of the defendant to plead set-off exists precisely as if the bar of the statute had not interposed."

(b) *Indiana.*

In Indiana, the statutes recognize the right of a party to enforce a set-off against a cause of action, although a recovery on the debt on which the set-off is based is barred by limitation. See *Fox v. Barker* (1860) 14 Ind. 309; *Fankboner v. Fankboner* (1863) 20 Ind. 62; *Rennick v. Chandler* (1877) 59 Ind. 354; *Armstrong v. Caesar* (1880) 72 Ind. 280; *Warring v. Hill* (1883) 89 Ind. 497; *Livingood v. Livingood* (1842) 6 Blackf. 268.

In *Peden v. Cavins* (1892) 134 Ind. 494, 39 Am. St. Rep. 276, 34 N. E. 7, the court said: "The life of a set-off is equal to that of the original claim, and is only barred when the original claim is barred."

In *Hyatt v. Cochran* (1882) 85 Ind. 231, it was held that a barred counter set-off is available against a set-off for improvements, although the original suit is in tort to which the doctrine of set-off is inapplicable. The court said: "The right to recover for the wrongful use and occupation of land is limited to the six years next before the commencement of the action. Code, § 598, Rev. Stat. 1881, § 1058. The ordinary rule of set-off does not apply, because the action of the plaintiff is not upon contract, but for a tort, and, were it not for the statute, the wrongdoer would be entitled to nothing for his improvements. By analogy to the rule applicable to ordinary set-off, if one who has been in wrongful possession more than six years pleads his improvements in reduction of the plaintiff's demand, the plaintiff ought to be permitted to, and we hold that he may, reply, by setting up the occupation before the commencement of

the six years as a counter set-off. Such, we think, was the legislative intent."

However, there can be no recovery by a defendant pleading a barred set-off, of any excess over the plaintiff's claim. *Livingood v. Livingood* (1842) 6 Blackf. 268, wherein the court said: "There is a proviso to the Statute of Limitations, which exempts from the operation of that act so much of any matter pleaded as payment or set-off as shall equal the amount of the plaintiff's demand (Rev. Stat. 1838, p. 447); and by a subsequent law it is enacted 'that a replication of the Statute of Limitations to any such plea of set-off shall only operate to prevent a recovery by the defendant or defendants of any excess of the amount of such plea, over and above what the plaintiff or plaintiffs may be entitled to in said actions' (Rev. Stat. 1838, p. 462). These two provisions are substantially the same. It is the object of both to prevent the Statute of Limitations from operating upon so much of the set-off as shall equal the plaintiff's demand; the excess, if any, is barred; and it is immaterial though the matter of set-off, had it been prosecuted by suit, would have been barred at the date of the cause of action against which it is pleaded. Neither of the statutes referred to prescribes any change in the form of a replication of the Statute of Limitations to a plea of set-off; and perhaps none is necessary. But the better practice would be to adapt the replication to the provisions of the statutes, and confine it to so much of the set-off as is necessary to meet the adverse claim, leaving the excess to be answered in some other manner. In the cause before us, the set-off exceeds in amount the demand claimed in the declaration, and the replication is to the whole plea. But it is not necessary for us to consider whether it is bad for that reason, because it is materially defective for another cause. It states that the cause of set-off did not accrue within five years next before the 1st day of November, 1833, which is the date of the instrument on which the action is founded. Now the plain-

tiff's right of action did not accrue, nor was the suit commenced, until nearly seven years after that period. The subject-matter of the plea might have originated in the interim. The replication is, therefore, no answer to the plea; and the demurrer should have been sustained."

In *Eve v. Louis* (1883) 91 Ind. 457, the court said: "A counterclaim or set-off (where it may be barred by the Statute of Limitations), if not barred at the commencement of the action in which it is pleaded, does not become so afterward during the pendency of that action."

To the same effect, and following *Eve v. Louis*, supra, see *Zink v. Zink* (1914) 56 Ind. App. 677, 106 N. E. 881.

(c) *Iowa.*

In Iowa, it is the statutory rule that "a counterclaim may be pleaded as a defense to any cause of action, notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred, and was not barred at the time the claim sued on originated; but no judgment thereon, except for costs, can be rendered in favor of the party so pleading it." See the following cases: *Reddish v. John* (1920) — Iowa, —, 179 N. W. 951; *Matthys v. Donelson* (1917) 179 Iowa, 1111, 160 N. W. 944; *Secor v. Siver* (1914) 165 Iowa, 673, 146 N. W. 845; *Bradley v. Hufferd* (1908) 138 Iowa, 611, 116 N. W. 814; *Richardson v. Richardson* (1907) 134 Iowa, 242, 111 N. W. 934; *Illsley v. Grayson* (1898) 105 Iowa, 685, 75 N. W. 518; *Folsom v. Winch* (1884) 63 Iowa, 477, 19 N. W. 305; *Allen v. Maddox* (1874) 40 Iowa, 124.

Thus, in an action between remaindemen for an accounting, it has been held that a counterclaim for money advanced on the purchase price of a stone building was available, although it was barred as an affirmative suit. *Reddish v. John* (1920) — Iowa, —, 179 N. W. 951.

And in an action on a foreign judgment it was held that a barred claim for damages for fraud and deceit was available as a counterclaim.

Secor v. Siver (1914) 165 Iowa, 673, 146 N. W. 845.

Likewise, a claim for false representations, barred by the Statute of Limitations as an inadequate action, has been held to be available as a counterclaim against a claim for money paid for the benefit of the defendant. **Bradley v. Hufferd** (1908) 138 Iowa, 611, 116 N. W. 814.

So, in **Richardson v. Richardson** (1907) 134 Iowa, 242, 111 N. W. 934, wherein it appeared that the counterclaim did not become barred until after the claim sued on originated, it was held to be available as a defense.

In **Allen v. Maddox** (1874) 40 Iowa, 124, it was held that an account for goods sold and delivered, although barred as an affirmative action, was available as a set-off in an action to foreclose a mortgage. At the time of the decision a set-off was limited to an action founded on a contract. The court said: "For a moment we will consider why the Statute of Limitation is suspended . . . in cases where the set-off and counterclaim are pleaded. The counterclaim and set-off, being based upon causes of action founded on contracts, are regarded in the nature of payment upon or satisfaction of claims against the holders, if held at the time the statute would otherwise bar them; hence, . . . they are excepted from the operation of the statute. Thus, if A holds a claim founded upon a written instrument against B, who, at the same time, holds a demand upon an account against A, it would seem inequitable that the statute should bar B's claim while A's could be enforced; hence the provision of the statute exempting the counterclaim and set-off from limitation. The claims, whenever they are barred, are regarded as debts that ought in justice to be set off against debts held by those owing them."

No judgment, however, can be recovered by the defendant for any excess of a barred claim over that of the plaintiff. As was said in **Folsom v. Winch** (1884) 63 Iowa, 477, 19 N. W. 305: "The counterclaim on its face is barred by the Statute of Limitations; and should the demurrer have been

sustained on this ground? The statute provides that 'a counterclaim may be pleaded as a defense to any cause of action, notwithstanding the same is barred by the provisions of this chapter, if such counterclaim so pleaded was the property of the party pleading it at the time it became barred, and the same was not barred at the time the claim sued on originated; but no judgment thereon, except for costs, can be rendered in favor of the party so pleading the same.' Code, § 2540. It is evident that, under this statute, a counterclaim may be pleaded as a defense to an action, although it is barred, and the effect is precisely the same as if it was not barred, except that no judgment in any event can be rendered in favor of the party so pleading it, except for costs. A counterclaim, when pleaded, although it may be an independent cause of action, is ordinarily pleaded as a defense to an action then pending, except that affirmative relief is asked. If the counterclaim was not barred, it certainly could be pleaded in this action, under the provisions of § 2659 of the Code; and it therefore follows that, under Code, § 2540, it may be so pleaded, even if it is barred. The word 'defense' simply means, we think, that no recovery can be had thereon for any amount over and above the amount of the plaintiff's claim."

It is provided by statute that, if the defendant pleads a counterclaim against the plaintiff's claim, the plaintiff may offer "any new matter, not inconsistent with the petition, constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, not inconsistent with the petition, which avoids the same, but an allegation of new matter in avoidance shall not be treated as a waiver of the denial of the allegations of the answer implied by law." Accordingly, it has been held that a plaintiff may, by way of reply, set up a barred counterclaim against the defendant's claim. **Matthys v. Donelson** (1917) 179 Iowa, 1111, 160 N. W. 944.

To the same effect, see *Illsley v. Grayson* (1898) 105 Iowa, 685, 75 N. W. 518.

(d) *Kansas.*

Section 102 of the Civil Code of Kansas provides as follows: "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, or by reason of the Statute of Limitations; but the two demands must be deemed compensated so far as they equal each other."

In an official syllabus, the court in *Drovers State Bank v. Elliott* (1916) 97 Kan. 64, 154 Pac. 255, said: "Where a customer does business with a bank for a period of years, depositing notes, checks, accounts, and his own promissory notes, and checking against the same as his business needs require, and the bank keeps the only record of this series of transactions, and the customer makes new notes from time to time, as requested by the bank cashier, who made false and fraudulent representations to the customer, upon which he relied, and where the bank charged items against the customer which he had not drawn, and failed to credit him with deposits made, the defendant customer, in an action by the bank to recover on notes so given, may set up a cross demand and counterclaim and have it used to compensate the bank's demand, 'so far as they equal each other,' and the bar of the Statute of Limitations to such counterclaim is specifically removed by § 102 of the Civil Code."

In *Cooper v. Seaverns* (1916) 97 Kan. 159, 155 Pac. 11, it was held that a right of action for slander may be pleaded as a set-off in an action for slander, although barred by the Statute of Limitations.

But the statute heretofore quoted, allowing cross demands notwithstanding the Statute of Limitations, is not applicable to a set-off for damages where a special contract between the parties prescribed conditions preced-

ent to a claim for damages, and provided that a failure to comply with those conditions would bar a recovery. *Chicago, R. I. & P. R. Co. v. Theis* (1915) 96 Kan. 494, 152 Pac. 619. And, under that statute, "parties holding cross demands against each other, under such circumstances that if one had brought a suit against the other a counterclaim or set-off could have been set up, will not be deprived of the benefit of them by reason of the Statute of Limitations, but if the demand of one party becomes completely barred before the demand of the other comes into existence, the barred demand is not available as a set-off against the live demand." *O'Neil v. Eppler* (1917) 99 Kan. 493, 162 Pac. 311.

In *McKenna v. Morgan* (1918) 102 Kan. 478, 170 Pac. 998, wherein a defendant counterclaimed for shortage in quantity of a stock of goods traded to him as a part consideration for a conveyance of land, the court said: "It is suggested by the plaintiffs that the defendant's counterclaim was barred by the Statute of Limitations, the counterclaim being based on fraud, and the answer having been filed more than two years after the fraud was discovered. Section 6994 of the General Statutes of 1915 prevents application of the Statute of Limitations to cross demands of the character here involved."

But in *Muckenthaler v. Noller* (1919) 104 Kan. 551, 180 Pac. 453, the court, in an official syllabus, said: "Section 24 of the Code of Civil Procedure, which declares that 'when a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense,' is construed to mean that a barred right of action cannot be used as a set-off or counterclaim, or for the purpose of obtaining affirmative relief; but not to apply to matters of pure defense."

(e) *Mississippi.*

Under the Mississippi statute (Code 1906, § 3117, Code 1892, § 2756a), a defendant may interpose a barred demand as a set-off, but he may not

recover any excess over the plaintiff's claim. *Feld v. Coleman* (1895) 72 Miss. 545, 17 So. 378, wherein the court said: "By our Statute of Limitation, Code 1892, § 2756a, it is declared: 'All the provisions of this chapter shall apply to the case of any debt or demand on contract alleged by way of set-off on the part of a defendant; and the time of limitation of such debt or demand shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced; and the fact that a set-off is barred shall not preclude the defendant from using it as such if he held it against the debt sued on before it was barred.' This section of the Code deals with the Statute of Limitations in three aspects: (1) The general provisions of the chapter provide that no action shall be brought after the right is barred by the statutory period applicable to it. The first clause of this section, treating the set-off as a cross action, applies the same Statute of Limitation to it as would have applied if the defendant had instituted an original action thereon. (2) By another section of the Code (§ 687), it is provided that, if the set-off pleaded by the defendant shall be established by him to an amount in excess of the sum found to be due to the plaintiff, the defendant shall have judgment against the plaintiff for such excess. The second clause of § 2756a suspends the running of the Statute of Limitations on the demand of the defendant pleaded by him as a set-off in that action, from the time when the plaintiff's action was commenced. Under this clause, a defendant whose demand against the plaintiff is not barred when the plaintiff's action is commenced, and which, but for the statute, would be barred when pleaded as a set-off, is given the right to use such demand defensively and offensively as against the plaintiff. (3) The third clause of this section was found for the first time in the Code of 1880 (§ 2687), and was intended to meet the precise case now presented—i. e., cases in which, persons having mutual and subsisting

demands against each other which might be used by either as a set-off in a suit brought by the other, the right of one becomes barred by limitation, and thereafter the other sues upon his unbarred claim. In such cases the right of the defendant to interpose his demand, though barred, defensively, is preserved. He may not recover over against the plaintiff any excess of his demand above that of the plaintiff, but may defeat any recovery by the plaintiff."

Where the defendant's set-off is in excess of the plaintiff's claims and a judgment for the excess is sought, it is incumbent on the plaintiff to plead the Statute of Limitations against the set-off in order to defeat a recovery over against him, although the plea of the statute does not prevent the defendant from using his set-off as a defense for an amount equal to that of the plaintiff's claim. *Jordan v. Holmes* (1912) 102 Miss. 487, 59 So. 809.

(f) *New Mexico.*

Section 2927 of the Compiled Laws of New Mexico, which was § 14 of the Act of 1880, provides as follows: "A set-off or counterclaim may be pleaded as a defense to any cause of action, notwithstanding such set-off or counterclaim may be barred by the provisions of this act, if such set-off or counterclaim so pleaded was the property or right of the party pleading the same at the time it became barred and at the time of the commencement of the action, and the same was not barred at the time the cause of action sued for accrued or originated; but no judgment for any excess of such set-off or counterclaim over the demand of the plaintiff as proved shall be rendered in favor of the defendant." See *Mann v. Gordon* (1910) 15 N. M. 652, 110 Pac. 1043.

(g) *Oklahoma.*

The Oklahoma Code (Laws 1905, p. 328, Laws 1909, § 5635, Laws 1910, § 4746) provides that a set-off or counterclaim "shall not be barred by

the Statutes of Limitation until the claim of the plaintiff is so barred."

In *Scrivner v. McClelland* (1918) 75 Okla. 239, 182 Pac. 503, the court, in an official syllabus, said: "A set-off pleaded in plaintiff's petition for the purpose of liquidating a judgment in favor of the defendant against the plaintiff is not barred by the Statutes of Limitation until the demand of the defendant is barred."

In *Mires v. Hogan* (1920) 79 Okla. 233, 192 Pac. 811, the statute was applied to permit a barred counterclaim for twice the amount of usurious interest paid to be asserted in an action for the principal debt.

In *CLARK v. DUNCANSON* (reported herewith) ante, 315, a cross petition seeking to cancel a tax deed in an action to quiet title was held to be a counterclaim within the statute.

In *Cooper v. Gibson* (1918) — Okla. —, 170 Pac. 220, the court said: "It is equally clear that the defense attempted to be stated in the pleading was the proper subject of a counterclaim under §§ 4745 and 4746, Rev. Laws 1910, inasmuch as the counterclaim for damages attempted to be stated arose out of contract,—that is, the contract of exchange of property entered into between these parties,—and resulted from a breach of the obligation of such contract by the plaintiff in error. *Mowatt v. Shidler*, — Okla. —, 168 Pac. 1169. Under the section of the statute last above cited (§ 4746), the counterclaim is not barred."

And in *Advance Thresher Co. v. Doak* (1913) 36 Okla. 532, 129 Pac. 736, it was held that a barred claim for the conversion of threshing machinery was available against notes given for its purchase price.

In *Stauffer v. Campbell* (1911) 30 Okla. 76, 118 Pac. 391, it was held that a claim for goods sold and delivered, though barred by limitations, was available as a counterclaim in an action on a supersedeas bond.

Prior to the enactment of the statute it was the rule that a claim barred by the Statute of Limitations was unavailable as a set-off. *Richardson v. Penny* (1900) 10 Okla. 32, 61 16 A.L.R.—22.

Pac. 584; *McClure v. Johnson* (1898) 10 Okla. 663, 65 Pac. 103.

In *Theis v. Beaver* (1908) 22 Okla. 333, 97 Pac. 973, it was held that the statute was not retroactive and did not revive a set-off already barred by a former statute.

(h) Utah.

In Utah, a statute provides that, where cross demands exist, they shall be deemed compensated so far as they equal each other.

In *Utah Commercial & Sav. Bank v. Fox* (1911) 40 Utah, 205, 120 Pac. 840, the court, referring to that statute, said: "In passing upon the Statute of Limitations the court should bear in mind the fact that while there may be claims preferred by a party which are barred by the Statute of Limitations in so far as to prevent a judgment in his favor, yet, in so far as to permit him to have such claims applied as compensation for, or as a set-off against, his adversary's claims, they may not be barred, under the provisions of Comp. Laws 1907, § 2971." But on a second appeal in (1914) 44 Utah, 323, 140 Pac. 660, the court, without referring to the statute or the previous decision, held that the counterclaim in question was not available because barred by limitations.

2. Barred claim held unavailable.

(a) Arkansas.

In Arkansas, it has been held without reference to the statute (*Kirby's Dig.* 1904, § 5092) making a barred debt unavailable as a counterclaim, that a counterclaim, regarded as an affirmative action, is not available if barred by the Statute of Limitations. The claim, however, was held to be available as a defense by way of recoupment. *Stewart v. Simon* (1914) 111 Ark. 358, 163 S. W. 1135, Ann. Cas. 1916A, 825. And see *HUGGINS v. SMITH* (reported herewith) ante, 323.

The foregoing cases are also set out *infra*, in subd. III.

See also *Camp v. Gullett* (1847) 7 Ark. 524, wherein it was held that a set-off which appeared on its face to be barred by the Statute of Limita-

tions could not be excluded on motion until it appeared that the defendant had no evidence which would remove the bar of the statute.

(b) *Georgia.*

In Georgia, by statute (§ 5673, Parks Anno. Code 1914), the Statute of Limitations applies to the subject-matter of set-offs, as well as to the plaintiff's demand. The following cases support the statutory rule, but no mention is made of the statute: *Lankford v. Peterson* (1917) 21 Ga. App. 1, 93 S. E. 499; *Brewer v. Grogan* (1902) 116 Ga. 60, 42 S. E. 525; *Saulsbury v. Iverson* (1884) 73 Ga. 733; *Finney v. Brumby* (1880) 64 Ga. 510.

Thus, in *Lankford v. Peterson*, supra, it was held that, where usurious interest has been paid and applied as such, a plea of set-off for its recovery is unavailable when the claim is barred by the Statute of Limitations.

To the same effect, see *Finney v. Brumby*, supra.

And in *Saulsbury v. Iverson* (1884) 73 Ga. 733, an action to set aside a mortgage, it was held that a debt barred by the Statute of Limitations was unavailable as a set-off.

In *Brewer v. Grogan* (1902) 116 Ga. 60, 42 S. E. 525, the court, in an official syllabus, said: "Where in defense to an action upon a promissory note the defendant sets up, by way of set-off (though denominating his defense a plea of payment), open accounts against the plaintiff, which are on their face barred by the Statute of Limitations, it is erroneous to overrule a demurrer to such a defense, presenting the point that the same shows on its face that the defendant's alleged cross action is barred."

And see *Lee v. Lee* (1860) 31 Ga. 26, 76 Am. Dec. 681, wherein it was held that a demand, barred at the commencement of the plaintiff's action, but during its pendency revived by a new promise, was unavailable as a set-off.

The case of *Brown v. Winship* (1856) 20 Ga. 693, decided, apparently, prior to the enactment of the statute, is in harmony with the statutory rule, it being held that the Statute of Limi-

tations may be replied to a plea of set-off.

(c) *Maine.*

By a Maine statute (Rev. Stat. 1903, chap. 83, § 105), the Statute of Limitations is made applicable to any debt or contract filed in set-off by the defendant. In *Nason v. McCulloch* (1850) 31 Me. 158, the court, denying the allowance of a barred set-off, said: "The defendant contends that, though his account was barred by the statute, he had the right to prove it, so far as to balance and defeat the note. But such a distinction would operate a repeal of the statute."

(d) *Massachusetts.*

In Massachusetts, the statutes expressly recognize the validity of the defense of the Statute of Limitations to a claim of set-off. *Tyler v. Boyce* (1883) 185 Mass. 558; *Hunt v. Spaulding* (1836) 18 Pick. 521.

Thus, in *Tyler v. Boyce*, supra, it was held that a barred claim for board, care, and nursing was unavailable as a set-off in a writ of entry to foreclose a mortgage.

And in *Hunt v. Spaulding*, supra, it was held that the filing of notes as a set-off was to be considered as the bringing of an action on them, and that those which were barred by the Statute of Limitations were unavailable in reduction of the plaintiff's claim.

(e) *Michigan.*

In Michigan, it is provided that the Statute of Limitations shall apply to the case of any debt or contract alleged by way of set-off "on the part of a defendant; and the time of the limitation of such debt shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced, provided such debt or contract would have been barred, according to law, before the accruing of the claim or demand upon which such defendant is sued." 2 How. Stat. § 8731; 5 How. Stat. 2d ed. § 14,153.

"Under the terms of this statute, the claim of defendant is barred if the period of limitation had run against it

before the accruing of the cause of action upon which the plaintiff brings suit, and not otherwise." *Busch v. Wilcox* (1895) 106 Mich. 514, 64 N. W. 485.

In *Kincade v. Peck* (1916) 193 Mich. 207, 159 N. W. 480, it was held that a claim for money loaned to the plaintiff was unavailable as a set-off in an action on a promissory note, it appearing that the set-off was barred by the Statute of Limitations.

(f) *New Jersey.*

In New Jersey, the Statute of Limitations applies to any debt on single contract alleged by way of set-off on the part of the defendant. 3 N. J. Comp. Stat. p. 3168, § 12.

In *Nolin v. Blackwell* (1865) 31 N. J. L. 170, 86 Am. Dec. 206, it was held that the Statute of Limitations applies as well to a demand attempted to be set off, as to one on which an action is brought.

(g) *New York.*

The New York Code of Civil Procedure, § 397, provides that "a cause of action, upon which an action cannot be maintained as prescribed in this title [limitations of actions other than for the recovery of real property] cannot be effectually interposed as a defense or counterclaim."

In *De Lavallette v. Wendt* (1879) 75 N. Y. 579, 31 Am. Rep. 494, the defendant attempted to set up a counterclaim. The court said: "There could be no recovery by the defendant, or set-off in his favor, arising out of the instrument put in evidence by him, dated November 3, 1866; for if it is to be regarded as a note or duebill, payable on demand, the Statute of Limitations had completely barred it at the time of the commencement of this action."

Compare *Herbert v. Day* (1884) 33 Hun, 461, 15 Abb. N. C. 172, and *Campbell v. Hughes* (1893) 73 Hun, 14, 25 N. Y. Supp. 1021, wherein it was held that a counterclaim arising out of the contract sued on may be asserted, though limitations have run against it as an independent cause of action.

The following cases were decided prior to the enactment of the Code:

In *Mann v. Palmer* (1865) 3 Abb. App. Dec. 162, 2 Keyes, 177, the court said: "Two questions are raised on the defendant's appeal: First, whether the note of \$1,500 given by William W. Mann to Palmer should have been allowed as an offset against plaintiff's claims. The referee rejected it on the ground that it was barred by the Statute of Limitations. The plaintiff had not pleaded the statute in reply. But, as this note was not a counterclaim within the Code, no reply was necessary. It was a demand against a third party, the plaintiff's assignor, and not against the plaintiff, and it did not grow out of the transactions out of which this suit arose so that it was connected with the subject-matter of the action, or the accounts between the parties, in any sense. It was, as the referee found, a demand for money lent, quite outside of the land transactions, and no judgment could have been rendered upon it against the plaintiff. The Code, § 150, defines a counterclaim as a demand existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and a reply is not necessary where the alleged offset is not within this definition. The referee was, therefore, right in holding that the Statute of Limitations was a bar to any right of action on this note." And in *Williams v. Willis* (1873) 15 Abb. Pr. N. S. 11, it was held that, where a counterclaim constitutes a cause of action against a party, the lapse of time is not a bar unless the party chooses to make it so, and pleads it.

III. *Recoupment.*

The defense of recoupment exists as long as the plaintiff's cause of action exists and may be asserted, though the claim as an independent cause of action is barred by limitations.

United States.—*Williams v. Neely* (1904) 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1.

Alabama.—*Harton v. Belcher* (1915) 195 Ala. 186, 70 So. 141. See also *Conner v. Smith* (1889) 88 Ala. 300, 7 So. 150.

Arkansas.—*Stewart v. Simon* (1914)

Cas. 1916A, 825. And see HUGGINS v. SMITH (reported herewith) ante, 323.

Connecticut.—Beecher v. Baldwin (1887) 55 Conn. 419, 3 Am. St. Rep. 57, 12 Atl. 401.

Georgia.—Morrow v. Hanson (1851) 9 Ga. 398, 54 Am. Dec. 346.

Minnesota.—C. Aultman & Co. v. Torrey (1893) 55 Minn. 492, 57 N. W. 211.

Nebraska.—Kaup v. Schinstock (1910) 88 Neb. 95, 129 N. W. 184.

In Stewart v. Simon (Ark.) supra, it was held that a counterclaim for unliquidated damages arising from a breach of the contract, in connection with which the note sued on was given, while barred by the Statute of Limitations if regarded as an affirmative action, was nevertheless available by way of recoupment.

And in C. Aultman & Co. v. Torrey (Minn.) supra, it was held that a breach of warranty was available by way of recoupment against the purchase price, irrespective of the bar of the Statute of Limitations.

In Morrow v. Hanson (Ga.) supra, the court said: "The only point in this case is whether, in a suit upon a promissory note by the plaintiff, the defendant may show, by way of defense, a warranty of the property for which the note was given, and that the consideration had totally failed, the warranty being by parol, and more than four years having elapsed from the time of making such parol warranty. The general rule of law is that where there is a total failure of the consideration, and the defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such total failure of consideration may be shown in bar of the action. . . . So long as the plaintiff has the legal right to sue the defendant, he may defend himself by showing he has no cause of action against him. The note of the plaintiff imports a consideration on its face; but it is competent for the defendant to show, either that there was no consideration, or that the consideration

failed; in other words, that the plaintiff has no cause of action against him; and it is not competent for the plaintiff to insist upon the Statute of Limitations in order to avoid the defendant's defense, when he is seeking to enforce the contract against him. So long as the plaintiff has the legal right to sue on the contract, the defendant has the correlative right to defend it."

In Williams v. Neely (Fed.) supra, it was held that a claim of recoupment for breach of warranty asserted in an action on a note for the purchase price of real estate was available though the cause of action on the covenant was barred by the Statute of Limitations. The court said: "Conceding, without deciding, that the bar of the statute had fallen upon the action on this covenant before this suit was instituted, that fact is not fatal to the defense of the complainants, nor to this suit to enforce it. That defense, as we have seen, is not set-off or counterclaim, but an equitable reason why the amount payable by the terms of the note should be reduced. It is reduction. It is that because the consideration of the note failed in part, and because the condition subsequent that the covenant against encumbrances should be kept was not fulfilled, the full amount of the note ought not to be paid. This defense attaches to and inheres in the note itself, and, while the cause of action upon that obligation survives, the defense lives and runs with it. The defense of reduction or recoupment, which arises out of the same transaction as the note or claim, survives as long as the cause of action upon the note or claim exists, although an affirmative action upon the subject of it may be barred by the Statute of Limitations."

So, in Harton v. Blecher (Ala.) supra, wherein the defendant pleaded fraud in defense of an action on a note for the purchase price of timberlands, the court said: "Defendant's claim sprang out of the contract between the parties and affected the considerations moving between them; it ran

with the contract, so to speak, and so far, at least, as it went to the consideration, as it did in the case here, defendant might rely on it without regard to the Statute of Limitation. So long as the contract, upon a breach of which the claim is predicated, subsists and may be enforced, the claim itself may be pleaded, in reduction, at least, of the demand on the contract; and this notwithstanding the matter of recoupment, independently considered, may be barred not only when it is pleaded, but also when the right of action against which it is asserted accrued." See to the same effect, *Kaup v. Schinstock* (Neb.) *supra*.

Similarly, in *Beecher v. Baldwin* (Conn.) *supra*, it was held that a defendant, sued on a covenant of warranty, may plead in recoupment notes given for the purchase price, although the set-off, as an independent action, is barred by the Statute of Limitations.

See also *Conner v. Smith* (Ala.) *supra*, wherein the court, in holding that the claim set up by way of recoupment was not barred, remarked that a claim for damages, the result of the act of the mortgagee in defeating the mortgagor's right of election to purchase certain personalty, was available by way of recoupment, irrespective of the Statute of Limitations.

IV. Set-off against heir or legatee.

a. View that barred claim is available.

In some jurisdictions the view is taken that a debt due the estate by a legatee or distributee may be set off against his legacy or distributive share, though it is barred by the Statute of Limitations.

Alabama.—*Noble v. Tait* (1903) 140 Ala. 469, 37 So. 278.

Indiana.—*Holmes v. McPheeters* (1898) 149 Ind. 587, 49 N. E. 452.

Iowa.—*Garrett v. Pierson* (1870) 29 Iowa, 304.

Kansas.—*Holden v. Spier* (1902) 65 Kan. 412, 70 Pac. 348; *Wilson v. Channell* (1918) 102 Kan. 793, 1 A.L.R. 987, 175 Pac. 95.

Louisiana.—*Shipwith's Succession* (1860) 15 La. Ann. 209.

New York.—*Re Timerson* (1903) 39

Misc. 675, 80 N. Y. Supp. 639; *Re Bogart* (1882) 28 Hun, 466.

South Carolina.—*Ex parte Wilson* (1909) 84 S. C. 444, 66 S.E. 675.

Vermont.—*Tinkham v. Smith* (1884) 56 Vt. 187.

England.—*Courtenay v. Williams* (1844) 3 Hare, 539, 67 Eng. Reprint, 494, 13 L. J. Ch. N. S. 461, 8 Jur. 844; *Coates v. Coates* (1864) 33 Beav. 249, 55 Eng. Reprint, 363, 33 L. J. Ch. N. S. 448, 10 Jur. N. S. 582, 9 L. T. N. S. 795, 12 Week. Rep. 634; *Rose v. Gould* (1852) 15 Beav. 189, 51 Eng. Reprint, 509, 21 L. J. Ch. N. S. 360; *White v. Cordwell* (1873) 44 L. J. Ch. N. S. 746, L. R. 20 Eq. 644, 23 Week. Rep. 826.

In *Holmes v. McPheeters* (Ind.) *supra*, it was held that the Statute of Limitations could not be successfully interposed by an heir to defeat the administrator's equitable right to apply a part of the heir's share of the estate in payment of a note due the estate. The court said: "This right is not one of set-off, but is founded on the principle that the administrator or executor has an equitable lien on the share of the distributee, or legatee, until the latter has discharged the obligation which he owes to the estate. The heir or legatee, as the authorities affirm, is not, in accordance with justice or good conscience, entitled to be awarded and receive his share as long as he is a debtor to the estate and thereby has in his own hands a part of the fund upon which the payment of his own share and the shares of others depend. To allow a distributee to receive his share of the fund in the hands of the administrator for distribution, while the former is in default in the payment and discharge of his own obligations to the estate, would serve to diminish the fund, and result, perhaps, to the prejudice of others. By permitting the distributee to receive his share, while he retains a part of the fund in his own hands, out of which his share ought to be paid, might and frequently would result in awarding to him a portion of the fund greater than that received by other equally entitled distributees. These principles, in reason, do and must apply when the recovery of the

debt which the distributee owes to the estate is barred by the Statute of Limitation. The Statute of Limitation is one of repose, and is only a bar to the remedy, and not to the debt itself, simply leaving it unpaid without any legal remedy on the part of the creditor to enforce its payment by suit, in the event the debtor relies on the statute as a defense. Measured, however, by a moral standard, and one in accord with good conscience, the debtor is still under an obligation to pay his debt, although a recovery thereon under the law may be barred by the lapse of time. The statutes of this state recognize the right of a party to enforce a set-off against a cause of action, although a recovery upon the debt upon which the set-off is based is barred by limitation. Burns's Rev. Stat. 1894, § 370 (Rev. Stat. 1881, 367)."

In *Garrett v. Pierson* (Iowa) *supra*, the court said: "We are unable to concur with the court below in the view that the evidence was sufficient to deprive defendant of his defense of the Statute of Limitations. The remedy sought in the chancery action against defendant is not a judgment for money paid by the estate on his account. It cannot in truth be said that the chancery proceeding is an action upon the claim which is the foundation of this suit. The claim may be barred by the statute, and yet be properly set up as a claim against defendant in settling his distributive share of the estate. It may, as we conceive, be taken into consideration in settling the estate, yet could not, on account of the statute, be enforced in a suit at law. If the object of the chancery suit were to enforce the payment of the claim to the estate, and there were no other objections thereto, the district court's view would probably be correct, but as the chancery proceeding is in no sense an action on the claim, we are utterly unable to see how it can prevent the statute running."

b. View that barred claim is unavailable.

In other jurisdictions it is held that

a debt due the estate by a legatee or distributee is unavailable as a set-off, if it is barred by the Statute of Limitations.

California.—*Re Schaeffer* (1921) — Cal. App. —, 200 Pac. 508.

Illinois.—*Hesley v. Shaw* (1905) 120 Ill. App. 92.

Maine.—*Holt v. Libby* (1888) 80 Me. 329, 14 Atl. 201.

Maryland.—*Watkins v. Harwood* (1830) 2 Gill & J. 307.

Massachusetts.—*Allen v. Edward* (1883) 136 Mass. 138; *Lovell v. Nelson* (1865) 11 Allen, 101, 87 Am. Dec. 706.

Nebraska.—*Boden v. Mier* (1904) 71 Neb. 191, 98 N. W. 701.

Ohio.—*Harrod v. Carder* (1888) 3 Ohio C. C. 479, 2 Ohio C. D. 274.

Pennsylvania.—*Milne's Appeal* (1882) 99 Pa. 483; *Reed v. Marshall* (1879) 90 Pa. 345; *Re Murray* (1870) 2 Pearson, 473; *Drysdale's Appeal* (1850) 14 Pa. 531; *Levering v. Rittenhouse* (1838) 4 Whart. 180.

Tennessee.—*Richardson v. Keel* (1882) 9 Lea, 74.

In *Holt v. Libby* (Me.) *supra*, the court said: "It is a general rule in the settlement of legacies by an executor that he may retain the legacy,—the whole or a sufficient portion,—in satisfaction of the legatee's debt to the estate, if the testator does not indicate, either in the terms of the bequest or in other parts of the will, that it shall be otherwise. This is the rule, both in law and equity. The English practice goes further, and allows the rule to prevail, on the idea of lien, as to debts which have become barred by the Statute of Limitations. . . . But a legacy was recoverable in England, in the day of the authorities cited, only in chancery. The same rule of equitable set-off prevails in that country, not only as to legacies, but also as to the share of one entitled as next of kin in the estate of an intestate. . . . This doctrine cannot be applicable in this state, and in most of the states, where a legacy is made by statute, if not by ancient practice, a legal claim. With us it is a distinct and independent legal claim. The estate is just as much of a debtor to

the indebted legatee as the legatee is to the estate. Each has a legal right and remedy. And a statute-barred debt is no more recoverable by an estate than by any other creditor. To our minds, this is the better doctrine. Observation leads us to believe that a testator is more likely to intend to remit than to collect such debts, when nothing is declared of them by him in his will—especially debts against his children and relatives. In many instances, such claims are covered by the dust of time and forgotten, though found by executors after the death of the testators. In many other instances, the advances are intended as benefactions and gifts, conditioned upon some unforeseen circumstance arising to make it expedient to regard them as debts."

In *Watkins v. Harwood* (Md.) supra, it was said: "By the Act of 1715, chap. 23, the Act of Limitations of this state, the recovery of a debt due by specialty is barred after a lapse of twelve years. This is claimed as a mere debt, by way of set-off against the distributive share of the appellant, and the mortgage is offered as evidence of that debt; and the question is whether the Act of Limitations ought to have been allowed. It is a settled principle that chancery follows the law; and, acting in obedience to the statute, the plea of limitations is as available in equity as at law, in relation to the same subject-matter. Here, the subject-matter is a debt of sixteen or seventeen years' standing (with no recognition of it during the whole of that time) that is claimed to be allowed as such in the statement of the account by the auditor, an action for the recovery of which, in a court of law, on the covenant in the mortgage, would be barred by the Act of Limitations. And we think equally barred in chancery, and that the plea of the appellant ought to have been allowed. The decree of the chancellor, therefore, so far as it disallows the plea of the Act of Limitations by the appellant, is reversed."

In *Harrod v. Carder* (Ohio) supra, the court said: "The right of action upon the notes set out in the answer having been barred in the lifetime of defendant in error's intestate, such notes are not available by way of set-off, the plea of which is in the nature of a cross action. If an action could not be maintained thereon, they cannot be set off.

A. S. M.

LEWIS H. BLACKLEDGE et al., Interveners,

v.

FARMERS' INDEPENDENT TELEPHONE COMPANY OF RED CLOUD, Appt.,

and

LINCOLN TELEPHONE & TELEGRAPH COMPANY.

Nebraska Supreme Court — February 23, 1921.

(— Neb. —, 181 N. W. 709.)

Telephones — division of business — validity.

1. Where the railway commission, as a condition of an order requiring the physical connection of two companies, directs that the two companies shall divide all new business, in such proportions that the relation in size of the one company to the other shall not change, but shall be continuously maintained so long as the order of exchange of service shall operate, the right of either company to accept as subscribers all who shall apply in

Headnotes by FLANSBURG, J. .

the territory covered by their system is denied, and the effect of such order is to take the company's property without due process of law.

[See note on this question beginning on page 352.]

— physical connection — scope of requirement.

2. The statute requiring physical connections to be made between telephone companies (Rev. Stat. 1913, §§ 7414, 7417) applies to companies operating "trunk and toll" lines, and contemplates only the forwarding of messages when such lines are used.

Public service commission — power over telephones.

3. The railway commission is, by the Constitution, given plenary power to regulate and control telephone companies which are operated as public utilities, but such powers are subject to the general constitutional limitations and subject to whatever specific legislation is enacted providing the manner and limit and extent that the power shall be exercised.

— physical connection of telephones.

4. Though at common law such public utilities could not be required to make physical connections of their telephone systems, the legislature or the railway commission may order

such connections when public convenience and necessity require, provided that the company required to render the service will receive proper compensation for the additional service which it renders, and that such conditions are imposed as will protect such company in its individual management and control of its own property, and that the order does not so operate as to create or allow of such discriminatory conditions as will cause injury to the company concerned.

[See 26 R. C. L. 519; see also note in 11 A.L.R. 1204.]

Courts — power over order requiring exchange of telephone business.

5. A regulation requiring the exchange of service between telephone companies is legislative in character and cannot be modified, but must be either approved or set aside by the courts, except, however, such portions as are distinctly separable may be sustained or annulled as separate and independent regulations.

APPEAL by applicant from an order of the State Railway Commission requiring physical connection between it and the Lincoln Company for the exchange of local service, and requiring the division of new business between them, in a proceeding in which certain parties intervened for the re-establishment of long-distance service by the Lincoln company. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Howard S. Foe, Stiner & Boslaugh, and W. M. Whelan, for appellant.

The legislature is the sole judge as to when and how the police power of the state is to be exercised.

State v. Drayton, 82 Neb. 254, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768; West Point Water Power & Land Improv. Co. v. State, 49 Neb. 218, 66 N. W. 6; Dinuzo v. State, 85 Neb. 351, 29 L.R.A.(N.S.) 417, 123 N. W. 309; Sanders v. State, 34 Neb. 872, 52 N. W. 721; Adams v. Weisberger, 62 Neb. 325, 87 N. W. 16; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; House v. Mayes,

219 U. S. 270, 55 L. ed. 213, 31 Sup. Ct. Rep. 234; People v. Johnson, 288 Ill. 442, 4 A.L.R. 135, 123 N. E. 543; Equitable Loan & Secur. Co. v. Ldwardsville, 143 Ala. 182, 111 Am. St. Rep. 34, 38 So. 1016; Missouri & N. A. R. Co. v. State, 92 Ark. 1, 31 L.R.A.(N.S.) 861, 135 Am. St. Rep. 164, 121 So. 930; 6 R. C. L. 185 et seq; 8 Cyc. 865 et seq.

The legislature of Nebraska has not provided for physical connection of competing telephone companies, except as to long-distance or toll service. Any other construction of the Act of 1913 renders it void.

State ex rel. Douglas v. McShane, 93 Neb. 46, 139 N. W. 850; McShane v. State, 93 Neb. 54, 139 N. W. 852; State ex rel. Graham v. Tibbets, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990; State v. Burlington & M. River

(— Neb. —, 181 N. W. 709.)

R. Co. 60 Neb. 741, 84 N. W. 254; Haverly v. State, 63 Neb. 83, 88 N. W. 171; Union P. R. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46.

The regulation of public utilities is an exercise of the police power of the state. Physical connection between two competing telephone companies is a privilege to be created only as a result of a private contract, or in obedience to some constitutional or statutory requirement.

Pond, Public Utilities, art. 565, p. 631; Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 50 L.R.A. (N.S.) 62, 137 Pac. 1119, Ann. Cas. 1915C, 822; Home Teleph. Co. v. People's Teleph. & Teleg. Co. 125 Tenn. 270, 43 L.R.A. (N.S.) 550, 141 S. W. 845; State ex rel. Goodwine v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Pacific Teleph. & Teleg. Co. v. Anderson, 196 Fed. 699; Billings Mut. Teleph. Co. v. Rocky Mountain Bell Teleph. Co. 155 Fed. 207; State ex rel. Public Service Commission v. Skagit River Teleph. & Teleg. Co. 85 Wash. 29, P.U.R.1915C, 902, 147 Pac. 885, 151 Pac. 1122, 89 Wash. 625, P.U.R.1916C, 590, 155 Pac. 144.

The leading and authoritative decisions involving the physical connection of competing public utilities result from constitutional or statutory provisions, providing for such compulsory physical connection.

Wisconsin Teleph. Co. v. Railroad Commission, 162 Wis. 383, L.R.A. 1916E, 748, P.U.R.1916D, 212, 156 N. W. 614; Home Teleph. Co. v. People's Teleph. & Teleg. Co. 125 Tenn. 270, 43 L.R.A. (N.S.) 550, 141 S. W. 845; Southwestern Teleg. & Teleph. Co. v. State, — Tex. Civ. App. —, 150 S. W. 604; Milbank v. Dakota Cent. Teleph. Co. 37 S. D. 504, P.U.R.1916F, 562, 159 N. W. 99; Michigan State Teleph. Co. v. Michigan R. Commission, 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240; Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 59 L. ed. 750, P.U.R.1915C, 263, 35 Sup. Ct. Rep. 422; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Billings Mut. Teleph. Co. v. Rocky Mountain Bell Teleph. Co. 155 Fed. 208; Pioneer Teleph. & Teleg. Co. v. Grant County Rural Teleph. Co. — Okla. —, 119 Pac. 968; Atlantic, S. R. & G. R. Co. v. State, 42 Fla. 358, 89 Am. St. Rep. 233, 29 So. 319; Smith

v. Chicago, M. & St. P. R. Co. 86 Iowa, 202, 53 N. W. 128.

Physical connection of competing telephone companies for long-distance or toll service is required by an act of the legislature of this state. This was an exercise of the police power by the legislature, and the order of the commission in this respect is valid.

Hooper Teleph. Co. v. Nebraska Teleph. Co. 96 Neb. 245, 147 N. W. 674; Wisconsin Teleph. Co. v. Railroad Commission, 162 Wis. 383, L.R.A. 1916E, 748, P.U.R.1916D, 212, 156 N. W. 614; Milbank v. Dakota Cent. Teleph. Co. 37 S. D. 504, P.U.R.1916F, 565, 159 N. W. 99; Michigan State Teleph. Co. v. Michigan R. Commission, 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240; Billings Mut. Teleph. Co. v. Rocky Mountain Bell Teleph. Co. 155 Fed. 207; Pioneer Teleph. & Teleg. Co. v. Grant County Rural Teleph. Co. — Okla. —, 119 Pac. 968, 38 Okla. 554, 184 Pac. 398, 45 Okla. 31, 144 Pac. 1060; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Pennsylvania Co. v. United States, 236 U. S. 351, 59 L. ed. 616, P.U.R.1915B, 261, 35 Sup. Ct. Rep. 370; Louisville & N. R. Co. v. United States, 227 Fed. 258; Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co. 214 Fed. 666; Southwestern Teleg. & Teleph. Co. v. State, — Tex. Civ. App. —, 150 S. W. 604; Railroad Commission v. Alabama Northern R. Co. 182 Ala. 357, 62 So. 749; Railroad Commission v. Alabama G. S. R. Co. 185 Ala. 354, L.R.A.1915D, 98, 64 So. 13; Dewey v. Atlantic Coast Line R. Co. 142 N. C. 392, 55 S. E. 292; Missouri, O. & G. R. Co. v. State, 29 Okla. 640, 119 Pac. 117; Gulf, C. & S. F. R. Co. v. State, — Tex. Civ. App. —, 167 S. W. 192.

The third part of the order of the railway commission does not respond either to public necessity or public convenience, and is opposed thereto. It is not a proper regulation, but an unwarranted invasion of private rights and property.

Smiley v. MacDonald, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; Iler v. Ross, 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 50 L.R.A. (N.S.)

652, 137 Pac. 1119, Ann. Cas. 1915C, 822; Hooper Teleph. Co. v. Nebraska Teleph. Co. 96 Neb. 245, 147 N. W. 674; Wisconsin Teleph. Co. v. Railroad Commission, 162 Wis. 383, L.R.A. 1916E, 748, P.U.R.1916D, 212, 156 N. W. 614; Milbank v. Dakota Cent. Teleph. Co. 37 S. D. 504, P.U.R.1916F, 562, 159 N. W. 99.

Mr. Lewis H. Blackledge, in propria persona:

The intervening petitioners are entitled to the telephone service requested.

Hooper Teleph. Co. v. Nebraska Teleph. Co. 96 Neb. 245, 147 N. W. 674; California v. Central P. R. Co. 127 U. S. 40, 32 L. ed. 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co. 214 Fed. 666.

Mr. J. S. Gilham, in propria persona:

The power of the court to review the decision complained of is limited to determining whether any of the orders contained in it are beyond the authority vested in the commission to make, or in violation of some lawful right of the party complaining. The court cannot substitute its judgment for that of the commission, and must either affirm or reverse the orders.

Omaha & C. B. Street R. Co. v. Nebraska State R. Commission, 103 Neb. 695, P.U.R.1919F, 307, 173 N. W. 690; Re Lincoln Traction Co. 103 Neb. 229, P.U.R.1919C, 927, 171 N. W. 192; Nebraska Teleph. Co. v. State, 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; New York ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; Hammond Lumber Co. v. Public Service Commission, 96 Or. 595, 9 A.L.R. 1223, 189 Pac. 639; Mt. Union v. Mt. Union Water Co. 256 Pa. 516, P.U.R. 1917E, 933, 100 Atl. 968; Hocking Valley R. Co. v. Public Utilities Commission, 92 Ohio St. 362, P.U.R.1916B, 406, 110 N. E. 952; State v. Great Northern R. Co. 130 Minn. 57, P.U.R. 1915D, 467, 153 N. W. 247, Ann. Cas. 1917B, 1201; Garson v. Steamboat Canal Co. 43 Nev. 298, 185 Pac. 801; Union P. R. Co. v. Public Utilities

Commission, 95 Kan. 604, P.U.R. 1915D, 377, 148 Pac. 667.

A commission order requiring physical connection of the two telephone exchanges for long-distance service, without any condition whatsoever, would result in the taking of a portion of the Lincoln company's property without compensation in violation of its constitutional rights.

Wisconsin Teleph. Co. v. Railroad Commission, 162 Wis. 383, L.R.A. 1916E, 748, P.U.R.1916D, 212, 156 N. W. 614; Milbank v. Dakota Cent. Teleph. Co. 37 S. D. 504, P.U.R.1916F, 562, 159 N. W. 99; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822.

Mr. Bernard McNeny, for appellee Lincoln Telephone & Telegraph Company:

The railroad commission has no authority to make an order that would be confiscatory, or compel one of two rival companies to surrender its advantages to the other without conditions which will compensate for such surrender.

Wisconsin Teleph. Co. v. Railroad Commission, 162 Wis. 383, L.R.A. 1916E, 748, P.U.R.1916D, 212, 156 N. W. 614; Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822; Philadelphia, M. & S. Street R. Co.'s Petition, 203 Pa. 354, 53 Atl. 191; Home Teleph. Co. v. People's Teleph. & Teleg. Co. 125 Tenn. 270, 43 L.R.A.(N.S.) 550, 141 S. W. 845; Shafor v. Public Utilities Commission, 94 Ohio St. 230, L.R.A.1917E, 1080, P.U.R.1916F, 432, 113 N. E. 809.

Flansburg, J., delivered the opinion of the court:

Appeal from an order of the Nebraska state railway commission, requiring physical connection between telephone companies for the exchange of local service, as well as for the transmission of long-distance messages.

The Farmers' Independent Telephone Company and the Lincoln Telephone & Telegraph Company, both Nebraska corporations, are engaged in the telephone business at Red Cloud, Nebraska. Each operates a local exchange, and in that

business they are direct competitors. The Farmers' company has, also, farm lines extending into the country, and has switching exchanges with certain other independent companies which operate small telephone exchanges in neighboring towns. The Lincoln company has an extended business over the entire state and operates long-distance lines in connection with and as a part of the Bell system throughout the United States and Canada.

For some years prior to October 1, 1917, a physical connection had been maintained between the exchanges of the two companies at Red Cloud, and the subscribers of the Farmers' company had been given the privilege of directly transmitting telephone messages over the Lincoln company's long-distance lines. By reason of the duplication of telephones, found necessary by many subscribers, and the other inconveniences incident to the division of the local business at Red Cloud between the two companies, a movement began among certain telephone users for the elimination of one or the other of these companies from the field. Meetings were held and an agreement reached by a number of citizens, to the effect that they would patronize the Farmers' company exclusively. As a result eighty-four of the Lincoln subscribers immediately transferred to the Farmers' company. The Lincoln company, in the protection of its own interests, promptly discontinued the long-distance service formerly rendered the subscribers of the Farmers' company. The Farmers' company then made application to the railway commission for an order requiring the re-establishment of the long-distance service. In that proceeding the two complainants, who are citizens of Red Cloud and telephone users, intervened; the one praying for an order to require the two companies to mutually exchange all telephone service, local as well as long-distance, and the other that the two companies be required to consolidate their telephone sys-

tems in Red Cloud. The railway commission, after a hearing, entered an order requiring the Lincoln company to furnish long-distance service to subscribers of the Farmers' company and to re-establish physical connection between the two plants for that purpose. It also ordered that the two companies make necessary physical connection, and that each be required to receive and transmit all local calls, originating on the lines of the other, where destined to a subscriber on its own local lines. As compensation for the exchange of local service, the rates to all local subscribers of each of the companies were increased. All business subscribers were increased 75 cents a month, residence subscribers 20 cents a month, and farm and switching subscribers 10 cents a month. The railway commission then made a specific finding to the effect that the above orders, if granted without other conditions, would work injuriously to the Lincoln company and would result in a practical confiscation of its properties at Red Cloud, since all of its subscribers would eventually, under the circumstances created, transfer to the Farmers' lines. It was therefore further ordered, avowedly as a protection to the interests of the Lincoln company, that the future local telephone business should be divided, and that neither company should accept new or additional local subscribers in numbers sufficient to change the proportion in size that one company bore to the other on October 1, 1917. The Farmers' company appeals, complaining of all those provisions except the order covering the long-distance service.

It is insisted that the statute, Laws 1913, chap. 79 (Rev. Stat. 1913, §§ 7414, 7417), requires only connections with trunk and toll lines, and not a general exchange of local business. The title and body of the act, we think, confirm this contention. The title of the act refers only to "trunk and toll" lines, and the

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body of the act also refers specifically to such lines and provides for the division of tolls for long-distance service only. It is also provided that the tolls for the transmission of each particular message shall be divided, in part, upon the basis of the number of miles of line furnished by the respective companies. We find nothing in the act, however, which attempts to limit the general power of the railway commission over telephone companies in so far as its action may go beyond and not be in conflict with the mandatory provisions of this act.

By the Constitution (article 5, § 19a) the railway commission is given general power to regulate and control such companies according to its own judgment and discretion, subject to the general constitutional limitations, and except in so far as the legislature shall, by specific legislation, provide how, and limit to what extent, that power shall be exercised.

The railway commission has, then, full and plenary power, legislative in character, to control these companies, and to pass reasonable rules and regulations for the conduct of their business. It is authorized, in that regard, to exercise the police power of the state and that power of regulation and control which is impliedly reserved by the state in the grant of charters to such public utilities.

It is the contention of the Farmers' company that a physical connection can be required between telephone companies only through a legislative enactment, or by virtue of contract, and that the order of the railway commission goes beyond the provisions of the statute, above mentioned. It is true that, by the common law, public utilities owed no duty beyond their existing lines, and, therefore, no obligation to make physical connections or exchange service with each other. Each had the right to operate independently. Where the common law

is not changed by legislation, a court would, therefore, find no authority upon which to base an order for such physical connections or exchange of service. *Home Teleph. Co. v. People's Teleph. & Teleg. Co.* 125 Tenn. 270, 43 L.R.A. (N.S.) 550, 141 S. W. 845; *Pacific Teleph. & Teleg. Co. v. Anderson* (D. C.) 196 Fed. 699; *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* 236 Mo. 114, 36 L.R.A. (N.S.) 124, 139 S. W. 108; *State ex rel. Goodwine v. Cadwallader*, 172 Ind. 619, 87 N. E. 644 (on rehearing) 172 Ind. 644, 89 N. E. 319; *Pacific Teleph. & Teleg. Co. v. Eshleman*, 166 Cal. 640, 50 L.R.A. (N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822.

The railway commission is, by the Constitution, delegated authority which is, in its nature, legislative, and the common law is not a limitation upon that power. Its orders, as well as the statutory enactments of the legislature, must meet constitutional requirements, and must not be oppressive nor arbitrary, nor disregard substantial property rights.

The question arises whether or not the order of the railway commission in this case, based in part upon the statute mentioned, and in part a direct exercise of its own power, can be justified as a reasonable regulation of the business and service of these companies, or does it offend against those constitutional inhibitions, prohibiting the taking of property without due process of law, or without just compensation?

Although it has been held (*Pacific Teleph. & Teleg. Co. v. Eshleman*, supra) that to require physical connection between different telephone systems, and to compel one company to furnish the service of its lines to the patrons of the other company, cannot, under any conditions, be justified as a regulation, but must be considered a taking of property, and that it can only be accomplished through the exercise of the power of eminent domain, it is now quite universally recognized that the state, or its delegated authorities, may, in the exercise of its police power or

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(— Neb. —, 181 N. W. 709.)

its power to regulate public service corporations, compel such physical connections and compel the one company to furnish its wires for the transmission of messages originating on the other company's lines, provided that an arrangement is made so that the company required to render the service will receive proper compensation for the additional service which it renders, and

—physical connection of telephones. — that such conditions are imposed as will protect such company in its individual management and control of its own property, and that the order does not so operate as to create or allow of such discriminatory conditions as will cause injury to the company concerned.

Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co. (D. C.) 214 Fed. 666; Pioneer Teleph. & Teleg. Co. v. State, — Okla. —, P.U.R.1919C, 544, 177 Pac. 580; Pioneer Teleph. & Teleg. Co. v. State, 77 Okla. 216, P.U.R.1920C, 557, 186 Pac. 934; Pioneer Teleph. & Teleg. Co. v. State, 78 Okla. 38, 188 Pac. 107; Wisconsin Teleph. Co. v. Railroad Commission, 162 Wis. 383, L.R.A.1916E, 748, P.U.R.1916D, 212, 156 N. W. 614; Michigan State Teleph. Co. v. Michigan R. Commission, 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240; State ex rel. Public Service Commission v. Skagit River Teleph. & Teleg. Co. 85 Wash. 29, P.U.R.1915C, 902, 147 Pac. 885, 151 Pac. 1122; Southwestern Teleg. & Teleph. Co. v. State, — Tex. Civ. App. —, 150 S. W. 604; Id. 109 Tex. 337, P.U.R.1919C, 56, 207 S. W. 308; Milbank v. Dakota Cent. Teleph. Co. 37 S. D. 504, P.U.R.1916F, 562, 159 N. W. 99.

Whether the regulation is made by the order of the railway commission, or by legislative enactment, it can, in either event, be upheld only after providing an equitable adjustment of the rights involved.

The principle of requiring such physical connection of lines in furtherance of public service and for the public convenience was first recognized as applied to railroads.

Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 59 L. ed. 750, P.U.R.1915C, 263, 35 Sup. Ct. Rep. 422; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 1115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

When a telephone company procures a connection, so as to be allowed the use of long-distance wires of another, or where two companies are required to connect their long-distance toll lines, the toll charges, being based on distance of transmission of messages, may be so apportioned that each company will get compensation for just such part of the services that it renders in the transmission of each individual message. To that extent there is a clear analogy in principle to the rule as applied to railroad companies, where the transportation charges are automatically apportioned between the two companies, one company receiving compensation for that part of the service rendered up to, and the other beyond, the connecting point.

Where two telephone companies are competing for local business and one of them has long-distance lines which it has been compelled, by a regulatory order, to furnish to the patrons of the other company, it has, in some instances, been found necessary, in order to maintain an equality between the companies and to insure a proper compensation to the company furnishing additional service, to provide a switching charge against patrons of the other company, to be collected in addition to the regular toll rates charged to the subscribers of the company having the long-distance lines. Wisconsin Teleph. Co. v. Railroad Commission, 162 Wis. 383, L.R.A.1916E, 748, P.U.R.1916D, 212, 156 N. W. 614; Southwestern Teleg. & Teleph. Co. v. State, — Tex. Civ. App. —, 150 S. W. 604; Id. 109 Tex. 337, P.U.R.1919C, 56, 207 S. W. 308; Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co. supra.

The order of the railway commis-

sion, in the case here before us, requires an exchange of all local service, and provides a flat rate, instead of an individual switching charge, as compensation for the additional service to be rendered by the respective companies. The local service of these companies as to their own subscribers is also not based upon toll rates, but on a flat rate per month, so that there is not the same opportunity for apportioning the compensation between the companies for the transmission of a message from the lines of one over the lines of the other as there is where the two companies are operating their lines on toll charges. No complaint is made that a flat rate cannot be justified in place of a toll rate, and we do not now see any reason why a flat rate would prevent a possibility of proper apportionment of compensation between the companies where the service upon which the flat rate is to be based is of such a uniform character that such a rate would work reasonably and equitably as to all concerned, and would result in no discrimination. The order under consideration gives to each of the companies, alike, an increase of 75 cents for business phones, 20 cents for residence phones, and 10 cents for farm phones, but the telephone rates of these two companies, to which these increases are to be added, are not the same. The Lincoln company's rates are from \$2 to \$2.50 a month for business service, and from \$1 to \$1.50 for residence service, while the Farmers' company's rates are \$1.50 for business service and \$1 for residence service. By the order entered, there is an effectual consolidation of the service of these two companies by which a subscriber of the one company appears to receive practically the same service as a subscriber of the other company. The rates to the subscribers of the Farmers' company are, however, under this arrangement, considerably lower. Furthermore, it would appear that the use of the Lincoln company's higher rate lines would be more valuable

than the use of the Farmers' lines. It is the service of these lines that the two companies are required to exchange, and yet the one company receives no more for the service than the other.

The matter of the fixation and adjustment of the conditions and of rates, where an exchange of service is ordered, is one exclusively for the railway commission, and not for the courts. The one function of the court is to determine whether such an order as has been made can be legally justified. The commission has apparently not attempted to work out a system of rates and charges which would work as an equitable foundation for an exchange of service, and this may have been for the reason that it considered such could not be done. However that may be, the findings of the commission show that the Lincoln company has sustained a considerable loss of patronage by reason of the Farmers' company's competition, which has the advantage of local ownership; and the commission further finds that the requirement for an exchange of local and long-distance service, as covered by those portions of the order that we have just discussed, will in practical effect work a confiscation of the Lincoln company's property through the process of a complete loss of its local subscribers to the other company, unless some provision is made in the order which will afford protection. Such an order, to be sustained, must be one that will operate reasonably, and not be arbitrary, nor violate constitutional inhibitions. Unless a reasonable adjustment can be made where the Lincoln company can be protected against such a detriment and substantial loss as the railway commission's findings show that it will otherwise suffer, it seems clear to us that this company cannot legally be forced to furnish either long-distance or local service to the patrons of its competitor. *Pioneer Teleph. & Teleg. Co. v. State*, supra, 77 Okla. 216, P.U.R.1920C, 557, 186 Pac.

934. For, as said in the case just cited: "A connection, under rules and regulations that amount to the destruction of property, or that work a discrimination against the subscribers of either exchange, would amount to the taking of property without due process of law. The state, of course, has the power to take private property for public use under its rights of eminent domain; but this can only be done for a fair consideration. The section of the Constitution contemplates the physical connection and the regulation of such union under the police powers of the state."

The order of the railway commission contains a provision calculated to protect the Lincoln company; it is that all new business shall be divided in such proportions between the companies that the relation in size of the one company to the other shall not change, but shall be continuously maintained throughout all future growth, or so long as the order for exchange of service shall operate.

Serious inconvenience is a necessary result of having two local telephone companies in operation side by side, and, though such duplication cannot be justified from an economic standpoint, it must be remembered that these companies each received a franchise to operate in the same locality, and that they have built plants and extended their lines throughout the territory granted. Their expenditures and investments have been based upon the public grant and their rights have become vested. It must be remembered also that these companies owe a duty to the public. They not only have the right to seek subscribers in the territory where they are operating, but all persons wishing to become subscribers have the reciprocal right to demand that they shall become such subscribers, and that the service of that public utility which they choose shall be rendered to them. To grant to such a company the right to construct a telephone

line, and then later to deny it the right to have all persons along that line connect with it as subscribers, is to take away the very grant that has been given. It is to deny the company the very use of the property for which the property was especially constructed. Statutes have been passed in some states providing that a public utility shall not extend its lines into new territory unless it shall have procured a certificate from a regulatory commission, showing that the territory is not already adequately served and that public necessity and convenience require additional service. The order here cannot be justified on the principles underlying those regulations. Those regulations, when within reasonable limits, do not affect vested rights, but deal only with an extension of grants to such companies into territory not theretofore served by them. We do not hesitate to say that the order of the railway commission, requiring the division of new business, cannot be legally justified, and is the taking of property rights without due process of law.

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business—
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The provision as to the division of such new business is so correlated and interdependent with the other provisions of the order that it cannot be separated from them. The order of the railway commission in this case is an entirety. It cannot be divided into separate and independent orders. It is, furthermore, a regulation legislative in character, and cannot be modified or changed by this court. The order, as found, must, so far as the power of this court goes, be either approved or set aside. *Omaha & C. B. Street R. Co. v. Nebraska State R. Commission*, 103 Neb. 695, P.U.R. 1919F, 307, 173 N. W. 690; *Nebraska Teleph. Co. v. State*, 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; *New York ex rel. New York & Q. Gas Co. v. McCall*, 245 U. S. 345, 62 L. ed.

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Rep. 122; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; Hooper Teleph. Co. v. Nebraska Teleph. Co. 96 Neb. 245, 147 N. W. 674.

For the reasons given, the order of the Railway Commission is annulled and set aside, without preju-

parties concerned to further proceedings before the Commission, for the purpose of arriving at some reasonable regulation for the exchange of service, under such conditions, if they can be found in this case, as will be legally justifiable and within constitutional limits.

Reversed.

ANNOTATION.

Regulations or provisions upon requiring physical connection of telephone lines.

- I. Right to regulate in general, 352.
- II. Nature of regulations:
 - a. In general, 353.
 - b. Expense of connection and maintenance, 354.
 - c. Compensation for service rendered, 354.
 - d. Protection against loss due to the connection, 358.
- III. Reservation of right to make further regulations in the future, 361.

Scope.

As shown in the annotation in 11 A.L.R. 1204, it is established by the weight of authority that the state has the power to require competing telephone systems to make physical connection of their lines, without compensation to either system for the loss of the advantage which it may have enjoyed by its ability to give its patrons exclusive service in certain fields. As there pointed out, however, this principle does not deprive either system of the right to compensation for the service actually rendered in connection with the other system, and this is generally the subject of regulation when the physical connection is required. The necessity, nature, and character of such regulations, and those in relation to the expense of making and maintaining the connection, are the subject of the present annotation.

I. Right to regulate in general.

A necessary incident of the power of the state agency authorized to require telephone companies to connect

their lines physically where public convenience requires is the power to prescribe the terms of such connection, either in the first instance, or in the event of the inability of the telephone companies to agree in that regard, since such physical connection may be required only under such regulations, and upon such terms in regard to the service rendered, as will not in its operation amount to the taking of the property of either company without due compensation.

United States.—Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co. (1914) 214 Fed. 666.

Illinois.—Reorganization Committee v. Prairie City Farmers Teleph. Co. (1916) P.U.R.1916B, 745; Assumption Mut. Teleph. Co. v. Central U. Teleph. Co. (1915) P.U.R.1915E, 940.

Indiana.—Northern Indiana & S. M. Teleph. Teleg. & Cable Co. v. People's Mut. Teleph. Co. (1918) 187 Ind. 496, P.U.R.1918D, 548, 119 N. E. 212.

Michigan.—Michigan State Teleph. Co. v. Michigan R. Commission (1916) 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240; Re Valley Home Teleph. Co. (1915) P.U.R.1915A, 55.

Minnesota.—Owatonna v. Northwestern Teleph. Exch. Co. (1917) P.U.R.1917C, 565.

Ohio.—Wharton Teleph. Co. v. Upper Sandusky Teleph. Co. (1915) P.U.R.1915B, 174.

Oklahoma.—Pioneer Teleph. & Teleg. Co. v. State (1913) 38 Okla. 554, 134 Pac. 398; Pioneer Teleph. & Teleg. Co. v. State (1920) 77 Okla.

216, P.U.R.1920C, 557, 186 Pac. 934; Darnell v. Pioneer Teleph. & Teleg. Co. (1915) P.U.R.1915A, 80; Moore v. Pioneer Teleph. & Teleg. Co. (1916) P.U.R.1916D, 701.

South Dakota. — Missouri Valley Teleph. Co. v. Dakota Cent. Teleph. Co. (1915) P.U.R.1915C, 183; Lake Front Teleph. Co. v. Dakota Cent. Teleph. Co. (1918) P.U.R.1918E, 550; Groton v. Groton-Ferney Mut. Teleph. Co. (1919) P.U.R.1919E, 894.

Texas. — Southwestern Teleph. & Teleg. Co. v. State (1918) 109 Tex. 337, P.U.R.1919C, 56, 207 S. W. 308.

Wisconsin.—Wisconsin Teleph. Co. v. Railroad Commission (1916) 162 Wis. 383, L.R.A.1916E, 748, P.U.R. 1916D, 212, 156 N. W. 614; Belmont & R. V. Teleph. Co. v. La Fayette County Teleph. Co. (1915) P.U.R.1915B, 101; Kestel v. Marshfield Rural Teleph. Co. (1915) P.U.R.1915C, 44.

In Oklahoma, the physical connection of the lines of telephone companies is mandatory, the only limitation being that the rules and regulations prescribed by the commission as a condition to the connection shall be reasonable and just. Pioneer Teleph. & Teleg. Co. v. State (1918) — Okla. —, P.U.R.1919C, 544, 177 Pac. 580; Pioneer Teleph. & Teleg. Co. v. State (1913) 38 Okla. 554, 134 Pac. 398; Pioneer Teleph. & Teleg. Co. v. State (1920) 77 Okla. 216, P.U.R. 1920C, 557, 186 Pac. 934.

Upon this point, in Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co. (Fed.) *supra*, the court said: "Considering the explicit purpose of the act, and these ample provisions, it would seem that nothing further is needed or requisite for conferring upon the commission adequate power and authority for the regulation of interchange of business between telegraph and telephone companies, which, by the very nature of things, comprises and includes the power to require physical connection between competing utilities for facilitating such interchange of business. In other words, the power to regulate within the purpose and spirit of the act includes the power to require physical connection; otherwise, regulation

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would prove largely ineffectual in practical application."

In Southwestern Teleph. & Teleph. Co. v. State (1918) 109 Tex. 337, P.U.R.1919C, 56, 207 S. W. 308, it was held that it was within the power of the commission to order physical connection between the lines of two telephone companies, where, by the terms of the order, each telephone company was compensated for the use of its line by the patrons of the other company.

II. Nature of regulations.

a. In general.

It has been held that the question whether a telephone company would sustain a loss in a given case, by reason of a physical connection, is one of fact. But, if loss be found, the question whether the state has the right to inflict it without compensation is one of law. Wisconsin Teleph. Co. v. Railroad Commission (1916) 162 Wis. 383, L.R.A.1916E, 748, P.U.R. 1916D, 212, 156 N. W. 614.

The matter of the fixation and adjustment of the conditions and rates, where an exchange of service is ordered, is one exclusively for the commission having general authority to order physical connection between telephone companies, and not for the court. The one function of the court is to determine whether such an order as has been made can be legally justified. *BLACKLEDGE v. FARMERS' INDEPENDENT TELEPH. CO.* (reported herewith) ante, 343.

And see Michigan State Teleph. Co. v. Michigan R. Commission (1916) 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240.

In Owatonna v. Northwestern Teleph. Exch. Co. (1917; Minn.) P.U.R.1917C, 565, the Minnesota railroad and warehouse commission said that, in fixing the compensation for a physical connection between telephone companies, it may take into consideration the cost of making the physical connection, of performing the service in exchange of messages, and the effect which the connection will have upon the business and earnings of the companies.

where the commission having power in that regard has adjusted the rates, tolls, and charges, it is for the complainant to show affirmatively that the physical connection ordered in view of such tolls, rates, and charges will inflict upon it an undue loss, and one that cannot be prevented by any adjustment of rates, tolls, and charges. Michigan State Teleph. Co. v. Michigan R. Commission (Mich.) supra.

In Pioneer Teleph. & Teleg. Co. v. State (1919) — Okla. —, P.U.R.1919C, 544, 177 Pac. 580, the court said that it was never intended to compel two telephone companies competing for the same business to make such physical connection between their lines and exchanges as would permit one company to have the benefit and use of the equipment and system of the other, to its detriment and causing a discrimination against its subscribers. "On the contrary, it was meant to require such a mechanical union of the lines as would constitute a transmission of the messages for the public convenience, and without destroying the property rights of either company. A connection under rules and regulations that amount to the destruction of property, or that work a discrimination against the subscribers of either exchange, would amount to the taking of property without due process of law. The state, of course, has the power to take private property for public use under its right of eminent domain; but this can only be done for a fair consideration."

b. Expense of connection and maintenance.

In Groton v. Groton-Ferney Mut. Teleph. Co. (1919; S. D.) P.U.R.1919E, 894, it is held that the actual mechanical work of making the connection of the lines at the exchange point of either company should be performed by the company owning the exchange, or its employees.

And in Farmers' Mut. Teleph. Co. v. Central U. Teleph. Co. (1915; Ill.) P.U.R.1915E, 13, the Illinois public utilities commission ordered a physi-

cal connection between a long-distance line and a local exchange, and ordered the latter to pay the expenses of connection.

To the same effect is Moore v. Pioneer Teleph. & Teleg. Co. (1916; (Okla.) P.U.R.1916D, 701 (a decision of the Oklahoma corporation commission).

In Reorganization Committee v. Prairie City Farmers' Teleph. Co. (1916; Ill.) P.U.R.1916B, 745, the Illinois public utilities commission ordered a connection between a long-distance company and a local exchange at the instance of the long distance company, and required it to pay the expense of the connection. The court said that if the companies could not agree upon the schedule of rates and charges which should be established, and the division of the tolls, the matter might be taken up with it at a later date.

In Darnell v. Pioneer Teleph. & Teleg. Co. (1915; Okla.) P.U.R.1915A, 80 (decision of the Oklahoma corporation commission), and Wharton Teleph. Co. v. Upper Sandusky Teleph. Co. (1915; Ohio) P.U.R.1915B, 174 (decision by the Ohio public utilities commission), a physical connection between a local exchange and a long-distance company was required, the expense of the connection to be borne equally by the companies.

Where one of the telephone systems is in bad order, it is within the power of the commission to require that, as a condition to a physical connection, the company shall repair and improve its system of lines and poles and change grounded lines to a metallic circuit. Northern Indiana & S. M. Teleph. Teleg. & Cable Co. v. People's Mut. Teleph. Co. (1918) 187 Ind. 496, P.U.R.1918B, 548, 119 N. E. 212.

c. Compensation for service rendered.

The commission, having power and control over the matter of physical connection of different telephone lines, likewise has the power to prescribe the terms and conditions of such connection, and in this regard the commission may adjust the expense of the connection and of main-

taining the same, and make such regulations relative to switching service, rates, tolls, differentials, and other charges as the equities of the particular case may require. The only limitation upon the power of the commission in this regard is that imposed by the restriction of taking property without due compensation, which in its application requires that the regulations prescribed by the commission shall be reasonable, in view of the conditions and circumstances of the particular case.

Each company may be required to guarantee, collect, and pay over to the other, monthly, all charges for toll messages originating on its line, including messages which are reversed. *Groton v. Groton-Ferney Mut. Teleph. Co.* (1919; S. D.) P.U.R.1919E, 894; *Moore v. Pioneer Teleph. & Teleg. Co.* (1916; Okla.) P.U.R.1916D, 701.

And it has been held that the joint rates and charges for toll or through service by the long-distance company to the local company should be on the same terms and conditions as those on which the long-distance company furnished the same to another local exchange. *Wharton Teleph. Co. v. Upper Sandusky Teleph. Co.* (1915; Ohio) P.U.R.1915B, 174.

The basis of toll charges to and from the local company, either in its local exchange or on rural lines connected therewith, shall be the same as the rates to subscribers of the long-distance company in the city where the local exchange is located, the local exchange being entitled to a certain per cent of all the toll revenue collected for toll traffic which originated or terminated on its lines, or rural lines connected therewith. *Darnell v. Pioneer Teleph. & Teleg. Co.* (1915; Okla.) P.U.R.1915A, 80.

In *Re Valley Home Teleph. Co.* (1915; Mich.) P.U.R.1915A, 56, in ordering physical connection to be made between two competing telephone companies, the railroad commission of Michigan ordered that the toll rate to be charged and collected as between the two companies, and the division thereof should, until the further order of the commission, be

based upon the toll schedule of the Michigan independent traffic association, which has application with most independent telephone companies of the state, and is in practical conformity with the rate charged by other telephone companies operating in that territory.

In *Kestel v. Marshfield Rural Teleph. Co.* (1915; Wis.) P.U.R.1915C, 44, the Wisconsin railroad commission ordered physical connection to be continued, and, it appearing that the connection was of about equal value to each of the exchanges, it was ordered that the subscribers, for the privilege of the exchange, should pay an additional amount, and that this amount should be divided equally between the two companies, with the proviso, however, that if this was found unfair to either company, the matter might be taken up at a later date.

In *Pioneer Teleph. & Teleg. Co. v. State* (1914) 43 Okla. 827, 144 Pac. 599, the syllabus of the court is to the effect that "where, on appeal from an order of the corporation commission, there is an absence of competent evidence to support the order, and where the order dividing tolls will result in loss and disadvantage to all parties concerned, and the record contains a proposition for the handling of the telephone business whereby the public would have the same or better accommodations, and all the parties concerned would be at less expense and probably derive a profit, the cause should be remanded for a rehearing, on which a new order may be predicated.

There is an interesting discussion by the Wisconsin railroad commission, with regard to the apportionment of the expenses and receipts due to a physical connection between two companies, in *Belmont & P. V. Teleph. Co. v. La Fayette County Teleph. Co.* (1915; Wis.) P.U.R.1915B, 101. Upon this question the commission said: "The method of switching-rate determination used in this case is an extension of the method heretofore used by this commission. Up until this time it has been the practice

ing service of the central office operators' salaries on the basis of weighted traffic, and obtain the portion of this cost which is incident to the switching service. Added to this are a portion of the central office maintenance, interest, and depreciation upon the apportioned value of that part of the local company's plant actually used to connect the rural company's lines with the local exchange, and proper proportions of the commercial, general, and undisturbed expenses of the local company. This method, though it appears to arrive fairly at the cost of the service, so far as it goes, does not take into consideration the cost incident to the different types of construction which may be used by the two companies. The equipment expenses, including interest, depreciation, and maintenance of the switchboard, wire plant, and substations of the two companies, have been considered to be at a balance, unit for unit, between the two companies. Let us assume a case in which one company has installed a poor grade of line construction, but in which the other company has a good grade of construction, and is, perhaps, operating in a city in which a large amount of underground work or other expensive construction is necessary, thus making the investment per telephone relatively high. It would seem fair, in such a case, that the first company should share in the expense incident to the large investment of the second company, in proportion as it uses that investment. Also, it seems reasonable that, within certain limits, there should be a reciprocal sharing of the expenses of the first company by the second, based, as in the first instance, upon the proportionate amount of use which is made of the facilities of the first company by the second. The limits which surround the application of this principle appear to be that each company shall make a reasonable use of its own facilities, and that the construction of both companies shall lie within a reasonable radius of some central point.

been followed in the determination of the switching rate in this case. The central office operators' salaries of the Shullzberg & Seymour Exchanges have first been apportioned to (1) the Shullzberg subscribers, (2) the subscribers on the rural lines connecting the two exchanges, and (3) the Seymour exchange subscribers, on the basis of percentage of operators' time devoted to the handling of each class of traffic, as determined by an analysis of the traffic studies. A determination has been made of all other expense directly incident to the Shullzberg exchange, of all expense directly incident to the rural lines connecting the two exchanges, and of all expense (excluding operators' salaries) directly incident to that portion of the Seymour exchange lines within a 7-mile radius of Shullzberg. Each of these groups of expenses has then been apportioned among the classes of service on the basis of use, as computed from the traffic studies. It will be noted that in this case it has been assumed that each company should share in the expenses of the other company, in proportion to its use of the facilities furnished by the other company. Where the need for physical connection is such that the service to be obtained through such connection should be furnished on a flat-rate basis, rather than upon a toll basis, it seems to us that, as far as possible, the entire system which is reasonably required for flat-rate service should be treated as if it were a single exchange. If the property were all owned by one company, there would probably be no question raised as to the propriety of this method of dealing with the situation. Suppose, for example, that a telephone utility operates both local and rural lines. Certainly, it would be unfair to ask rural subscribers to help bear the expenses incident to the upkeep of local wire-plant and substation equipment, if local subscribers were not required to bear a part of similar expenses of the rural system. The problem which we have before us in physical connection cases, such as the present

one, is not unlike that which arises in adjustment of rates as between local and rural lines owned by the same company. If it is reasonable to furnish the service incident to such physical connection on an unlimited basis, it must be because the reasonable exchange requirements of the parties affected are for such unlimited service. If the rural lines which are to be connected to Shullzberg, or the Belmont & Pleasant View Telephone Company, which owns these lines, are to be required to meet a part of the expenses of the Shullzberg exchange in payment for its use of the facilities furnished by that exchange, in order that it may offer its subscribers the unlimited use of that exchange, it seems only reasonable that the La Fayette County Telephone Company, as owner and operator of the Shullzberg exchange, should bear such expenses of the Belmont & Pleasant View Company as are incident to the service furnished by the Belmont company to the Shullzberg exchange. The mere fact that the La Fayette County Telephone Company is the objecting party in this case does not mean that the Belmont company should pay the cost incurred by the La Fayette County Company in furnishing this service, and not receive from that company payment for the service which is furnished to it. This connection is for the benefit of the patrons of both companies. Neither company can be expected to furnish this service without compensation, but the net amount to be paid by the Belmont & Pleasant View Company to the La Fayette County Telephone Company does not have to cover the entire expense of the latter company in connection with furnishing this service. As long as this service is for the benefit of the patrons of both companies, the Belmont & Pleasant View Telephone Company should be required to pay to the La Fayette County Telephone Company only the amount by which the cost of the service furnished to the Belmont & Pleasant View subscribers by the La Fayette County Company exceeds the cost of the service furnished to La Fayette

county subscribers by the Belmont & Pleasant View Company. The fact that an application for physical connection is made by one of the telephone companies concerned does not make the situation any different from what it would be if the application for physical connection were made by individuals not representing either company. Suppose, for example, that the complaint in this case was brought by a number of individuals not officially connected with either of the companies. The La Fayette County Telephone Company could not reasonably be required to furnish the service unless it were to be compensated for it. The Belmont & Pleasant View Telephone Company, likewise, could not reasonably be required to furnish the service without compensation. It would hardly be concluded, however, that, in an action brought by outside parties, the Belmont & Pleasant View Telephone Company should pay to the La Fayette County Telephone Company the total expense of the latter company involved in furnishing the service, without receiving from that company payment for the service furnished by it, any more than it could be concluded that the La Fayette County Telephone Company should bear the expense of the Belmont & Pleasant View Telephone Company involved in such service, without receiving from that company compensation in turn. As a matter of fact, the connection is made for the benefit of the subscribers of both companies, and the subscribers must be the ones to bear the cost. If at their present rates they are adequate to furnish this service, and the service is reasonably required, it should be granted them at the present rates. If the present rates are not adequate, they should be so adjusted as to meet the cost of the reasonable exchange-service requirements. The mere fact that the expenses of one company involved in furnishing service to the other company are greater than the expenses of the second company involved in furnishing service to the first can no more be a reason why the second company should pay the en-

tire expenses of the first company, without an offset for its own expenses incurred in serving the first company, than it can be a reason why the first company should pay the expenses of the second one, without any offset. Both companies are engaged in a joint service to the subscribers of both. These subscribers should pay their own companies for the additional service furnished, but, if one company furnishes to subscribers of the other a greater service than is furnished by that company to subscribers of the first one, the company furnishing the greater service should be entitled to receive a net amount from the other company, sufficient to meet the difference in cost. Where a physical connection is established on a flat-rate basis, the available exchange limits are thereby extended for the patrons of both companies concerned. The subscribers of both companies eventually must bear the cost of such connection, but there is no reason that we can see why the cost of such connection should be borne entirely by the subscribers of one of the companies. The amount fixed by the order in this case to be paid by the Belmont & Pleasant View Telephone Company to the La Fayette County Telephone Company, as has been explained, will not be the total cost to the La Fayette County Telephone Company of furnishing this service. It has been found that this service on a flat-rate basis is a reasonable exchange-service requirement. To the extent by which the payments by the Belmont & Pleasant View Company to the La Fayette County Company are less than the cost to the latter company of furnishing this service, the cost of such physical connection must eventually fall upon subscribers of the La Fayette County Company. There is no issue raised in this case as to the reasonableness of the present exchange rates of the La Fayette County Telephone Company for the added exchange service involved in this physical connection. Consequently, the present adequacy of the exchange rates has not been investigat-

ed. If, however, the revenues of the La Fayette County Telephone Company, with its present exchange rates and with the terms fixed in this order for physical connection, should prove to be insufficient to meet the requirements of such physical connection, the proper action would be to secure a readjustment of the exchange rates of that company, so that the remainder of the cost to that company of physical connection will be borne by its subscribers who are benefited by such service. The same would hold true of a similar set of conditions in the Belmont & Pleasant View Telephone Company."

d. Protection against loss due to the connection.

The fact that a long-distance telephone company has a local exchange, and will be subjected to competition if required to connect with another company having a local exchange at the same place, affords no ground for refusing a physical connection of the two companies. *Northern Indiana & S. M. Teleph. Teleg. & Cable Co. v. People's Mut. Teleph. Co.* (1918) 187 Ind. 496, P.U.R.1918D, 548, 119 N. E. 212. (This is also the logical implication of the cases cited in the note in 11 A.L.R. 1212, upholding the power of the state to require physical connection without compensation for loss of this advantage.)

The commission, however, may make an adjustment of rates, tolls, and charges which will prevent the local exchange of a long-distance company from being placed at a disadvantage with the local exchange company. *Michigan State Teleph. Co. v. Michigan R. Commission* (1916) 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240.

While the power to require and regulate physical connection of telephone companies is well settled, it would seem that, under the guise of regulation, the commission cannot interfere with or injure the business of one company by requiring it to route messages coming over it, to be transferred over the exchange of another company, in a manner which will give

the latter company an undue and unfair advantage over the former. *Pioneer Teleph. & Teleg. Co. v. State* (1920) 77 Okla. 216, P.U.R.1920C, 557, 186 Pac. 934. The foregoing case holds that such a requirement, without a provision for compensation being first made, constitutes a taking of the property of the injured company without compensation, and is an exercise of the power of eminent domain, and not of the police powers of the state. In reaching its conclusion, the court cites and quotes from *Pacific Teleph. & Teleg. Co. v. Eshleman* (1913) 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822, which is commented upon in the annotation in 11 A.L.R. 1204, as being opposed to the great weight of authority, as to the power of the state to require the physical connection of telephone companies, without resorting to eminent domain proceedings.

In that annotation Oklahoma cases are cited as sustaining the general rule, including an Oklahoma decision handed down subsequently to *Pioneer Teleph. & Teleg. Co. v. State*.

As heretofore pointed out, the question under consideration in this annotation relates to the character of the regulations upon requiring the physical connection of different telephone companies; it does not involve the question as to the power of the state to require telephone companies within its borders physically to connect their lines, nor the necessity of compensating either telephone company for any loss or injury to its business by reason of a physical connection with another company. These questions are the subject of the annotation in 11 A.L.R. 1204. As there pointed out, the requirement that competing telephone companies physically connect their lines does not constitute the taking of property, within the meaning of eminent domain laws requiring compensation, even though one of the companies will suffer loss or injury to its business by reason of the connection. In this regard, it is pointed out in the annotation referred to that, at common law, there was no power vest-

ed in any political body to require the physical connection of telephone companies, all power in that regard resting upon a statute or a constitutional provision. These enactments usually provide for compensation for the service rendered and the expense of the connection, to be fixed by the board of commissioners having the power to order the connection. This authority has been conferred in such general terms in some states as to vest in the board of commissioners the power, in fixing the rates, to take into consideration the present business of the companies concerned, and fix such rates, charges, or tolls as will afford protection to the business of each company.

Applying this rule, in *Owatonna v. Northwestern Teleph. Exch.* (1917; Minn.) P.U.R.1917C, 565, where the long-distance business of one competing telephone company was much greater than that of the other, both having competing lines to many points in and out of the state, the commission, in ordering a physical connection at a given point between the two companies, held that the company having the greater business was entitled to protection by the establishment of a differential, having no relation to the rates, and not to be increased according to the distance the message was to be carried, but a flat arbitrary charge, to apply to the movement of all traffic handled over the two lines. This was fixed at 10 cents in addition to the regular toll rates. The purpose of this differential was, frankly stated by the commission to be the protection of the property of the competing companies, and it is apparent that the business of the company was regarded as property.

Upon this point, in *Wisconsin Teleph. Co. v. Railroad Commission* (1916) 162 Wis. 383, L.R.A.1916E, 748, P.U.R.1916D, 212, 156 N. W. 614, the court said: "It is suggested that it was not within the power of the railroad commission to make such a regulation as it proposed to make in its original decision, and as it afterwards made in its supplemental order. If these orders were made on

the theory that there was a taking of property for which compensation should be made, and that such property was paid for by the exaction of the extra charge provided for, we do not see how they could be sustained, because no power of condemnation is conferred on the commission. The orders, however, are made on the theory that there is no taking. The charge is exacted because an extra service is furnished to those who take advantage of the connection, and for the purpose of removing any inducement there might be on the part of plaintiff's subscribers to quit it, because of the connection, and become patrons of the local exchange of the rival company. The purpose of the regulation is not to pay for any taking of property, but to prevent incidental loss that might result to the plaintiff from the connection. Viewed in this light, we see no objection to the regulation, and think it comes fairly within the statute." This regulation was apparently in the form of a differential, the same as that in the preceding case. It was, however, based upon the distance the message was to be transferred, the amount being fixed at 5 cents for the first 50 miles, and 10 cents for all over that and not over 100 miles, and 15 cents for all distances over 100 miles.

In *Michigan State Teleph. Co. v. Michigan R. Commission* (1916) 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240, the court said that the railroad commission "has full power, under the statute, to prescribe the joint rates, tolls, and charges to be made for the use of the connection, and to determine the division of such rates, tolls, and charges, if the parties interested fail to agree upon the division. In fixing these rates, tolls, and charges, the commission seems to have a very large discretion, and while, unquestionably, they must be reasonable when all the circumstances affecting the situation are taken into consideration, yet they are not necessarily limited to the actual cost of operation, or even to an ordinary profit thereon. In fixing the

rates, tolls, and charges, the commission may undoubtedly take into consideration all of the equities growing out of the regulation, and make use of the rates in adjusting those equities." It is further suggested in this case that it is within the power of the commission to rescind the order requiring the physical connection, if it is found to operate unduly to the injury of one of the companies.

The public utilities commission of Illinois, in *Assumption Mut. Teleph. Co. v. Central U. Teleph. Co.* (1915; Ill.) P.U.R.1915E, 940, ordered physical connection between two exchanges in the same place for toll service, and as a condition thereto the long-distance company was given the right to charge a reasonable amount for the use of its facilities, in addition to the regular toll rates. One purpose of this provision was to protect it against loss of subscribers by the connection.

And in *Farmers Mut. Teleph. Co. v. Central U. Teleph. Co.* (1915; Ill.) P.U.R.1915E, 13, the Illinois public utilities commission, upon ordering a physical connection between two telephone lines, said that in the first instance it would not attempt to fix the terms for the privilege of the connection, but that, in order to prevent injury to the long-distance company, the terms upon which the connection should be made must be such as to prevent the loss of business to that company because of the connection.

So, the South Dakota board of railroad commissioners in *Lake Front Teleph. Co. v. Dakota Cent. Teleph. Co.* (1918; S. D.) P.U.R.1918E, 550, held that, as a condition to the physical connection of a long-distance company with a local exchange, the local-exchange company should be required to put into effect a party-line rental which shall not be less than the party-line rate contemporaneously charged and collected by the long-distance company for like service in the locality served by both companies, and that the local company should also pay a certain switching charge.

And in *Missouri Valley Teleph. Co. v. Dakota Cent. Teleph. Co.* (1915;

S. D.) P.U.R.1915C, 183, the South Dakota commission ordered a physical connection between two companies at a certain point where there was very little competition between the exchanges of the company, although at other points there was considerable competition, and it refused the connection except at this one point. The connection was made upon the basis that the local exchange was to account to the long-distance exchange for all tolls collected from its subscribers, and to guarantee the payment thereof.

In *Owatonna v. Northwestern Teleph. Exch. (Minn.) supra*, in ordering a connection, there was a provision for a differential in favor of the long-distance company, and it was pointed out that this differential had no relation to any rate, and it should not be increased according to the distance the message was carried, but it should be a flat arbitrary charge to apply to movement of all traffic handled over the two lines. It was also provided that each company should bear one half the cost of the additional construction and the local exchange should pay to the long-distance company a reasonable rental charge for the use of the necessary conduit.

In *Pioneer Teleph. & Teleg. Co. v. State (1919) — Okla. —*, P.U.R.1919C, 544, 177 Pac. 580, one of the companies involved in a proceeding for physical connection was a mutual company which furnished its subscribers with free toll service to the various towns reached by its line and it appeared that adding the toll-line facilities of a long-distance company through a physical connection with the latter exchange would give the former a great advantage over its competitor, and thus bring about the elimination of the exchange of the competitor; indeed, the commission ordering the connection conceded that this was the effect of the order. Under these circumstances the action of the commission was reversed, and the case sent back for an order to be made which would protect both companies.

In the reported case (*BLACKLEDGE*

v. FARMERS' INDEPENDENT TELEPH. Co. ante, 343), a peculiar situation is presented, in that the long-distance telephone company and the local exchange company both had local exchanges, and the subscribers to the long-distance company, at a meeting held for that purpose, united in their agreement to terminate their contract with the long-distance company and join the local company, the exchange rates of the latter being the cheaper. At this time there was a physical connection of the lines of the two companies, but immediately upon this action upon the part of the subscribers to the long-distance company the latter company terminated the connection, and the local company appealed to the commission to have the connection restored. Upon ordering a restoration of the connection, and fixing a certain basis for the exchange service, the commission declared that the result of this order would be practically to destroy the local exchange of the long-distance company, and it undertook to meet this by an order that all future business should be divided, and that neither company should accept new or additional local subscribers in numbers sufficient to change the proportion and size that one company bore to the other on a certain date. This order is held to be beyond the power of the commission to make, and it is therefore reversed, and the case sent back with instructions for the commission to make an order or regulation for the exchange of service under such conditions, if they can be found, as will be legally justifiable and within constitutional limits.

III. Reservation of right to make further regulations in the future.

The matter of regulating the terms and conditions of a physical connection of the lines of different telephone companies, where the companies cannot agree, may be reserved by the commission for future hearing, and orders may be made from time to time, adjusting the rights of the companies as future developments may require. *Farmers' Mut. Teleph. Co. v. Central U. Teleph. Co. (1915; Ill.)*

P.U.R.1915E, 13; Reorganization Committee v. Prairie City Farmers Teleph. Co. (1916; Ill.) P.U.R.1916B, 745; Re Valley Home Teleph. Co. (1915; Mich.) P.U.R.1915A, 55; Moore v. Pioneer Teleph. & Teleg. Co. (1916; Okla.) P.U.R.1916D, 701; Pioneer Teleph. & Teleg. Co. v. State (1914) 43 Okla. 827, 144 Pac. 599; Kestel v. Marshfield Rural Teleph. Co. (1915; Wis.) P.U.R.1915C, 44.

And in Assumption Mut. Teleph. Co.

v. Central U. Teleph. Co. (1915; Ill.) P.U.R.1915E, 940, in ordering a physical connection to be made between a long-distance company and a local-exchange company, the court said that under the statute it was the duty of the company to undertake to agree as to the apportionment of the tolls, and if they could not do so, then the matter could be presented to the commission.

A. G. S.

CHARLES MOON, Appt.,

v.

STATE OF ARIZONA, Respt.

Arizona Supreme Court — June 7, 1921.

(— Ariz. —, 198 Pac. 288.)

Evidence — finger prints.

1. Evidence of correspondence of finger-print impressions when introduced by qualified finger-print experts is admissible to connect an accused with a crime committed.

[See note on this question beginning on page 370.]

— experiment — pairing finger prints.

2. It is not error, in a case in which finger-print evidence has been used, to permit an expert to pair finger prints of the jurors, properly taken and developed, for the purpose of illustrating the methods of the system of finger-print identification and the truth of the claim that invisible finger prints can be developed and the identity of the maker revealed.

— experience in other cases.

3. A finger-print expert in a criminal case, who has been subjected to a searching cross-examination, may, on redirect examination, be permitted to relate his experience in other cases in which finger-print evidence was used; at least, where accused insists throughout the trial that there is no such science as that of finger-print identification.

Appeal — nonprejudicial error.

4. Permitting a finger-print expert in a criminal case to go too minutely

into the details of other cases in which he has been employed is not reversible error, if under the peculiar circumstances of the case no prejudice is shown.

Constitutional law — evidence against self — finger prints.

5. One voluntarily permitting his finger-print impressions to be taken and photographed cannot object to the introduction in evidence of the photograph, for the purpose of identifying him with finger prints found at the scene of crime.

Evidence — finger-print record from identification bureau.

6. Permitting the introduction in a criminal case of the finger-print records of accused, taken from the bureau of identification of a city, is not reversible error because on the same card is his criminal record, if the criminal record was so covered that it was not seen by the jury.

APPEAL by defendant from a judgment of the Superior Court for Cochise County (Lockwood, J.) convicting him of burglary in the first degree. *Affirmed.*

Statement by Baker, J.:

The defendant has appealed from a judgment of the superior court of Cochise county, whereby he was convicted of the offense of burglary in the first degree, and pursuant to which he was sentenced to the state prison at Florence for an indeterminate period of not less than five nor more than fifteen years.

The facts are substantially as follows: John Treu's butcher shop, situated in Bisbee, was burglarized in the nighttime, on the 6th of September, 1919. The safe in the shop was broken open and rifled, and about \$1,700 to \$1,750, belonging to John Treu, was stolen. The cash register was removed a few feet from the counter and broken.

On the following morning the sheriff of Cochise county, together with others, carefully examined the premises at the scene of the burglary. It appears that the sheriff had had previous experience with finger printing, and that he at once examined the doors of the safe and tools and other surfaces upon which he might reasonably expect to develop finger prints; that, among other things, he discovered finger prints upon a porcelain slab on the front of the cash register which had been removed from the counter to the floor; that upon the development of the finger prints upon this porcelain slab it was seen that a right hand had been laid upon this slab leaving the impression of four fingers, the entire print being sufficiently clear to distinguish the impression of the four fingers. However, the impressions of two of the fingers, to wit, the index and little fingers, were blurred beyond possibility of identification. The print of the middle finger was blurred at the center, but on development well-defined ridges were found along the margin of this finger print. The print of the ring or third finger, however, was exceptionally perfect—perfect in the sense that it was approximately a complete and perfect picture of what is technically called a "dab"

impression of the end of the ring finger of the right hand. The officer caused the finger prints to be carefully photographed by a competent photographer, and the photograph of the print, together with the original slab, was positively identified and introduced in evidence in the case. One of the officers, who aided in the preliminary examination of the premises, discovered a piece of human skin adhering to a closet door situated alongside the safe which had been broken open; that this piece of skin which he found was bloody, and that drops of blood were found upon the closet door at and about the place where the piece of human skin adhered to the door, that blood was spattered over the front door of the safe and about the interior of the safe, so that it was obvious that the same person who had rifled the safe had injured some part of his hand, and that, working about and in the safe, the wound had bled sufficiently to have sprinkled drops of blood.

The officers at once made search about the town for a man whose hand had been hurt, and soon ascertained that the defendant had an injured hand, and he was thereupon arrested and taken to the sheriff's office, where his hand was examined and finger prints taken without any objection upon his part.

Upon examining the defendant's hand it was noticed that there was a similarity between the wound on his hand and the piece of skin found at Treu's butcher shop. One of the officers brought the piece of skin and compared it with the wound. The piece of skin was submitted to a doctor, who also compared it with the wound. Both the officer and the doctor testified that the piece of skin conformed to the wound upon the right hand of the defendant.

Enlargements of the photograph of the finger print on the porcelain slab and of the actual finger print of the defendant were made for the purposes of comparison, and submitted to five finger-print experts, each of whom testified that the fin-

ger print upon the porcelain slab was made by the hand of the defendant.

Mr. Louis B. Whitney, for appellant:

It was error to permit one of the expert witnesses introduced by the state to make certain demonstrations and tests before the jury in order to bolster up and add to the weight of his testimony.

22 C. J. Evidence, ¶ 609, p. 526; 1 Thompson, Trials, ¶ 620; Tullis v. Kidd, 12 Ala. 648; People v. Holmes, 111 Mich. 364, 69 N. W. 501; Forchheimer v. Stewart, 73 Iowa, 216, 32 N. W. 665, 35 N. W. 148; United States v. Ried, 42 Fed. 134; Spires v. State, 50 Fla. 121, 39 So. 181, 7 Ann. Cas. 214; State v. Sanders, 68 Mo. 202, 30 Am. Rep. 782; Forehand v. State, 51 Ark. 553, 11 S. W. 766; People v. Conkling, 111 Cal. 616, 44 Pac. 314; Burke v. People, 148 Ill. 70, 35 N. E. 376; Com. v. Piper, 120 Mass. 185; Yates v. People, 38 Ill. 527; Jim v. State, 4 Humph. 288; Langston v. Southern Electric R. Co. 147 Mo. 457, 48 S. W. 835; DePhue v. State, 44 Ala. 39; Farmers & M. Bank v. Young, 36 Iowa, 45; 11 R. C. L. ¶ 47, pp. 627-629; Faulkner v. State, 43 Tex. Crim. Rep. 311, 65 S. W. 1093.

It is not competent for an expert witness to testify as to particular cases claimed to be analogous to the case on trial.

People v. Holmes, 111 Mich. 374, 69 N. W. 501; Tweed v. Western U. Teleg. Co. 107 Tex. 247, 166 S. W. 696, 177 S. W. 957, — Tex. Civ. App. —, 138 S. W. 1155; DePhue v. State, 44 Ala. 39; Horne v. Williams, 12 Ind. 324; People v. Dickerson, 164 Mich. 148, 33 L.R.A. (N.S.) 917, 129 N. W. 199, Ann. Cas. 1912B, 688.

The admitting, as exhibits, of photographs of what purported to be defendant's finger prints for purpose of comparison, or for any purpose, was reversible error.

State v. Thompson, 132 Mo. 301, 34 S. W. 35, 141 Mo. 408, 42 S. W. 949; Little v. Beazley, 2 Ala. 703, 36 Am. Dec. 431; Bishop v. State, 30 Ala. 34; Griffin v. State, 90 Ala. 596, 8 So. 670.

Photographs are not admissible in evidence when the originals can be produced in court, photographs being at best but secondary evidence.

White Sewing Mach. Co. v. Gordon, 124 Ind. 495, 19 Am. St. Rep. 109, 24 N. E. 1053.

Defendant was compelled to submit to the taking of his finger prints, and his constitutional rights were violated when the result of this was admitted in evidence against him.

Day v. State, 63 Ga. 667; Cooper v. State, 86 Ala. 610, 4 L.R.A. 766, 11 Am. St. Rep. 84, 6 So. 110; Stokes v. State, 5 Baxt. 619, 30 Am. Rep. 72.

The evidence given at the trial was wholly insufficient and of a very unsatisfactory nature, and the evidence adduced on behalf of the state, when taken in its most favorable light, is such that it can truthfully be said that there was no substantial evidence to support the verdict and judgment.

People v. Jennings, 252 Ill. 534, 43 L.R.A. (N.S.) 1206, 96 N. E. 1077; People v. Silva, — Cal. App. —, 192 Pac. 330; Davis v. State, — Okla. Crim. Rep. —, 193 Pac. 745; People v. Stevens, 68 Cal. 113, 8 Pac. 712; People v. A. Ping, 27 Cal. 490; State v. Hutchings, 30 Utah, 319, 84 Pac. 893; State v. Gray, 23 Nev. 301, 46 Pac. 801; Territory v. Booth, 4 Ariz. 148, 36 Pac. 38.

Mr. Alexander B. Baker also for appellant.

Messrs. W. J. Galbraith, Attorney General, George R. Hill and William A. Harkins, Assistant Attorneys General, and Edward J. Flanigan, for respondent:

Identification by finger prints is an established fact in jurisprudence.

11 R. C. L. 628; People v. Jennings, 43 L.R.A. (N.S.) 1206, and note, 2, 2 Ill. 534, 96 N. E. 1077; Parker v. Rex, 14 C. L. R. (Austr.) 681, 3 B. R. C. 68; State v. Kuhl, 42 Nev. 185, 3 A.L.R. 1695, 175 Pac. 190; People v. Sallow, 100 Misc. 447, 165 N. Y. Supp. 915; State v. Connors, 87 N. J. L. 419, 94 Atl. 812; State v. Cerciello, 86 N. J. L. 309, 52 L.R.A. (N.S.) 1010, 90 Atl. 1112; People v. Roach, 215 N. Y. 602, 109 N. E. 618, Ann. Cas. 1917A, 410; McGarry v. State, 82 Tex. Crim. Rep. 597, 200 S. W. 527.

Experiments may be permitted to be made in court, where they will throw light on the issues, if the conditions are similar to those which are the subject of issue.

26 R. C. L. 1016; West Pub. Co. v. Lawyers' Co-op. Pub. Co. 35 L.R.A. 400, 25 C. C. A. 648, 51 U. S. App. 216, 79 Fed. 756; 5 Enc. Ev. 471; Leonard v. Southern P. Co. 15 L.R.A. 221, and note, 21 Or. 555, 23 Pac. 887; Spires

v. State, 50 Fla. 121, 39 So. 181, 7 Ann. Cas. 214; Chicago Teleph. Supply Co. v. Marne & E. Teleph. Co. 134 Iowa, 252, 111 N. W. 988; Elliott, Ev. § 1252; Ulrich v. People, 39 Mich. 245; Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Clayton v. Southern R. Co. 110 S. C. 122, 96 S. E. 479; Rudolph v. Pennsylvania S. Valley R. Co. 186 Pa. 541, 47 L.R.A. 782, 40 Atl. 1083.

It was not error for the state to permit the expert witnesses, Sanders and Evans, to testify to the former finger-print cases in which they had been engaged.

Evans Ditch Co. v. Lakeside Ditch Co. 13 Cal. App. 119, 108 *Pac.* 1027; Shepherd v. Inman-Poulsen Lumber Co. 86 Or. 652, 168 *Pac.* 601; Salmon v. Rathjens, 152 Cal. 290, 92 *Pac.* 733; State v. Maynes, 61 Iowa, 119, 15 N. W. 864; Parker v. Johnson, 25 Ga. 576; Rogers, Expert Testimony, § 17; Wright v. Schnaider, 35 Misc. 37, 70 N. Y. Supp. 123; Southwestern Teleg. & Teleph. Co. v. Clark, — Tex. Civ. App. —, 192 S. W. 1077; Chicago City R. Co. v. McLaughlin, 146 Ill. 353, 34 N. E. 796; Donahoe v. New York & N. E. R. Co. 159 Mass. 125, 34 N. E. 87; Com. v. Leach, 156 Mass. 99, 30 N. E. 163; Cochran v. United States, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628.

The introduction of finger-print photographs for comparison or identification was proper.

People v. Jennings, 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077; State v. Cerciello, 86 N. J. L. 309, 52 L.R.A.(N.S.) 1010, 90 Atl. 1112; State v. Kuhl, 42 Nev. 185, 3 A.L.R. 1695, 175 *Pac.* 190.

Enlarged photographic copies may be used for comparison.

Marcy v. Barnes, 16 Gray, 161, 77 Am. Dec. 405.

Mr. R. N. French also for respondent.

Baker, J., delivered the opinion of the court:

Error is assigned upon the usual ground that the evidence is insufficient upon which to base the conviction or sustain the judgment. After a very careful review of the evidence in the case, we fail to see any merit in the assignment. The evidence for the prosecution rests principally upon the correspondence

or exactness of certain "finger prints." This evidence was introduced by several expert witnesses, who testified in detail as to their study of and inquiry into the subject of finger prints as a means of identification. They claimed to have made a close study of the subject, to have had extensive practical experience in the comparison of finger-print impressions, and to be able, by comparison of enlarged photographs of finger prints, to determine questions of identity, claiming that it furnished an accurate means thereof, since "never in the world were there two sets that exactly corresponded." The experts agreed in their testimony that the admitted finger-print impressions of the defendant corresponded exactly with the finger-print impressions appearing upon the porcelain slab of the cash register, which the proof showed had been attempted to be rifled at the time the safe was burglarized and the money stolen, and that these impressions were made by the same person. The additional evidence that the defendant had a bleeding wound upon his right hand, early in the morning after the commission of the burglary, and that the piece of human skin found adhering to the closet door situated alongside of the safe which had been broken open corresponded with the wound upon the defendant's hand, tended also to connect the defendant with the commission of the crime.

The defendant does not deny that the safe was burglarized, but he claims that during the whole time he was so far from the place where the crime was committed that he could not have participated in it. He attempts to explain the wound on his hand by saying that he received it while cutting some kindling on the morning after the burglary. Of course, evidence of this character conflicted with the evidence for the prosecution, but it was for the jury to settle this conflict. There can be no doubt, if the evidence for the prosecution was true,

that the defendant was present at the scene of the burglary and committed the crime.

The case is one of first impression in the courts of this state, and is a novel one, although students of the science claim that the use of finger prints in making personal identification was known to the Chinese before the birth of Christ. They claim that a finger print is "an unforgeable signature," and is the most positive and certain means of identification known to men. Mr. Frederick A. Brayley, in his work entitled "Finger Prints Identification," uses the following emotional language: "'God's finger-print language,' the voiceless speech and the indelible writing imprinted on the fingers, hand palms, and foot soles of humanity by the all-wise Creator for some good and useful purpose in the structure, regulation, and well-being of the human body, has been utilized for ages before the civilization of Europe as a means of identification by the Chinese, and who shall say is not a part of the plan of the Creator for the ultimate elimination of crime by means of surrounding the evilly disposed by safeguards of prevention, and for the unquestionable evidence of identity in all cases where such is necessary, whether it be in wills, deeds, insurance, or commercial mediums of finance, as well as in the discovering and identification of lawbreakers."

It seems to be well settled, both in England and in this country, that evidence of the correspondence of finger-print impressions for the purpose of identification, when introduced by qualified finger-print experts is admissible in criminal cases; the weight and value of such testimony always being a question for the jury.

The historical facts and the more recent legal decisions upon the subject are collated in a very able opinion handed down by Wadhams, J., in the case of *People v. Sallow*, 100 Misc. 447, 165 N. Y. Supp. 925, which we here reproduce in part:

"Scientific authority declares that finger prints are reliable as a means of identification. 10 Enc. Britannica, 11th ed. 376. The first recorded finger prints were used as a manual seal, to give a personal mark of authenticity to documents. Such prints are found in the Assyrian clay tablets in the British Museum. Finger prints were first used to record the identity of individuals officially by Sir William Herschel, in Bengal, to check forgeries by natives in India in 1858. C. Ainsworth Mitchell, in 'Science and the Criminal,' 1911, p. 51. Finger-print records have been constantly used as a basis of information for the courts, since Sir Francis Galton proved that the papillary ridges which cover the inner surface of the hands and the soles of the feet form patterns, the main details of which remain the same from the sixth month of the embryonic period until decomposition sets in after death, and Sir Edward Henry, the head of the metropolitan police force of London, formulated a practical system of classification, subsequently simplified by an Argentine named Vucetich. The system has been in general use in the criminal courts in England since 1891. It is claimed that by means of finger prints the metropolitan police force of London during the thirteen years from 1901 to 1914 have made over 103,000 identifications, and the magistrates' court of New York city, during the four years from 1911 to 1915, have made 31,000 identifications without error. Report of Alfred H. Hart, Supervisor, Finger-print Bureau, Ann. Rep. N. Y. City Magistrates' Courts, 1915. Their value has been recognized by banks and other corporations, passport bureaus of foreign governments, and civil service commissions as a certain protection against impersonation.

"It was held in 1909 by the Lord Chief Justice of England that the court may accept the evidence of finger prints, though it be the sole ground of identification. *Castleton's Case*, 3 Cr. App. Pr. 74. In

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Finger prints.**

People v. Jennings, 252 Ill. 534, 549, 43 L.R.A.(N.S.) 1206, 96 N. E. 1082. Mr. Chief Justice Carter, in holding such evidence admissible, states that 'there is a scientific basis for the system of finger-print identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it.'

"And in *People v. Roach*, 215 N. Y. 592, at page 604, 109 N. E. 623, Ann. Cas. 1917A, 410, Mr. Justice Seabury said: 'In view of the progress that has been made by scientific students and those charged with the detection of crime in the police departments of the larger cities of the world, in effecting identification by means of finger-print impressions, we cannot rule as a matter of law that such evidence is incompetent. Nor does the fact that it presents to the court novel questions preclude its admission upon common-law principles. The same thing was true of type-writing, photography, and X-ray photographs, and yet the reception of such evidence is a common occurrence in our courts.' "

See also the recent case of *State v. Kuhl*, 42 Nev. 185, 3 A.L.R. 1694, 175 *Pac.* 190. See further: *State v. Cerciello*, 86 N. J. L. 309, 52 L.R.A. (N.S.) 1010, 90 Atl. 1112; *State v. Connors*, 87 N. J. L. 419, 94 Atl. 812; *Parker v. Rex*, 14 C. L. R. (Austr.) 681, 3 B. R. C. 68; *Rex v. Morris* [1914] St. R. Qd. 274.

We are cited to the case of *McGarry v. State*, 82 Tex. Crim. Rep. 597, 200 S. W. 527, where it is held that finger-print impressions were insufficient to support the conviction. The case, however, is clearly distinguishable from the present case. It was a burglary case in which entry was made by breaking window glass from the outside and unfastening the door from the inside. The defendant's finger prints were found upon the window glass and identified with substantial cer-

tainty, and he was convicted upon that evidence alone. The evidence showed that this window was in a public place, and that there were other finger prints upon the window glass. The court, in reviewing the case, held that it was possible for the defendant to have innocently placed his hand upon the window glass, and that consequently his presence at the window was a fact that was not inconsistent with the hypothesis of his innocence. But it cannot be said of this defendant that his presence at the cash register, as necessarily found by the jury, was consistent with any hypothesis of his innocence. The cash register was not in a public place. It had been removed and placed on the floor in an effort to rifle it. There were no finger prints other than the alleged finger prints of the defendant upon the porcelain slab. The facts of the two cases are entirely different.

Complaint is made of alleged errors of the trial judge in the admission of evidence. The expert witness Sanders was permitted to make the test of pairing the finger prints of the twelve jurymen, which consisted of taking two prints in duplicate on separate cardboards of the finger prints of the twelve jurymen in the absence of the expert, who upon returning to the room, in the presence of the court and jury, developed the finger prints of the jurymen by means of finger-print powder, and correctly paired the cards off by comparing the finger prints as developed. It is not claimed that the test was made under conditions different from the conditions actually existing in the case, or that there was any trick or device about the test, or anything which smacked of a sleight-of-hand performance. It seems to have been

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pairing finger
prints.

fairly conducted, and tended, as we think, to illustrate the methods of the system of finger-print identification, and the truth of the claim that invisible

finger prints can be developed and identity of the maker revealed, by simple process, to positive certainty. In the present instance the evidentiary value of the abstract explanation of the methods of the system of developing finger-print impressions given by the expert witnesses was probably difficult for the jury to grasp. To most of us it is very hard to conceive that there cannot be two fingers that are exactly alike. But as the methods of the system were susceptible of actual demonstration by means of a test, we can see no reason why such test should not be made. Upon this point we reproduce the reasoning of counsel for the state: "To a layman, unsophisticated and incredulous, the idea that a finger laid on a clean sheet of paper, leaving no visible trace, thereby leaves a signature upon that paper, absolutely and positively, is a fact startling enough, but to see that finger print developed under the finger-print powder is a demonstration impressive and convincing. It might well be that, until a jurymen witnessed this demonstration, he would never believe that a plain porcelain slab would reveal the incriminating finger print, but having seen their own finger prints developed from invisible impressions on sheets of paper, it was no longer a question of speculation; it was to the jurymen a fact as common place as radium, or wireless, or flying in the air."

For obvious reasons the admission of experimental testimony must largely rest in the discretion of the trial judge, and the exercise of this discretion will not be controlled unless it is manifestly abused.

The expert witness Evans, over the objection of the defendant, was permitted, on redirect examination, to detail the circumstances and facts in certain other cases in which he was engaged, and in which finger-print evidence was used. This procedure is assigned as error. The record discloses that the defendant, on searching cross-examination,

sought to impeach the qualification of the witness as an expert upon the subject of comparing finger-print impressions, and thus throw doubt upon his testimony. Throughout the trial it seems to have been insisted that there was no such science as that of finger-print identification. Under such circumstances, the value and weight of the testimony of the expert witness became a question of prime importance before the jury, and we therefore think it was proper procedure to allow the witness, on redirect examination, to relate ^{—experience in other cases.}

his experience in other cases in which he had been employed, as a foundation for his opinion as an expert that the finger-print impressions on the porcelain slab corresponded with the finger-print impressions of the defendant. We do not think that the order in which the testimony was elicited is of great importance. The real question is: Was it admissible at all? Mr. Wigmore, in his work on Evidence (vol. 1, ¶ 555), under the convenient heading of "General Theory of Experiential Capacity," says: "In experience, then, are included all the processes—the continual use of the faculties, the habit and practice of an occupation, special study, professional training, and the rest—which contribute to produce a fitness to acquire accurate knowledge upon a given subject."

Again, at ¶ 562 of the same volume, the learned author says: "The experiential qualifications of a witness are usually established by his own testimony reciting the facts of his career and special experience."

The facts and circumstances of the other cases were too minutely recited, and should have been omitted. In this sense the procedure was probably violative of the rule that an expert may not be questioned about the particulars of other cases which have happened to come within his observation, because it tends to introduce collateral

issues (Rogers, Expert Testimony, ¶ 35), but the error was of a technical nature under the peculiar facts of the case, and does not, in our opinion, call for a reversal of the judgment of conviction.

The introduction of the finger-print photographs for comparison or identification is assigned as error. The question of using finger-print photographs was raised in the case of *People v. Jennings*, 252 Ill. 534, 548, 43 L.R.A. (N.S.) 1206, 96 N. E. 1082, *supra*, where the court said: "When photography was first introduced it was seriously questioned whether pictures thus created could properly be introduced in evidence, but this method of proof, as well as by means of X-rays and the microscope, is now admitted without question. Wharton, *Crim. Ev.* 8th ed. § 544; 1 Wigmore, *Ev.* § 795; Rogers, Expert Testimony, 2d ed. § 140; Jones, *Ev.* 2d ed. § 581."

It is objected that it was error to admit in evidence the photograph of the finger prints of the defendant, for the reason that a defendant under the Constitution cannot be compelled to give evidence against himself.

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law—evidence
against self—
finger prints.

But the uncontradicted evidence shows that the defendant voluntarily suffered his finger-print impressions to be taken, which were photographed. There is no claim that any force or improper duress was used in taking the finger prints. It is clear that there was no violation of the constitutional rights of the defendant in suffering the photograph to be introduced in evidence. *People v. Sallow*, 100 Misc. 447, 165 N. Y. Supp. 925, *supra*.

An assignment of error is based upon the introduction in evidence of the state's exhibits PP and QQ. Exhibit QQ is a photograph of the defendant. While the photograph was immaterial and its introduction superfluous and useless, yet we cannot perceive how its introduction could possibly be harmful to the defendant. PP is a photograph of the

finger-print impressions of the defendant, taken in the San Francisco Bureau of Identification in March, 1918. On the opposite page of the card upon which the finger-print impressions appear, and also under the finger-print impressions on the same side of the card, appears the criminal record of the defendant, showing that he had been arrested for an assault and attempt to murder, etc. The contention here is that this exhibit tended to show the commission of a different offense than that charged in the information, and had no connection with the case being tried, and was prejudicial to the defendant. Upon a critical examination of the record, we find that when the exhibit was offered in evidence the court said: "The ruling is, the finger prints will be admitted, and the card on which they are will be admitted only upon the written part being covered in such manner as to render the printing thereon invisible."

What was actually done in respect to concealing the printed matter on the card is not disclosed by the record. We must presume, however, that the ruling of the court was obeyed; there being nothing to the contrary. Hence we conclude that the jury never saw the printed matter on the card, and had no knowledge thereof.

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finger-print
record from
identification
bureau.

The other questions argued by counsel have not been overlooked, but are not of controlling importance. We find no fault with the instructions. They fairly state the law and cover every phase of the case. The record, which, together with the able argument of counsel for the defendant, is quite voluminous, has had careful and thorough consideration, and we are not convinced that the defendant was denied a fair trial in the court below.

Finding no error, its judgment is therefore affirmed.

Ross, Ch. J., and McAlister, J., concur.

ANNOTATION.

Finger prints as evidence.

- I. Admissibility, 370.
- II. Weight, 370.
- III. As requiring accused to furnish evidence against himself, 371.
- IV. Experts and their testimony, 373.
- V. Miscellaneous, 373.

The question of identification by palm-print impressions is discussed in *State v. Kuhl*, 3 A.L.R. 1694, and the annotation thereto appended.

I. Admissibility.

It is uniformly held that evidence as to the correspondence of finger prints is admissible to prove identity. See the reported case (*MOON v. STATE*, ante, 362); *People v. Jennings* (1911) 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077; *State v. Cerciello* (1914) 86 N. J. L. 309, 52 L.R.A.(N.S.) 1010, 90 Atl. 1112; *State v. Connors* (1915) 87 N. J. L. 419, 94 Atl. 812; *People v. Roach* (1915) 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917A, 410; *McGarry v. State* (1918) 82 Tex. Crim. Rep. 597, 200 S. W. 527; *Castleton's Case* (1909) 3 Cr. App. Pr. (Eng.) 74; *Parker v. Rex* (1912) 14 C. L. R. (Austr.) 681, 3 B. R. C. 68; *Rex v. Morris* [1914] St. Rep. Qd. (Austr.) 274; *Emperor v. Sahdeo* (1904) 3 Nagpur L. Rep. (India) 1, cited in 3 Chamberlayne, Ev. § 2072.

In *Parker v. Rex* (1912) 14 C. L. R. (Austr.) 681, 3 B. R. C. 68, it is said by Griffith, Ch. J.: "The fact of the individuality of the corrugations of the skin on the fingers of the human hand is now so generally recognized as to require very little, if any, evidence of it, although it seems to be still the practice to offer some expert evidence on the point. A finger print is therefore in reality an unforgeable signature. That is now recognized in a large part of the world, and in some parts has, I think, been recognized for many centuries. It is certainly now generally recognized in England and other parts of the English Dominion."

The fact that identification by means of finger-print impressions pre-

sents to the court novel questions does not preclude its admission upon common-law principles. *People v. Roach* (1915) 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917A, 410.

In *State v. Cerciello* (1914) 86 N. J. L. 309, 52 L.R.A.(N.S.) 1010, 90 Atl. 1112, the court, in holding that experts may testify as to the result of a comparison of finger-print impressions with those of the defendant, said: "In principle, its admission as legal evidence is based upon the theory that the evolution in practical affairs of life, whereby the progressive and scientific tendencies of the age are manifest in every other department of human endeavor, cannot be ignored in legal procedure, but that the law, in its efforts to enforce justice by demonstrating a fact in issue, will allow evidence of those scientific processes which are the work of educated and skilful men in their various departments, and apply them to the demonstration of a fact, leaving the weight and effect to be given to the effort and its results entirely to the consideration of the jury. Stephen's Dig. Ev. 267; 2 Best, Ev. 514. The instances are numerous, and the books replete with cases where this rule, arising and applied ex necessitate, and based in its incipency upon the maxim of the civil law, 'cuilibet in sua arte perito est credendum' exhibiting one of the prominent exceptions of the general rules of evidence, has been applied in a multiform variety of cases, from the earliest era of reported common law, to elucidate and demonstrate disputed and elusive facts. *Sussex Peerage Case* (1844) 11 Clark & F. 85, 8 Eng. Reprint, 1034; 2 Best, Ev. 864."

II. Weight.

While the weight of the evidence of identity of the prisoner with the person who committed the crime, thus adduced, is a question for the jury (see *People v. Jennings* (1911) 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077; *State v. Cerciello* (1914) 86 N. J. L.

309, 52 L.R.A. (N.S.) 1010, 90 Atl. 1112; *State v. Connors* (1915) 87 N. J. L. 419, 94 Atl. 812; *People v. Roach* (1915) 215 N. Y. 592, 101 N. E. 618, Ann. Cas. 1917A, 410; *Emperor v. Abdul Hamid* (1905) 32 Ind. L. Rep. (Calcutta series) 759, cited in 3 Chamberlayne, Ev. § 2561, note 3), such evidence may be sufficient to support a conviction (see *State v. Connors*, 87 N. J. L. 419, 94 Atl. 812; *Castleton's Case* (1909) 3 Cr. App. R. (Eng.) 78; *Parker v. Rex* (1912) 14 C. L. R. (Austr.) 681, 3 B. R. C. 68; *Rex v. Morris* [1914] St. Rep. Qd. (Austr.) 274).

In *Emperor v. Abdul Hamid* (1905) 32 Ind. L. Rep. (Calcutta series) 759, as set forth in 3 Chamberlayne, Ev. p. 3453, note, it was held that where certain thumb impressions were blurred, and many of the characteristic marks therefore far from clear, thus rendering it difficult to trace the features enumerated by an expert as showing the identity of the impressions, and the court could only find a distinct similarity in some respects, e. g., pattern and central core, the jury were not wrong in refusing to accept the opinion of the expert.

In the reported case (*MOON v. STATE*, ante, 362) a conviction was upheld notwithstanding the impression of the index and little fingers were blurred beyond possibility of identification, and the print of the middle finger was blurred at the center, where the print of the third finger was exceptionally perfect, and there was other evidence tending to prove that defendant had committed the burglary in question.

To warrant a conviction, however, the finger prints corresponding to those of the accused must have been found in the place where the crime was committed, under such circumstances that they could only have been impressed at the time when the crime was committed.

Such has been held to be the case where the finger print was found upon a bottle in a shop which had been burglarized. *Parker v. Rex*, 14 C. L. R. (Austr.) 681, 3 B. R. C. 68.

In the reported case (*MOON v. STATE*, ante, 362) the finger-print

impressions were upon a porcelain slab on the front of the cash register, which had been removed from the counter to the floor.

The identity of the accused with the person who committed a burglary is established by the correspondence of his thumb imprints with markings on the bowl of a lamp left by the occupants of the house in the kitchen, but on their return discovered in another part of the house. *Rex v. Morris* [1914] St. Rep. Qd. (Austr.) 274.

In *McGarry v. State* (1918) 82 Tex. Crim. Rep. 597, 200 S. W. 527, it was held that the connection of defendant with the burglary of a depot office, which had been entered by breaking a window glass from the outside and unfastening the door from the inside, was not supported by evidence that upon one of the windowpanes of the window there were finger prints which were identified by expert testimony as identical with finger prints made by defendant on a piece of paper after his arrest, where it appeared that there were other finger prints upon the windowpane, and it was not practicable to tell when and by whom these were made and when those claimed to have been made by the defendant were placed upon the window, and the window was situated so as to make it accessible to the general public.

III. As requiring accused to furnish evidence against himself.

A constitutional provision that the defendant in a criminal case cannot be compelled to give evidence against himself is not violated by the introduction in evidence of photographs of finger-print impressions which the defendant voluntarily suffered to be taken. *MOON v. STATE* (reported herewith) ante, 362; *McGarry v. State* (1918) 82 Tex. Crim. Rep. 597, 200 S. W. 527.

Nor is such provision violated by an order of the court directing the taking of the finger prints of the accused as a means of identification, and their reception in evidence upon the testimony of a competent witness whose qualification as an expert is not questioned. *People v. Sallow* (1917) 100

Misc. 447, 165 N. Y. Supp. 915. The court, in concluding an extensive discussion of the authorities bearing upon the construction of such constitutional provision, said: "It has always, at common law and in the practice prevailing under the Constitution and laws of our state, been permissible to put in evidence for the purpose of identification of the defendant, testimony as to his personal appearance, his hair, his eyes, his complexion, marks, scars, teeth, his hands, and the like. Finger prints are but the tracings of physical characteristics or the lines upon the fingers. Nothing further is required in finger printing than has been sustained heretofore by the courts in making proof of identification. The steps are to exhibit the fingers of the hands and to permit a record of their impressions to be taken. The requirement that the defendant's finger prints be taken for the purpose of establishing identity is not objectionable in principle. There is neither torture nor volition nor chance of error. The defendant is required to allow another to make observation and record. Torture is defined as 'the act of inflicting severe pain as a means of persuasion.' Century Dict. Finger printing is entirely harmless, and it is not done as a means of persuasion. There is no claim that any excessive force or improper duress was used in taking the finger prints. No volition—that is, no act of willing—on the part of the mind of the defendant is required. Finger prints of an unconscious person, or even of a dead person, are as accurate as are those of the living. It is reported that by finger prints bodies have been identified by the bureau of unidentified dead of the New York city police department. N. Y. City Mag. Ct. Rep. 1915. By the requirement that the defendant's finger prints be taken, there is no danger that the defendant will be required to give false testimony. The witness does not testify—the physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance of her finger prints, or change them in one line, and therefore there is no danger

of error being committed or untruth told. The taking of finger prints is not a violation of the spirit or purpose of the constitutional inhibition. 'The scope of the privilege, in history and in principle,' says Greenleaf, 'includes only the process of testifying by word of mouth or in writing, i. e., the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on the witness's body or about his person.' Vol. 1, 16th ed. § 469e. It would be a forced construction to hold that by finger printing the defendant was required to furnish evidence against herself. Such is not the case. The defendant was already in the case. The court merely makes inquiry by physical examination, and records the same as to her identity while it detains her. It might as well be urged that by her arrest the defendant was deprived of her constitutional rights, because her body is produced before the court. Both upon sound reason and upon the authority of analogous cases I am of opinion that the taking of the defendant's finger prints and their introduction in evidence were not a violation of the Constitution of this state. The proof was not the defendant's proof. She was not called as a witness. It was proof by a competent witness, based upon the record of this examination of the defendant. The constitutional inhibition, in my opinion, has reference to testimonial utterances by the defendant, and may not be used to prevent the establishment of the truth as to the existence or nonexistence of certain marks of identity upon the defendant's fingers from which the record of her former convictions may be ascertained."

The rule that a defendant cannot be required to furnish evidence against himself does not preclude the introduction into evidence, for purpose of comparison with alleged finger prints of the defendant, of finger-print impressions obtained by inducing him to sign his name upon a sheet of paper, which act incidentally impressed his finger prints upon the sheet. *State v. Cerciello* (1914) 86 N. J. L. 309, 52 L.R.A.(N.S.) 1010, 90 Atl. 1112.

IV. Experts and their testimony.

The classification of finger-print impressions and their method of identification is a science requiring study, and it is therefore proper to allow witnesses of peculiar and special experience on the subject to testify as to the identity of two sets of finger prints. *People v. Jennings* (1911) 252 Ill. 534, 48 L.R.A.(N.S.) 1206, 96 N. E. 1077.

Witnesses who, for several years, have made a study of finger prints in connection with detective bureaus, and have had actual experience in identifying persons by that method, may make comparisons, as experts, of finger prints in evidence for purpose of identification. *Ibid.*

A witness is sufficiently qualified to testify as an expert upon the question of identity of finger prints where it is shown that he has been engaged in the study of the subject for ten years, that he is skilled in the photographic process necessary to enlarge and develop photographs of finger prints, and is able by comparison of enlarged photographs to determine questions of identity. *McGarry v. State* (1918) 82 Tex. Crim. Rep. 597, 200 S. W. 527.

Evidence of a finger-print expert is not rendered inadmissible because he states that prints given him for comparison were made by the same person, rather than that in his opinion they were so made. *People v. Jennings* (Ill.) *supra*.

An expert may be permitted to pair finger prints of the jurors, properly taken and developed, for the purpose of illustrating the methods of a system of finger-print identification, and

the truth of the claim that invisible finger prints can be developed and the identity of the maker revealed. *MOON v. STATE* (reported herewith) ante, 362.

A finger-print expert who has been subjected to a searching cross-examination may, on redirect examination, be permitted to relate his experience in other cases in which finger-print evidence was used; at least, where the accused insists throughout the trial that there is no such science as that of finger-print identification. *MOON v. STATE* (reported herewith).

V. Miscellaneous.

Where, during the examination of a witness testifying as to the identity of a certain thumb-print impression with that of the accused, upon a juror's stating that he would like to ask the witness whether it would be possible for another thumb to make the same impression, the court said: "Absolutely impossible—that is to say, no such thing has been discovered yet," such a statement is not error where it appears that the court was only expressing his view of the logical effect of the evidence already given by the witness. *Rex v. Morris* [1914] St. Rep. Qd. (Austr.) 274.

Permitting the introduction in a criminal case of the finger-print records of accused taken from the bureau of identification of a city was not reversible error because his criminal record was on the same card, if the criminal record was so covered that it was not seen by the jury. *MOON v. STATE* (reported herewith) ante, 362.
E. S. O.

JOHN J. FITZGERALD

v.

ALBERT E. NICKERSON et al.

THOMAS J. DORNEY

v.

SAME.

Rhode Island Supreme Court — April 27, 1921.

(— R. I. —, 113 Atl. 290.)

Garnishment — property in hands of police officer.

1. Property taken from alleged criminals, and held by the police officials

to be used as evidence in case of their prosecution, is subject to garnishment in the hands of the officials.

[See note on this question beginning on page 378.]

Replevin—of property subject to garnishment.

2. Garnishment by creditors, of property taken from prisoners by po-

lice officials for use as evidence if needed, will defeat a replevin suit by subsequent assignees of the prisoners.

EXCEPTIONS by defendants to rulings of the Superior Court for Providence and Bristol Counties (Tanner, J.) made during the trial of actions brought to recover possession of certain property, which resulted in verdicts for each plaintiff. *Sustained.*

The facts are stated in the opinion of the court.

Messrs. Gardner, Moss, & Haslam, for defendants:

The writs of replevin are bad because brought by grantees of the defendants in the attachment suits, under bills of sale made subsequent to the attachments.

Arnold v. Chapman, 13 R. I. 586; Hines v. Allen, 55 Me. 114, 92 Am. Dec. 574; Cobbey, Replevin, § 332; 23 R. C. L. 877; Providence Inst. for Sav. v. Barr, 17 R. I. 131, 20 Atl. 245.

The automobile and personal property attached were not in the "custody of the law," so as to render void the attachments.

20 Cyc. 1025; Reifsnyder v. Lee, 44 Iowa, 101, 24 Am. Rep. 733; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459. See also Ex parte Hurn, 92 Ala. 102, 13 L.R.A. 120, 25 Am. St. Rep. 23, 9 So. 515.

If the attachments are bad because the property at the time was in custodia legis, then for the same reason the writs of replevin must be void, since at the time these actions were commenced the property had not been released by the court and was still in custodia legis.

Hail v. Spencer, 1 R. I. 17; Taft v. Daggett, 6 R. I. 266; Eaton v. Chapin, 7 R. I. 408; 34 Cyc. 1337; Cobbey, Replevin, § 289.

Messrs. Fitzgerald & Higgins and William H. Camfield, for plaintiffs:

Property taken from a prisoner, and in the hands of an officer, is not subject to garnishment.

Patterson v. Pratt, 19 Iowa, 358; Coffee v. Haynes, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459; 12 R. C. L. 811; 2 Shinn, Attachm. & Garnishment, p. 882; 10 Standard Proc. p. 464.

Vincent, J., delivered the opinion of the court:

About October 1, 1914, several men, accused of breaking and entering the stores of the Louis K. Liggett Company and the Regal Shoe Company in Providence, were arrested in New London, Connecticut, and brought back. Certain property found in the possession of these men was taken from them at the time of their arrest, and later turned over to the defendant Albert E. Nickerson, then chief police inspector for the city of Providence. This property consisted of a Pierce-Arrow automobile, one dress suit case full of burglars' tools, one automobile trunk, six hats, five pairs of shoes, one robe, one overcoat, three raincoats, three dress suit cases, one bundle containing wearing apparel and other personal effects, four jack-knives, one ring, three pencils, one fountain pen, one nickel watch, one diamond horseshoe pin, eleven diamonds, and \$675.12 in money. This property was retained by Nickerson for use as evidence in the criminal proceedings. The men arrested were later indicted, tried, found guilty, sentenced, and committed to the state prison.

On October 2, 1914, immediately following the arrest of these men at New London and their return to Providence, the Louis K. Liggett Company and the Regal Shoe Company each brought an action against them, and attached their personal property in the hands of Nickerson. The writ of attachment in the Lig-

(— R. I. —, 118 Atl. 290.)

gett case was served October 22, 1914, and in the case of the Regal Company on October 23, 1914.

Subsequent to these attachments, bills of sale were executed by these men, transferring their interest in the automobile, its accessories and contents to Mr. Fitzgerald and in the remaining property to Mr. Dorney. The exact dates of these bills of sale do not appear and are not important as it is undisputed that they were executed after the attachments.

On February 17, 1915, Mr Fitzgerald brought an action of replevin against the defendant Nickerson for the recovery of the automobile and its accessories. Service of the writ was made on March 22, 1915, the deputy sheriff charged with such service having been furnished by Mr. Fitzgerald with the following order and release:

March 22, 1915.

To Police Department of City of Providence:

Gentlemen:—

Please deliver to Herman Paster, deputy sheriff, 'Pierce Arrow Automobile,' also trunk, 2 extra tires & rims, suit cases, robe & all attachments owned by me. Mr. Paster has a bill of sale which he will show you if you so desire.

Very truly yours,

John J. Fitzgerald.

March 22, 1915.

The above-mentioned property is hereby ordered released from the custody of law.

George T. Brown,

Justice of the Superior Court.

On March 15, 1915, Mr. Dorney brought an action of replevin against Nickerson to recover the balance of the property not covered in the suit of Mr. Fitzgerald, the service of the writ occurring on the following day, March 26, 1915. In the case of Mr. Dorney, the deputy sheriff was furnished with a release as follows: State of Rhode Island, Providence—Sc.: Superior Court. Indictments No. 8,239 and No. 8,240. State of Rhode Island v. Edward F.

Tate alias Raymond W. Staley, Nos. 8,239 and 8,240. Joseph T. Baird alias Joseph T. Brady, Albert C. Percival alias Burnside McCullin, alias David Hendricks, Leonard C. Maynard alias, and Michael P. Devlin alias.

In the above-mentioned two indictments, No. 8,239 and No. 8,240, all the personal property belonging to each and all said defendants and now in the custody of the state of Rhode Island is hereby released. March 26, 1915. George T. Brown, Justice of the Superior Court.

In each of these cases the articles enumerated in the writs were obtained from the defendant Nickerson, and turned over by the officer to the respective plaintiffs. In both cases the defendant Nickerson filed three pleas: First, the general issue; second, a general denial of the plaintiffs' claims; and third, a special plea setting forth that the defendant had taken the personal property in question from certain persons who had been arrested, and held them as articles that might be needed as evidence in the criminal proceedings; and that, while having possession of such articles, a writ of attachment in the two law cases then pending had been served upon him as trustee; and that the plaintiffs' only claims to the title were by virtue of bills of sale from the persons arrested, made after the writs of attachment had been served. To the special plea the plaintiff in each of the replevin cases filed a demurrer on the ground that the attachments were not valid because the goods and chattels at the time of such attachments were in the custody of the law. This demurrer, after hearing, was sustained by the superior court, and to this ruling the defendant excepted.

On November 23, 1915, the Louis K. Liggett Company and the Regal Shoe Company filed a motion asking for leave to intervene in the replevin suits for the purpose of protecting their attachments which motion was granted.

After being permitted to inter-

vene the interveners adopted and confirmed the pleas previously filed by the defendant Nickerson, and filed an additional plea in their own behalf, entitled "Plea of the Interveners," setting forth that the goods and chattels replevied were on October 22, 1914, in possession of defendant Nickerson as the goods and chattels of Percival, Maynard, and others, the men who had been arrested; that writs of attachment had been duly served on said defendant as garnishee in the suits of the Liggett and Regal Companies; that said goods and chattels were afterwards replevied from the said defendant Nickerson, the plaintiffs claiming title thereto by virtue of bills of sale made subsequent to the service of said writs of attachment; and praying that said goods and chattels be delivered to the officer charged with the service of the attachment writs, to be held by him to await the determination of the actions brought by the Liggett and Regal Companies. To this plea the plaintiffs demurred on the same ground as before, and the demurrer was overruled. Thereupon the plaintiffs filed a replication to the plea of the interveners, and to that the interveners demurred, which was also overruled, and the interveners excepted. Thereafter the interveners filed a rejoinder to the plaintiffs' replication, and joined issue on the fact whether or not the superior court had released from its custody the goods and chattels replevied at the time that the two replevin suits had been instituted. Later, testimony on this point was introduced, certain exhibits were put in evidence, and stipulations entered into as to evidence, as appears from the transcript of testimony. The trial justice decided in favor of the plaintiffs for possession and 10 cents damages. To this decision the defendant interveners excepted, and now come before this court on their bills of exceptions:

"(1) To a certain ruling of said justice made on October 29, 1915, sustaining the plaintiffs' demurrer

to the defendant Nickerson's third plea.

"(2) To a certain ruling of said justice made on January 15, 1918, sustaining the plaintiffs' demurrer to the defendant Nickerson's fourth plea.

"(3) To a certain ruling of said justice, made on November 4, 1919, overruling the interveners' demurrer to the plaintiffs' replication to the interveners' plea.

"(4) To the said decision of said justice made at the trial of said case on September 21, 1920, in favor of the said plaintiffs."

The two questions which appear to be essential for our consideration in determining the present controversy are: (1) At the time of the attachments in the suits of the Liggett and Regal Companies, was the property in question in custodia legis so as to render such attachments void? and (2) can the plaintiffs, claiming title under bills of sale made subsequent to the attachments, maintain their actions of replevin?

It is not disputed that the property in question belonged to the persons who had been arrested; that it had been taken from them by police officers at New London, and by them turned over to the defendant Nickerson, chief inspector of police in Providence, by whom the same was held in case it should be needed as evidence in the criminal proceedings. Under these conditions the Liggett and Regal Companies brought their suits against the owners of the property for the purpose of reimbursing themselves for the losses which they had suffered and attached the personal estate of the defendants in such suits in the hands of Nickerson. The plaintiffs' only claim of title to this property is based upon certain bills of sale, which were executed by the owners thereof subsequent to the service of the writs of attachment. The property appears to have been taken in good faith, and retained with the belief that it might be needed later as evidence. There is nothing from which an inference can be drawn

that this property was taken or retained by the officers for the benefit or convenience of, or in collusion with, the two attaching companies.

The officers doubtless were justified in retaining this property for the purpose of evidence, and for such purpose it may be said to have been in custodia legis, but such custody did not change or affect the title thereto. By § 30, chapter 354, General Laws 1909, it is provided that "all property, money or estate taken or detained as evidence in any criminal cause shall be subject to the order of the court before which the complaint or indictment shall be brought or pending, and shall, at the termination thereof, be restored to the rightful owner."

The plaintiffs argue that the garnishment of these articles might interfere with their use at the trial; that public officers should be saved from the vexation and annoyance of incidental litigation; and that such garnishment, if held to be valid, might induce collusion between creditors and police officers. We fail to see any force in these contentions. In the first place, the garnishment neither removes the property from the possession of the garnishee nor prevents its production and use as evidence in the criminal proceedings against the owners. Were it otherwise, the section of the statute above quoted makes all such effects subject to the order of the court until the termination of the proceedings. The fact that the property in the possession of the garnishee could not be seized under attachment or execution, because temporarily subject to the order of

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officer.

the court, does not prevent the charging of the garnishee in respect

thereto, because he can hold it until such time as he is permitted to deliver it. Drake, Attachm. 6th ed. § 464.

The garnishee is required by law to make an affidavit disclosing what

property of the defendant he had in his hands and possession at the time of the attachment, and for that he receives the statutory fee. The performance of this duty cannot be said to be a vexation and annoyance, any more than the compliance with any other law might be vexatious and annoying, but, however that may be, the garnishment in no way defeats the ends of justice by rendering unavailable any evidence which the property taken from criminals might supply.

As we have said before, there is no evidence of any collusion between creditors and officers in the present cases. In cases where such collusion is shown, the authorities clearly point out that the attachment would be void, and therefore any consideration of the question on the ground of public policy is unnecessary.

While there is some conflict of authorities, we think, as stated in 20 Cyc. 1025, that "the better rule seems to be that money or other property taken from the person of a prisoner at the time of his arrest by an officer, upon the belief that it is connected with the crime charged, or might be used by the prisoner in effecting his escape, is subject to garnishment in the hands of such officer."

In Reifsnnyder v. Lee, 44 Iowa, 101, 24 Am. Rep. 733, a case where money and valuables had been taken by an officer from a person arrested for larceny, the court held that they were liable to garnishment in a civil action against the prisoner by the party who had suffered loss. The court said in its opinion: "It is our conclusion that the money and watch in question were lawfully taken from Lee by the officers, and, when the garnishment process was served upon Gray, were lawfully in his possession. We cannot convert the rules of law, intended for the protection of the person and property of the citizen, into instruments by which thieves and other felons may conceal their crimes and resist

police officers in honest and commendable efforts to bring them to justice."

In *Closson v. Morrison*, 47 N. H. 482, 93 Am. Dec. 459, it was held that money taken from a prisoner in good faith was subject to attachment in the hands of the officer taking the same, and the court in its opinion said: "If this property had been separated from the person of the prisoner, or taken from his dwelling house, under authority of law, it is separated from his person and out of his house for all purposes. If this defendant rightfully and lawfully holds possession of the property in question, without having used force or fraud to obtain it, then, when a writ is put into his hands, he may properly and lawfully attach it."

We think that the garnishments of the Liggett and Regal companies ^{Replevin—of property subject to garnishment.} are valid, and that the plaintiffs' replevin suits cannot be maintained.

The defendant interveners' exceptions numbered 2 and 4 are sustained. The other exceptions of the defendants do not require consideration. As the conclusions which we have reached are decisive of the cases, the plaintiffs may appear before this court, if they shall see fit, on Wednesday, May 4, 1921, at 9 o'clock A. M., standard time, and show cause, if any they have, why these cases should not be remitted to the Superior Court, with direction to enter judgment for return and restoration, 10 cents damages, and costs.

ANNOTATION.

Money or other property taken from prisoner as subject of attachment, garnishment, or seizure under execution.

While there is a division of judicial opinion on the present subject, the majority of the cases hold that property taken from a prisoner by police officials is, while in the possession of such officials, not subject to attachment, garnishment, or execution; the reasons assigned generally being that the property is in the custody of the law, and that to hold otherwise would open the door to the possibility of grave abuses.

Alaska.—*Pioneer Min. Co. v. Tiberg* (1913) 4 Alaska 670 (obiter).

California.—*Coffee v. Haynes* (1899) 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482.

Georgia.—*Connolly v. Thurber-Whyland Co.* (1893) 92 Ga. 651, 18 S. E. 1004.

Iowa.—*Commercial Exch. Bank v. McLeod* (1885) 65 Iowa, 665, 54 Am. Rep. 36, 19 N. W. 329, 22 N. W. 919.

Massachusetts.—*Robinson v. Howard* (1851) 7 Cush. 257; *Morris v. Penniman* (1859) 14 Gray, 220, 74 Am. Dec. 675; *Wallace v. Coyne* (1918) 230 Mass. 475, 120 N. E. 73.

Michigan.—*Hubbard v. Garner*

(1897) 115 Mich. 406, 69 Am. St. Rep. 580, 73 N. W. 390.

Missouri.—*Holker v. Hennessey* (1897) 141 Mo. 527, 39 L.R.A. 165, 64 Am. St. Rep. 524, 42 S. W. 1090.

Oregon.—*Dahms v. Sears* (1885) 13 Or. 47, 11 Pac. 891.

Pennsylvania.—*Davies v. Gallagher* (1883) 17 Phila. 229.

Tennessee.—*Hill v. Hatch* (1897) 99 Tenn. 39, 63 Am. St. Rep. 822, 41 S. W. 349.

Texas.—*Richardson v. Anderson* (1892) 4 Tex. App. Civ. Cas. (Willson) 493, 18 S. W. 195.

Washington.—*Wooding v. Puget Sound Nat. Bank* (1895) 11 Wash. 527, 40 Pac. 223 (not subject to garnishment if taken wrongfully from prisoner).

Under the statutes in some of the states, however, money or other property in the possession of a sheriff or other police officer is subject, at least under certain conditions, to attachment or garnishment, although it has been taken from a person arrested on a criminal charge. *Ex parte Hurn* (1890) 92 Ala. 102,

13 L.R.A. 120, 25 Am. St. Rep. 23, 9 So. 515; *Warren v. Matthews* (1892) 96 Ala. 183, 11 So. 285; *Reifsnyder v. Lee* (1876) 44 Iowa, 101, 24 Am. Rep. 733; *Closson v. Morrison* (1867) 47 N.H. 482, 93 Am. Dec. 459; *FITZGERALD v. NICKERSON* (reported herewith) ante, 373.

At common law, it was said in *Ex parte Hurn* (Ala.) supra, property in the hands of an officer was regarded as in gremio legis, and not subject to process.

But under a statute authorizing the attachment of money in the hands of a sheriff or other officer, it was held in *Ex parte Hurn* (Ala.) supra, that an officer might be garnished for money which he had taken from the debtor under arrest, if the arrest was made in good faith and there was probable ground for believing that the money was connected with the offense or useful as evidence on the trial of the prisoner. The court said that there was no evidence that the defendant in this case was arrested for the purpose of obtaining a levy, or that the criminal charge against him was false or fabricated; that the important question, therefore, was as to whether the sheriff was authorized to search the defendant and take from him the money, either for the purpose of using it as evidence on the criminal prosecution, or to prevent the prisoner from using the money to effect his escape. The court reached the conclusion that there was no warrant, either in the common law or statute, for taking money from the person of the prisoner unless it was connected with the offense charged, or was to be used as evidence on the trial; but that the sheriff might seize any money, or anything connected with the offense, which might be used as evidence on the prosecution, and retain it until turned over to the state's attorney or paid into court; and that an officer acting in good faith in the execution of his duty, and proceeding upon probable grounds for believing that the money or thing was connected with the offense charged or might be used as evidence, might search and take from the defendant arrested on

a criminal charge money found on his person; and that he would not be liable for a trespass although it turned out that the money or other property was not in fact connected with the offense and could not be used as evidence. And it was held that property rightfully taken from the person of the one arrested was subject, under the statute, to attachment or garnishment. But if the money or other property seized was taken without probable grounds for believing that it was connected with the offense, or useful as evidence, the court said that the levy would be invalid; and the officer, if he knew of the fraud, and the person procuring the levy, would be liable for damages.

In the reported case (*FITZGERALD v. NICKERSON*, ante, 373), the court held that property taken from the alleged criminals, and held by police officials to be used as evidence on their prosecution, was subject to garnishment in the hands of the officials. The court said there was no evidence of any collusion between creditors and officers. And the view was taken that, while the property might be regarded as in custodia legis and therefore could not be seized, this fact would not prevent its being subject to garnishment, the garnishee holding the property until such time as he might be permitted to deliver it. The court also ruled against the contention that the property should not be held subject to garnishment because of interference with public officers in the performance of their duties, or alleged vexation and annoyance on their part.

However, in *Coffee v. Haynes* (1899) 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482, the court said: "It is generally held to be the law that property taken from a prisoner on his arrest by an officer charged with that duty is not, while in the hands of such officer, subject to levy, and cannot be reached by the process of garnishment, the reason being that to hold otherwise would lead to a grave abuse of criminal process."

But the court held in *Coffee v. Haynes* (Cal.) supra, that the above

rule did not apply where money of one who was arrested for murder was taken, not from his person, but, under his direction, from a cabin, where he disclosed that the money was hidden. The court said that in this case the money was not taken at the time of the arrest, nor from the person of the defendant, and had no connection whatever with the cause of the arrest; but that the police officer (the garnishee) had come into possession of it by direction of the defendant, and with his consent; that such officer was neither more nor less than the bailee of the defendant; that he did not hold the money in his official capacity, and owed no duty to disburse it in such capacity; so that the money might be reached by garnishment. The court took the view that under these circumstances the money, although in the custody of an officer of the law, was not in the custody of the law within the meaning of the rule exempting property in such custody from garnishment or other process.

And in other cases a reason, among others, assigned for holding that the property taken from the prisoner was not subject to attachment or garnishment, has been that it was in *custodia legis*.

Thus, where a sheriff took money and checks from the possession of one arrested for carrying a pistol, the purpose being to preserve the same during the prisoner's incarceration, it was held in *Richardson v. Anderson* (1892) 4 Tex. App. Civ. Cas. (Willson) 493, 18 S. W. 195, that the property was not subject to garnishment in the hands of the sheriff, because it was in *custodia legis*.

So, where money and other property were taken by a constable from one arrested on a criminal charge, it was held in *Robinson v. Howard* (1851) 7 Cush. (Mass.) 257, that the property, while in the officer's possession, was not subject to trustee process at the instance of a creditor of the prisoner. The court said: "We should fear that any other construction would lead to a gross abuse of criminal process. Such process might be used to search the person, or otherwise, under color

of lawful authority, to get possession of the property of a debtor, in order to place it in the hands of the officer, and thus make it attachable by trustee process."

And in *Morris v. Penniman* (1859) 14 Gray (Mass.) 220, 74 Am. Dec. 675, where a watch was taken by a police officer from one arrested on a charge of larceny of money, it was held that an attachment levied on such property while retained in the possession of such officer for the purpose of being used as evidence, if necessary, upon the trial, was invalid.

The court expressed the view in *Byrne v. Byrne* (1895) 89 Wis. 659, 62 N. W. 413, that if a constable, in arresting one for larceny of a horse, took and retained possession of the animal, it was in the custody of the law, and not subject to replevin by the owner. But in this case it was held that the owner might replevin the property where, pursuant to order of court, the officer had redelivered the horse to the prisoner on his giving a bond for its return at the next term of court, or upon demand; the order further providing that nothing therein contained should impair the right of the owner of the horse to obtain possession by due process of law.

And the courts have called attention frequently to the likelihood, or at least possibility, of oppression and abuse, if property taken from a prisoner were subjected to attachment or garnishment.

Thus, in holding that personal property taken by police officers from a prisoner at the time of his arrest on a criminal charge, which was not in any way connected with such charge, was not subject to garnishment in the possession of the officers, the court in *Hill v. Hatch* (1897) 99 Tenn. 39, 63 Am. St. Rep. 822, 41 S. W. 349, after stating that there was a diversity of judicial opinion on the question, said: "We are satisfied, however, that the better policy, as well as the weight of authority, is with the ruling of the trial judge. In disposing of it, we do not deem it necessary to determine the right of the police officer, upon arresting a prisoner, of his own motion, to

take from him articles of value, or the reasonableness of municipal regulations which may authorize this to be done. It may be conceded, for our present purpose, that in either case this may be done, and that a wise precaution requires that it should be done. But when an officer of the law, acting under police rules or without them, takes from his prisoner personal property, either for its safe-keeping or to remove from his control that which he might use in effecting escape, a sound public policy, we think, requires that, for the time, it should be safe from seizure by civil process. We speak now of such property as is in no respect connected with the criminal charge. It would be a dangerous temptation to eager, and sometimes unscrupulous, creditors, to resort to the machinery of the criminal courts against their reluctant debtors, if it were once understood that whatever of value was taken from the person of the party arrested by the officer having him in charge could be at once impounded by the levy of an execution or attachment. Such a practice, we are sure, would likely be productive of results oppressive to the individual and shocking to the moral sense of the community."

And, although the arrest in this instance was on civil process, the opinion in *Dahms v. Sears* (1885) 13 Or. 47, 11 Pac. 891, holding that money taken from the prisoner was not, while in the hands of the sheriff, subject to attachment, apparently proceeds upon grounds applicable also to arrest on criminal process. The court said that the security of the public might justify the searching of a prisoner confined in prison upon criminal or even civil process, and the taking from him of any property in his possession that would aid him to make an escape; that it would probably be regarded under such circumstances as a reasonable search and seizure; but that to allow private parties to take advantage of the circumstances, in order that they might secure a personal benefit, would be a violation of that faith which the commonwealth owes to persons held

in custody under its authority and laws, and would lead to oppression and abuse; that the object and purposes of an arrest under civil and criminal process would be perverted, and schemes and devices be resorted to by importunate creditors to enforce a payment of their demands that would outrage justice and the right to personal security.

The interruptions in the enforcement of the law, from permitting police officers to be thus brought into court, and considerations of public policy and convenience, have also weighed in favor of the doctrine that property in their hands, taken from a prisoner, should not be subject to levy. See *Connolly v. Thurber-Whyland Co.* (1893) 92 Ga. 651, 18 S. E. 1004, set out *infra*, "Question of good faith and lawful seizure."

And in *Davies v. Gallagher* (1883) 17 Phila. (Pa.) 229, where the warden of a penitentiary who, by order of court, had received money taken on arrest from one who was subsequently sentenced to the penitentiary, it was held that the money in the possession of the warden was not subject to attachment execution. The court, after reciting the duties of the warden, stated that it would clearly be against public policy, and contrary to law, that such a public officer should be harassed with attachments against his prisoners, in which he was made garnishee; that considerations of public policy and convenience required that money in the hands of such officers should not be stopped while in *custodia legis*.

But see in this connection the reported case (*FITZGERALD v. NICKERSON*, ante, 373).

In *Pomroy v. Parmlee* (1859) 9 Iowa, 140, 74 Am. Dec. 328, it was held that an attachment should be discharged where there had been a levy of property taken from one arrested on a criminal charge. But the ground of the decision does not appear distinctive to the class of cases under consideration, as in this case the plaintiff had sued out a warrant upon a criminal charge against the defendant, and at about the same time had

caused a writ of attachment to issue against his property. The sheriff found the defendant in another county, and there arrested him, and wrongfully caused property in his possession to be returned, with him, to the county from which the attachment had issued, under a pretense that he had a writ of attachment for the property. After the property was brought back to the proper county, a formal levy was made upon it. The discharge of the attachment was because of the unlawful means used in bringing the property within the jurisdiction of the court.

From *Patterson v. Pratt* (1865) 19 Iowa, 359, it appears that by statute in Iowa, money in possession of a sheriff or constable is subject to garnishment; and that the statute also provides the method by which an attachment may be levied upon a fund in court. In this case money was taken from the defendant under a search warrant issued at the instance of one who claimed to have lost a certain sum of money and alleged the belief that it was in the defendant's possession. The sum taken from the defendant exceeded that claimed to have been lost, and it was held that this surplus, which was in the hands of the justice of the peace who had issued the search warrant, was a fund in court, and subject to garnishment at the instance of a judgment creditor of the defendant.

See other Iowa cases *infra*, "Relation of the property taken to the crime charged."

In *Holker v. Hennessey* (1897) 141 Mo. 527, 39 L.R.A. 165, 64 Am. St. Rep. 524, 42 S. W. 1090, where the one arrested had forfeited his bail and was a fugitive from justice, it was held that, as there had never been a conviction, the lien given by statute in favor of the party injured on the estate of the criminal, subject to a lien provided by another statute in favor of the state for costs, was not enforceable by garnishment of the property in the hands of the sheriff; the court saying that the statute showed clearly that the lien could only be enforced after final conviction, as

it was given on the estate of a criminal, and no one was properly called a criminal until convicted of crime.

Under the Missouri statute giving to the state a lien on the defendant's property for costs, fines, etc., from time of the arrest, it was held in *McKnight v. Spain* (1850) 13 Mo. 536, that property taken from one arrested on a criminal charge, and retained by the officers of the criminal court until after the prisoner was indicted and convicted and adjudged to pay the costs of the prosecution, was subject to levy and sale on execution in favor of the state for costs, and that this lien was not subject to be devested by any assignment made by the prisoner after his arrest, even though the assignment was to an attorney for the purpose of procuring counsel to defend the proceedings.

Where jewelry taken from persons arrested on a criminal charge was impounded by an order of the police court "for the purposes of prosecution of this complaint, until further order of the said court," it was held that the same could not be reached by trustee process in another court before the impounding order had been brought to an end. *Wallace v. Coyne* (1918) 230 Mass. 475, 120 N. E. 73. The court said that the obstacle was that, until the impounding order had been brought to an end, the jewelry was in the possession and control of the police court, and so was not subject to be taken on a writ issuing out of another court. And it was held, also, that this conclusion was not affected by the fact that the principal defendants had been convicted and sentenced, and that the prosecuting attorney, before service of the trustee writ, had stated to one of the trustees that he saw no reason why the jewelry should not be turned over to the principal defendant; since that did not remove the obstacle, but, at most, only showed a willingness on the part of the district attorney that it should be removed.

Although not strictly in point in the annotation, as the property was not, in this instance, taken from the per-

son arrested, attention is called to *National Bank v. Winston* (1875) 5 Baxt. (Tenn.) 685, holding that where one convicted and sentenced to the penitentiary in Tennessee had pawned a watch and other personal property in Kentucky, in which state he was arrested, the prisoner's interest in the property was subject to attachment in the possession of one who had redeemed it from the pledgee and brought it into Tennessee.

The doctrine that property taken from a person arrested on a criminal charge is not subject to attachment or levy under execution is supported by an obiter statement in *Pioneer Min. Co. v. Tiberg* (1913) 4 Alaska, 670, which quotes with approval from the opinion in *Dahms v. Sears* (1885) 13 Or. 47, 11 Pac. 895, *supra*. In the *Tiberg* Case, where the defendant was arrested for the theft of gold dust while employed as foreman in the plaintiff's mine, the suit was to impress a trust upon the proceeds of property alleged to have been stolen, such proceeds being taken from the defendant when he was arrested for the theft. It was held that a demurrer to the bill should be sustained.

Question of good faith and lawful seizure; presumption.

The question whether money and other personal property taken from one arrested on a criminal charge is subject to attachment in the possession of the officer was held in *Closson v. Morrison* (1867) 47 N. H. 482, 93 Am. Dec. 459, to depend on whether the property was lawfully and in good faith taken by a police officer from the prisoner, which was a question of fact for the jury, with the presumption in favor of the bona fides of the officer in case there was no evidence, or the jury was unable, from the evidence presented, to arrive at a conclusion. The court said: "We think the officer arresting a man for crime not only may, but frequently should, make such searches and seizures; that in many cases they might be reasonable and proper, and courts would hold him harmless for so doing, when he acts in good faith, and from a regard to

his own or the public safety, or the security of his prisoner. It must, we think, in a case like this, be a question of fact for the jury, whether the taking of the property from the prisoner were bona fide, for any purpose indicated above as reasonable and proper, and, of course, justifiable, or whether it were mala fide, unreasonable, and for an improper and unjustifiable purpose. . . . If the jury shall find, or if it be conceded, that the defendant was justified, in the first instance, in taking this property from the prisoner under his warrant to arrest, then the subsequent attachment of the goods on the writs was well enough, and will be valid. But if it be found or conceded that the officer took this property from the prisoner, for the purpose of converting it to his own use, or merely for the purpose of getting it into his possession so that he might be able to attach it on writs of other parties, which he then held, or was expecting to receive afterwards, then his possession would be fraudulent and unlawful, and the attachment he might subsequently make in pursuance of such purpose would, we think, be void."

And on the question of presumption, the court in *Closson v. Morrison* (N. H.) *supra*, said that the facts should all be submitted to the jury, and they should find, upon a preponderance of all the testimony, whether the seizure was made bona fide or mala fide; that if there was no evidence in the case from which that question could be settled, or, if after hearing all the evidence that might be introduced, the jury should find the scales to hang in even balance, the presumption was that the seizure was made bona fide, and the jury should be instructed accordingly.

But, as already indicated, the courts have not in all instances regarded the question as depending on whether the property was lawfully and justifiably taken from the prisoner. If the money or other property was taken and held lawfully and justifiably, then, in the absence of special statute on the subject, the property has been held not to be subject to attachment or

garnishment, because it is in custodia legis; and if it was taken and held illegally and unjustifiably, it has been held not subject to process, because the officer was a trespasser and the prisoner was entitled to its return. And the chief reason assigned in many of the cases which hold that the property is not subject to attachment or garnishment is that to hold otherwise, would open the door to possibilities of abuses, by subjecting persons to arrest for the purpose of obtaining money or other personal property to subject to a levy.

It was held in *Connolly v. Thurber-Whyland Co.* (1893) 92 Ga. 651, 18 S. E. 1004, that money and other personal property taken by a police officer from one arrested on a criminal charge could not, while in the possession of such officer, or his superior, to whom it was afterwards delivered, be subjected to garnishment at the instance of creditors of the one arrested; and that this rule applied whether the property was taken from the debtor lawfully or unlawfully. The court said the property was in custodia legis; and that it was contrary to public policy that an officer of the court or of a municipal corporation should be subjected to the process of garnishment under such circumstances; that the reason for the rule was that public corporations are created for the public benefit, and the public policy demands that such bodies and their officers should not be subjected to such interruptions, inconvenience, and delay as would prevent that prompt and efficient discharge of official duties so necessary to the public welfare; that, in this instance, if the chief of police were to attend to the various lawsuits pending against him, it would require a very large portion of his time and attention which should be devoted to the public service.

In *Connolly v. Thurber-Whyland Co.* (Ga.) supra, the court expressly stated that it did not pass upon the question as to whether a police officer would be liable to garnishment where the prisoner voluntarily deposited with him money or other valuables for safe-keeping.

And it was held in *Holker v. Hennessey* (1897) 141 Mo. 527, 39 L.R.A. 165, 64 Am. St. Rep. 524, 42 S. W. 1090, that money and property lawfully taken from a prisoner under arrest is not subject to garnishment in the hands of the sheriff; since it is in custody of law. And the court held, also, that if the money or property was unlawfully taken from the prisoner under arrest, it was not subject to garnishment, because a wrongful use of criminal process had been made in obtaining possession of it.

Where money was taken by the jailer from one arrested for a misdemeanor, it was held in *Hubbard v. Garner* (1897) 115 Mich. 406, 69 Am. St. Rep. 580, 73 N. W. 390, that the money was not subject to garnishment while in the jailer's possession, even though there was no bad faith on the part of the jailer or the plaintiff, who sought to subject it to the garnishment process. The court took the view that the officer had no authority to take and retain possession of the money, as it did not constitute any evidence which could be used in the criminal proceeding. The court cited *Bailey v. Wright* (1878) 39 Mich. 96, where an attachment was held illegal because a trespass had been committed in levying it; and stated that under the authority of that case it was clear the money could not, after the unauthorized seizure, have been attached, and on principle it should be held also exempt from garnishee process; that to sustain such proceedings would open the door to invasion of the personal security of the individual, which could not receive the sanction of the court; and that while there was no collusion shown in this case, yet in all cases it might be difficult to show actual collusion, and the safe rule was that which excluded the possibility thereof.

The view was taken in *Wooding v. Puget Sound Nat. Bank* (1895) 11 Wash. 527, 40 Pac. 223, that if a police officer, in arresting one for a crime, takes money from his possession wrongfully and without his consent, it is not subject to garnishment while in the hands of the officer or

these to whom he delivers it; since garnishment only reaches debts or credits owing to or held for the defendant in the principal action by the garnishee, or property of the defendant held by the garnishee as the property of another, and a trespasser in possession of another's goods cannot be charged as garnishee of the owner.

Relation of the property taken to the crime charged.

That the money or other property taken from the prisoner is or is not connected with the crime charged may affect the question whether it is subject to attachment or garnishment. If it is held by the police officer as evidence, if desired, on the trial, the theory that it is in the custody of the law may prevent its subjection to garnishment or attachment. But see the reported case (*FITZGERALD v. NICKERSON*, ante, 373). If it is not so held, the same conclusion may be reached on the ground that the prisoner is entitled to its return. But if the property is the same that has been stolen, and the arrest is for the theft, a distinction has been made in Iowa with respect to the right of the owner to attach or garnish it and the ordinary case of an attaching creditor.

Where, without the prisoner's consent, money and other personal property was taken from his possession, and there was no contention that it was in any way connected with the crime charged, it was held in *Commercial Exch. Bank v. McLeod* (1885) 65 Iowa, 665, 54 Am. Rep. 36, 19 N. W. 329, 22 N. W. 919, that the property was not subject to attachment, as the possession of the officer was the possession of the prisoner, even though the search was justifiable and the officer lawfully took possession of the property temporarily. The court said: "We think the sheriff was justified in making the search, and in taking from the person all money or property which was in any way connected with the crime charged, or which might serve to identify the prisoner. If, however, the sheriff knew that the watches and money

were in no manner connected with the crime, and that they could not be used in any way as evidence in the prosecution, we think it was his duty to return them to the defendant. If a constable or other officer takes possession of property found on a prisoner, the court will order the same to be restored, if not required as a means of proof at the trial, or which does not finally appear to be the fruits of the crime with which he stands charged.

. . . When it was ascertained that the money and property were in no way connected with the offense charged, and were not held as evidence of the crime charged, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if they were in the prisoner's pockets. To hold otherwise would lead to unlawful and forcible searches of the person under cover of criminal process, as an aid to civil actions for the collection of debts. It does not appear that such was the purpose of the prosecution in this case; but the court was justified in finding that the money and property were taken from the defendant by force and without his consent; and, as it is not claimed that the money or property was in any way connected with the crime charged, no advantage should be taken of the defendant, because the same was taken from his person by force and against his will. . . . The search was justifiable, and possibly the officer, in his discretion, could retain, for a time at least, the property, if thereby the defendant might be aided in effecting his escape, or if it would tend to connect him with the commission of a crime. But the possession of the officer was the possession of the defendant."

But where the money taken from the prisoner was connected with the crime, it was held in *Reifsnyder v. Lee* (1876) 44 Iowa, 101, 24 Am. Rep. 733, that it was subject to garnishment in the possession of a police officer. In this case the prisoner had stolen cattle and sold them to the plaintiff for a certain sum of money.

Money and a watch were taken by the officer from the prisoner on his arrest on a charge of larceny. The plaintiff sued the prisoner for money obtained by the sale of the cattle, and garnished the officer. The court, in holding that the property was subject to garnishment, stated that there was ample ground to hold that the money taken from the prisoner was the money which he had procured from the plaintiff for the stolen cattle. Although the decision is not expressly placed on this ground, this circumstance must be considered the distinguishing feature of it, in view of the later decision in *Commercial Exch. Bank v. McLeod* (Iowa) *supra*, where the two cases are distinguished.

See *Patterson v. Pratt* (1865) 19 Iowa, 359, *supra*, as to Iowa statute providing for attachment or garnishment of money held by a sheriff or constable.

Illegal arrest.

Where the arrest was illegal, being made without a warrant under circumstances not justifying such a course, it was held that money or other property taken by a police officer who made the arrest, from the one arrested, was not subject to garnishment. *Cunningham v. Baker* (1893)

104 Ala. 160, 53 Am. St. Rep. 27, 16 So. 68. The court said: "A search of the person arrested is justifiable only as an incident to a lawful arrest; if the arrest be unlawful, the search is unlawful, and is aggravated by the illegality of the arrest. . . . The moneys and effects in the possession of the garnishee having been obtained by him illegally, tortiously, the relation of debtor and creditor did not exist between him and the defendants in attachment; the only relation he bore to them was that of a tort-feasor, and from that relation no debt, no demand, having in it the element of contract and the subject of garnishment, could arise. But it is contended that, while this may be true, the garnishee may be charged because he had in his possession and under his control, moneys and effects of the defendants in attachment. The contention cannot be supported. A garnishment, whether it is employed to reach and subject debts or demands due and owing by the garnishee to the attachment or judgment debtor, or moneys or effects of the debtor in the possession of the garnishee, presupposes a contractual relation existing between the debtor and the garnishee."

R. E. H.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Appt., v.

GEORGE A. CALLICOTTE.

United States Circuit Court of Appeals, Eighth Circuit — June 1, 1920.

(267 Fed. 799.)

Judgment — injunction against enforcement — extrinsic fraud.

1. Feigning paralysis by one alleging injury by negligence, and, by means of a conspiracy between himself, his physician, and members of his family, deceiving the experts who examine him, so that they testify at the trial that he is paralyzed, and also deceiving the court and jury, and receiving an award of damages on the theory that he is paralyzed, is an extrinsic and collateral fraud within the rule that such fraud will warrant an injunction against the enforcement of the judgment.

[See note on this question beginning on page 397.]

(867 Fed. 799.)

Courts — Federal — enjoining enforcement of state's judgment.

2. The Federal courts may enjoin the enforcement of a judgment recov-

ered in a state court, since the decree acts on the party, not on the court which rendered the judgment.

[See 15 R. C. L. 728.]

APPEAL by complainant from a decree of the District Court of the United States for the Western District of Missouri (Van Valkenburgh, J.) in favor of defendant in a suit to enjoin the enforcement of a judgment at law and to set aside the judgment alleged to have been fraudulently obtained by defendant in a state court for personal injuries received by him while in the employ of complainant. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Hook, Circuit Judge, and Amidon and Booth, District judges.

Messrs. Luther Burns and John E. Dolman, for appellant:

The evidence presented by complainant upon the trial is sufficient to authorize the court to set aside the judgment of the state court for fraud exercised in the procurement of said judgment.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Graver v. Faurot, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 257; Graves v. Graves, 132 Iowa, 199, 10 L.R.A. (N.S.) 216, 109 N. W. 707, 10 Ann. Cas. 1104; Electric Plaster Co. v. Blue Rapids City Twp. 81 Kan. 730, 25 L.R.A. (N.S.) 1237, 106 Pac. 1079; Garrett Biblical Inst. v. Minard, 82 Kan. 338, 108 Pac. 80; Miller v. Miller, 89 Kan. 151, 130 Pac. 681; Cheever v. Kelly, 96 Kan. 269, 150 Pac. 529; Wonderly v. Lafayette County, 150 Mo. 635, 45 L.R.A. 386, 73 Am. St. Rep. 474, 51 S. W. 745; Lieber v. Lieber, 239 Mo. 1, 143 S. W. 458; Howard v. Scott, 225 Mo. 685, 125 S. W. 1158; Breanehan v. Price, 57 Mo. 422; Lee v. Harmon, 84 Mo. App. 157; Fitzpatrick v. Stevens, 114 Mo. App. 497, 89 S. W. 897; Springfield Traction Co. v. Dent, 159 Mo. App. 220, 140 S. W. 606; McDonald v. McDaniel, 242 Mo. 172, 145 S. W. 452; Mangold v. Bacon, 237 Mo. 496, 141 S. W. 650; Cantwell v. Johnson, 236 Mo. 575, 139 S. W. 365; Wabash R. Co. v. Mirrieles, 182 Mo. 126, 81 S. W. 437; Nelson v. Meehan, 12 L.R.A. (N.S.) 374, 83 C. C. A. 597, 155 Fed. 1; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 781; Stead v. Curtis, 112 C. C. A. 463, 191 Fed. 529; Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L.

ed. 362; Pickford v. Talbott, 225 U. S. 651, 56 L. ed. 1240, 32 Sup. Ct. Rep. 687; McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369; Simon v. Southern R. Co. 236 U. S. 115, 59 L. ed. 492, 35 Sup. Ct. Rep. 255; Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; Union R. Co. v. Illinois C. R. Co. 125 C. C. A. 283, 207 Fed. 745.

Messrs. K. B. Randolph, Charles F. Strop, and Charles H. Mayer, for appellee:

A court of equity will not set aside, on the ground of fraud, a final judgment, because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. Before equity will give relief, there must be fraud extrinsic to the matter tried in the cause, and not merely perjured testimony.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; United States v. Beebe, 180 U. S. 343, 45 L. ed. 563, 21 Sup. Ct. Rep. 371; Greenameyer v. Coate, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345; United States v. Gleason, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778; Nelson v. Meehan, 12 L.R.A. (N.S.) 374, 83 C. C. A. 597, 155 Fed. 1; Hudgens v. Baugh, 225 Fed. 899; Pico v. Cohn, 91 Cal. 129, 13 A.L.R. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Ross v. New York, 70 N. Y. 8; New York v. Brady, 115 N. Y. 599, 22 N. E. 237; Toledo, W. & W. R. Co. v. Ingram, 85 Ill. 172; Wabash R. Co. v. Mirrieles, 182 Mo. 126, 81 S. W. 437; Hamilton v. McLean, 139 Mo. 678, 41 S. W. 224, s. c. 169 Mo. 51, 68 S. W. 930; 23 Cyc. 1028.

Booth, District Judge, delivered the opinion of the court:

This is a suit in equity seeking to enjoin the enforcement of a judgment at law and to set aside the judgment. The judgment was obtained by Callicotte against the railway company in the state circuit court of Buchanan county, Missouri, for personal injuries received by him December 28, 1914, while an employee of the railway company. The salient points in the history of the litigation are as follows:

Action was commenced by Callicotte in the state court April 5, 1915. Verdict was rendered and judgment entered in his favor June 23, 1915. On August 7, 1915, a motion for a new trial and a motion in arrest of judgment were made and overruled, and on the same day an appeal was allowed to the state supreme court. On December 6, 1916, the bill of complaint in the present case was filed in the district court for the western district of Missouri. On July 19, 1917, in the state court in which the personal injury case had been tried, a "motion for an order in the nature of an application for an order for a writ of error coram nobis" was made, by which it was sought to vacate and set aside the judgment of June 23, 1915, on the ground that the judgment had been procured either through fraud or palpable mistake, or upon conjecture. On the same day this motion was overruled, and an appeal taken to the supreme court of Missouri from the order overruling the motion. September 25, 1917, upon the trial of the present suit in the United States district court a decree was entered sustaining a demurrer by the defendant to the plaintiff's evidence, and dismissing the bill. In May, 1918, decisions were rendered in the supreme court of the state of Missouri (— Mo. —, 204 S. W. 528; Id. 274 Mo. 689, 204 S. W. 529), affirming the judgment entered June 23, 1915, in the state circuit court of Buchanan county, and also affirming the order of said circuit court in overruling the motion of

the railway company for a writ of error coram nobis.

In the complaint in the case at bar plaintiff railway company alleges that Callicotte fraudulently and falsely pretended to receive injuries at the time of the accident which resulted in permanent paralysis of his lower limbs; that at the time of the trial of the personal injury case in the state court, and prior thereto, Callicotte, being aided by co-conspirators, feigned paralysis of his lower limbs, and produced, or caused to be produced, an apparent paralysis of his lower limbs; that said feigned paralysis could not be detected by the usual and ordinary medical tests used for that purpose, although such tests were in fact made by the railway company; that Callicotte testified falsely at the trial that said paralysis was genuine and the result of personal injuries; that Callicotte after the accident, both before and for some time after the trial, kept himself secreted in his house, so that his true condition should not be ascertained; that during said period he had perfect use of his lower limbs, and made use of them at will; that Callicotte and his co-conspirators, by said fraudulent, deceitful, and feigned conduct, caused witnesses to falsely testify at the trial that his lower limbs were paralyzed; that Callicotte and his co-conspirators caused him to be fraudulently exhibited to the jury at the trial as a hopeless paralytic; that the court and jury were fraudulently deceived and misled by these fraudulent acts of Callicotte, and by the false testimony of himself and others, who were induced to testify by the false and fraudulent acts of Callicotte; that by reason of the close and watchful care of Callicotte and his co-conspirators the railway company was prevented from discovering his real condition, and did not discover it until about January 8, 1916.

The defendant, Callicotte, in his answer in the present suit denied that he had ever feigned paralysis or produced the same; denied that he had conspired to deceive the

court, jury, or defendant railway, and denied that he had caused witnesses to testify falsely; denied that there was any false testimony on the trial on the part of himself or his own witnesses; alleged that the question of false testimony and the question of feigned paralysis were issues in the personal injury case tried. He also set up as defense, by way of adjudication, the proceedings by the railway company to obtain a writ of error coram nobis.

At the trial of the present suit in the lower court the plaintiff railway company introduced: (1) A complete abstract of record in the personal injury case; (2) a transcript of the evidence given by Callicotte in a case entitled "State of Missouri vs. Callicotte," tried in April, 1916; (3) oral testimony of numerous witnesses. At the close of the plaintiff's case the defendant demurred to the evidence on the ground that the same failed to prove facts sufficient to constitute a cause of action, and, as has already been stated, the demurrer was sustained, and a decree entered dismissing the bill.

It becomes necessary, therefore, to determine: (1) What facts were disclosed by the evidence; (2) whether those facts make a case for the equitable relief demanded; (3) whether such relief can be afforded in the Federal court.

1. Among the important facts which are established by the evidence are the following: That on the trial of the personal injury case testimony of plaintiff as to the history of his case was "that since a day or two after the accident, a period of more than six months, he had been completely paralyzed in his lower limbs; that he had no control over them, or sensation in them;" that before the trial Callicotte had been examined on behalf of the railway company, and also on his own behalf, by several skilled medical men, who made the usual tests to ascertain whether paralysis existed as claimed by Callicotte, and the tests indicated that he had no control over his legs and no sensation

in them; that at the time of these several examinations the history of the case up to that time was given to these doctors either by Callicotte or by his regular attending doctor; that this history of the case was a material factor in the conclusions drawn by the expert medical witnesses for Callicotte to the effect that this paralysis would be permanent; that one of Callicotte's own medical witnesses who had testified for him on the trial of the personal injury case testified on the trial of the case at bar on behalf of the railway company to the effect "that if in fact Callicotte walked and otherwise used his legs between the time of the accident and February, 1915, the time when he examined him, it would be his opinion that the paralysis which he found in February, 1915, had been produced by artificial means;" that Callicotte was not paralyzed, as testified by himself, but in fact had the use of his legs, and had actually used them in walking about the house and otherwise, during the whole period from the time of the accident to the time of the trial and thereafter; that it was admitted that Callicotte had had the use of his legs since August 19, 1915, but it was claimed that the paralysis disappeared on that date; that Callicotte, with the aid and understanding of members of his family and his wife's family, kept his true condition concealed from the general public both during the period between the accident and the trial of the personal injury case and thereafter; that he made use of such methods as keeping the blinds of his house drawn and the doors locked when he was up and about, or by making use of a wheel chair; that as late as January, 1916, he was discovered one afternoon disguised in women's clothes, going to a coal shed in his back yard; that he remarked at that time, upon being discovered, that "the jig was up;" that Callicotte threatened to kill one of the members of his wife's family if she ever gave him away; that the discovery of the fraud was not made

until long after appeal had been taken from the trial court to the supreme court and that discovery was made possible through a falling out among the conspirators. The evidence further established that it is possible by the injection of certain drugs to produce and reproduce local temporary paralysis, and that paralysis so produced cannot be distinguished from genuine paralysis, except by observation over an extended period.

We have here, therefore, a conspiracy by Callicotte and others (1) to prevent his true condition and the history of his case being known; (2) to swear falsely as to his condition and the history of his case; (3) to produce a false condition and fabricate a false history of the case as a basis for testimony by witnesses other than himself. This conspiracy was directed against the defendant, the defendant's witnesses, and certain of the plaintiff's own witnesses, and against the court and jury. Its purpose was not merely to present a false case for plaintiff, but also to prevent the defendant company from putting in its own case in defense.

2. Do the facts warrant the relief demanded? The circumstances under which a court of equity will restrain the enforcement of a judgment on the ground of fraud have been the source of much litigation both in the Federal and state courts. The leading case is *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, where it was sought to set aside a patent alleged to have been procured by false testimony and a forged instrument of title. The title had been passed upon by a duly constituted board of commissioners in 1853. The decree of that board had been affirmed by the United States district court, 1856. The bill attacking the title was filed in 1876. Richardson, the original claimant, was dead. His heirs were not made parties to the suit. In that case the court laid down the following rules: "Where, by reason of something done by the successful party to a suit, there was in fact no adversary

trial or decision of the issue in the case; where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

But the court said further: "The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

In applying these rules to the case under consideration the court said: "The genuineness and validity of the concession . . . produced by complainant was the single question pending before the board of commissioners and the district court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made."

The decree of the lower court sustaining a demurrer to the bill and dismissing it on the merits was affirmed.

Vance v. Burbank, 101 U. S. 514,

25 L. ed. 929, was a suit to set aside a patent and a town-site entry for fraud, consisting of false testimony. A demurrer was sustained to the bill and an appeal taken. In the course of its opinion the court said: "The operative allegation in this bill is of false testimony only. That testimony Scott had full opportunity of meeting. Rehearings were granted him when the case seemed to require it, and he took all the appeals the law gave. . . . As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if it in fact existed, was discovered long before the contest in the Land Department, and if it had any importance in the case the amplest opportunity was given to show the error and get relief against the agreement."

The Throckmorton Case was cited and followed.

Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583, was a suit to set aside a decree of foreclosure against the plaintiff railroad, on the ground that no real defense has been made in the foreclosure suit on account of the unfaithful conduct of the solicitor and directors of the plaintiff in carrying out an alleged fraudulent scheme. The lower court had sustained a demurrer to the bill. This was reversed, with directions to overrule the demurrer. The Throckmorton Case was cited with approval.

The case of *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10, was a suit by the United States to cancel two patents for land, on the ground of fraud, the fraud being that the patentees were fictitious persons, and the documents had been fabricated by the register and receiver of the Land Office. In affirming a decree for the government the court in its opinion said: "A strenuous effort is made by counsel to bring these cases within the doctrine declared in *United States v. Throckmorton*, and *Vance v. Burbank*, *supra*, but without success. . . . Here officers, consti-

tuting a special tribunal, entered into a conspiracy; and the frauds consist of documents which they had fabricated, and presented with their judgment to those having appellate and supervisory authority in such matters; and thus a fictitious proceeding was imposed upon the latter as one which had actually taken place. It was a fraud upon the jurisdiction of the officers of the Land Department at Washington, and not the mere presentation to them of doubtful and disputed testimony."

Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237, was a suit attacking an order of sale made by a probate court in the state of Ohio. The sale was alleged to have been fraudulently made by the guardian of an infant. The court below sustained a demurrer to the bill. Counsel for appellees, in their brief, cited the Throckmorton Case, but the court, in its opinion, made no mention of it. In its opinion the court said: "While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper circuit court of the United States may, without controlling, supervising, or annulling the proceedings of state courts, give such relief, in a case like the one before us, as is consistent with the principles of equity—" citing *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407.

Continuing, the court quoted with approval from *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. ed. 547, 556, 4 Sup. Ct. Rep. 634: "In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

The decree of the court was reversed, with directions to overrule the demurrer.

Marshall v. Holmes, 141 U. S. 589,

35 L. ed. 870, 12 Sup. Ct. Rep: 62, was a suit brought to enjoin the enforcement of certain judgments, on the ground that they had been obtained by false testimony, and by testimony as to the contents of a letter which plaintiff claimed either never existed or was a forgery. Judgments had been obtained in the state court of Louisiana, and the bill to obtain relief from the judgments was also brought originally in the state court, and a preliminary injunction obtained. Thereafter plaintiff in the suit filed a petition and bond for removal to the Federal court. The state court denied the removal, and proceeded to try the case, denying relief to the plaintiff, dissolving the preliminary injunction, and ordering judgment on the bond in favor of the defendant. The plaintiff appealed to the supreme court of Louisiana, where the appeal was dismissed for want of jurisdiction. The plaintiff then appealed to the state court of appeals of Louisiana, which affirmed, with certain modification, the judgment of the state district court. The plaintiff then prosecuted a writ of error to the Supreme Court of the United States. The court, in its opinion, said: "After the filing of the petition for removal, accompanied by a sufficient bond, and alleging that the controversy was wholly between citizens of different states, the state court was without authority to proceed further if the suit, in its nature, is one of which the circuit court of the United States could rightfully take jurisdiction."

The court next held that a circuit court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive the party of the benefit of a judgment fraudulently obtained by him in the state court if the circumstances are such as would authorize relief by a Federal court, if the judgment had been rendered by it, and not by a state court, as a decree to that effect does not operate upon the state court, but upon the party.

In the course of its opinion the court used the following language (141 U. S. 596): "It is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery'"—citing numerous cases, and among them the Throckmorton Case.

The court further said: "While the court, upon final hearing, would not permit Mrs. Marshall, being a party to the actions at law, to plead ignorance of the evidence introduced at the trial, it might be that relief could be granted by reason of the fact, distinctly alleged, that some of the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner. It was not, however, for the state court to disregard the right of removal upon the ground simply that the averments of the petition were insufficient or too vague to justify a court of equity in granting the relief asked. The suit being, in its general nature, one of which the circuit court of the United States could rightfully take cognizance, it was for that court, after the cause was docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case was made which, according to the established principles of equity, entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained."

The judgment of the state court was accordingly reversed, and the cause remanded, with directions that the state district court set aside all orders made after filing the petition and bond for removal.

There was at one time a question

(867 Fed. 799.)

in the lower courts whether *Marshall v. Holmes* did not overrule or modify the *Throckmorton Case*, and the circuit court of appeals of the seventh circuit attempted to certify a question, in the case of *Graver v. Faurot*, to the Supreme Court, for the purpose of having the apparent conflict determined. The Supreme Court, however, dismissed the certificate, on the ground that to answer the question was practically to pass upon the whole case. See *Graver v. Faurot* (C. C.) 64 Fed. 241; *Id.*, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 257; *Id.*, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799. As to the views of the circuit court of appeals of the second circuit, see *United States v. Gleeson*, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778.

That the Supreme Court of the United States does not regard the *Marshall Case* and the *Throckmorton Case* as being in conflict is shown by the fact that each of the cases has been followed with approval by that court in its subsequent decisions. As illustrations, see *United States v. Beebe*, 180 U. S. 343, 349, 45 L. ed. 563, 568, 21 Sup. Ct. Rep. 371; *Greenameyer v. Coate*, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345; *Simon v. Southern R. Co.* 236 U. S. 115, 59 L. ed. 492, 35 Sup. Ct. Rep. 255. And that the rules laid down in the *Throckmorton Case* have been followed by both Federal and state courts repeatedly, see *Nelson v. Meehan*, 12 L.R.A. (N.S.) 374, 83 C. C. A. 597, 155 Fed. 1, where the circuit court of appeals of the ninth circuit collects and reviews a large number of the cases, both state and Federal.

The inquiry, therefore, remains, in the case at bar, whether the facts take it out of the rule announced in the *Throckmorton Case*.

In *Hilton v. Guyot*, 159 U. S. 113, 207, 40 L. ed. 95, 123, 16 Sup. Ct. Rep. 160, a case involving primarily the question of the impeachment of a foreign judgment, the court, in its opinion, again announced the rule in the *Throckmorton Case*, but in

slightly different language, as follows: "It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it."

From the multitude of cases in which relief has been granted in equity against judgments at law on account of fraud, we cite a few as illustrative:

In the case of *Graver v. Faurot*, *supra*, the fraud which was attacked, and which was held sufficient to justify relief in equity, was the interposition of a false answer, under oath, in a suit in equity, which had caused the plaintiff to go no further with the suit, which had been dismissed at the instance of the defendant upon introducing the sworn answer in evidence.

In *Lehman v. Graham*, 67 C. C. A. 513, 135 Fed. 39, the fraud consisted in a conspiracy by which judgment had been taken against *Graham* on a note given by him as collateral, though he had theretofore paid the original debt in full.

In *Pickens v. Merriam*, 155 C. C. A. 139, 242 Fed. 363, the fraud consisted in deliberate omissions of assets from the inventory and accounts on the part of an administrator in a probate proceeding which had gone to final decree. The court in its opinion, after citing the *Throckmorton Case*, said: "Because of the conduct of the defendants in concealing the facts concerning the estate, it appears that there has been no adversary trial or decision upon these issues; and we find nothing in the proceedings or decree of the superior court of Los Angeles county, as set up in the bill of complaint, to estop the complainants from having these matters inquired into and the question of the alleged fraud determined by the court."

An interesting early case is that of *Ocean Ins. Co. v. Fields*, 2 Story, 59, Fed. Cas. No. 10,406. That was a case where suit was brought to set aside a judgment obtained upon a policy of insurance on a ship, it being claimed that the judgment had been obtained by fraud. It appeared from the bill that the defense of fraud had been set up in the action at law, but it also appeared that the fraud set up and tried was fraud in "casting away the ship," whereas the new fraud alleged in the bill was in "boring holes in her bottom," and it was alleged that the latter fraud was not known until after the judgment. Demurrer to the bill was overruled by Justice Story.

In *Young v. Sigler* (C. C.) 48 Fed. 182, the fraud consisted of a conspiracy by plaintiff and one of two joint trespassers against him, by which a judgment should be obtained for the benefit of both conspirators against the remaining joint trespasser. A settlement had been made by the plaintiff with one of the joint trespassers, and this had been concealed until after judgment had been obtained against the other.

In *Daniels v. Benedict* (C. C.) 50 Fed. 347, the fraud consisted in a conspiracy on the part of certain agents of the husband, Daniels, by which his wife was induced to agree to the entry of a decree of divorce on the ground of desertion; but the decree, in fact, was obtained on the ground of adultery, testimony being introduced in the absence of the wife.

In *Graves v. Graves*, 132 Iowa, 199, 10 L.R.A. (N.S.) 216, 109 N. W. 707, 10 Ann. Cas. 1104, the fraud consisted in concealment of assets and false swearing in relation to property owned by the husband, in the trial of a divorce case.

In *Nugent v. Metropolitan Street R. Co.* 46 App. Div. 105, 61 N. Y. Supp. 476, the fraud consisted in a conspiracy between plaintiff's attorney and certain witnesses, by which they were induced to commit perjury, in testifying that they were

eyewitnesses to a certain accident resulting in a personal injury suit.

In *Taylor v. Nashville & C. R. Co.* 86 Tenn. 228, 6 S. W. 393, the fraud consisted in suing and taking judgment a second time upon certain bonds which had already been put in judgment, but which had been thereafter stolen.

In *Wonderly v. Lafayette County*, 150 Mo. 635, 45 L.R.A. 386, 73 Am. St. Rep. 474, 51 S. W. 745, the fraud consisted in concealment of the real ownership of certain bonds, so that suit might be brought on them in a Federal court on the ground of diverse citizenship. The court, in its opinion, said: "The scheme was a fraud on the court, whose jurisdiction was betrayed, and a fraud on the defendant, who was tricked out of its defense. True, the statement in the petition in that suit that Owings, a citizen of Illinois, was the owner of the bonds, is a statement which, under fair conditions, might have been traversed, and the plaintiff put to his proof. But there were no such fair conditions there. The fact that that statement was false was known only to the plaintiff and Owings, and they concealed it for the purpose of preventing defendant from making that defense. Not only was the true ownership of the bonds known to them, but the false appearance of ownership was a fact of their own creation, concocted for the purpose of deceiving the court into entertaining a case which, if the truth appeared, it would have rejected on the ground that it had no jurisdiction."

The cases cited by defendant wherein relief was denied, which have not already been reviewed, are the following:

Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, which was a case where the fraud complained of was perjury pure and simple. The *Throckmorton Case* was cited and followed.

Hudgens v. Baugh (D. C.) 225 Fed. 899, was a case where the fraud attacked was not between the

plaintiff and defendant in the bill, but a fraud practised on the plaintiff by a third party. The court said: "It is not alleged nor suggested that the defendant in this action, the plaintiff in the action at law, practised any fraud on the complainants, whereby they were prevented from making a full defense."

In *Ross v. Wood*, 70 N. Y. 8, 12, the fraud attacked was perjury simply. The court, in its opinion, said: "There was no suppression of evidence by the plaintiff in the former action, or ignorance on the part of the present plaintiff of any fact material to the controversy, and all the evidence which is now within his reach was produced or might have been produced on that trial, and was equally competent then as now."

In *New York v. Brady*, 115 N. Y. 599, 608, 22 N. E. 239, the fraud attacked was thus described by the court in its opinion: "The entire grievance of the plaintiff, when reduced to its simplest form of statement, consists of a complaint that its own surveyor has classified certain excavations as earth, which should have been described as rock, and the measure of relief demanded is that the court make a classification which the contract requires the surveyor to make."

And again (115 N. Y. 618): "The plaintiff must be considered negligent in not discovering and availing itself of its defense, upon the trial of the action, resulting in the judgments referred to."

In *Toledo, W. & W. R. Co. v. Ingram*, 85 Ill. 172, a bill was filed in equity for a new trial at law, on grounds of false and fraudulent testimony, and that evidence to that effect had been discovered since the trial. The bill was dismissed because it was not accompanied by affidavits of witnesses by whom the new evidence would be given.

In *Wabash R. Co. v. Mirrieles*, 182 Mo. 126, 81 S. W. 437, the fraud attacked was perjury by the plaintiff in the law action. The court, in its opinion, said: "The only fraud

propounded or suggested in this alleged false testimony given by the then plaintiff in the case. . . . There is no averment of any artifice, trick, promise, or fraudulent conduct of the said plaintiff whereby the company was in any manner deceived or lulled into security, or by any means prevented from obtaining testimony to rebut the said evidence of plaintiff."

In *Hamilton v. McLean*, 139 Mo. 678, 688, 41 S. W. 226, the fraud attacked was false testimony and a forged deed introduced in the action at law, and the case was held to be within the rule in the *Throckmorton Case*, the court adding, as to the perjury: "It does not appear . . . that plaintiff was prevented by any interposition of defendants from showing that fact, if true, in the partition suit."

Hamilton v. McLean, 169 Mo. 51, 68 S. W. 930, was a second suit between the same parties, on the same cause of action as in 139 Mo. The result was the same.

The facts in the case at bar have been already stated, and the question arises wherein lay the fraud. Was it simply in the false testimony at the time of the trial that plaintiff was permanently paralyzed? By no means. The fraud consisted also in a concocted history of the case, to wit, that plaintiff a few days after the accident became paralyzed, and remained so continuously thereafter up to the time of the trial, a period of more than six months. The continuance of the paralysis for a period of more than six months was one of the most important factors on which all of the medical men, both for plaintiff and defendant, based their conclusions. We may disregard the question whether at the several times of the examinations of plaintiff he was artificially paralyzed by drugs or feigned paralysis through self-control. We may even assume that he had true paralysis on these several occasions, if possible, but the fact remains that in the intervals he had the use of his legs, and had been seen and known

to use them on many occasions. Yet this true history of the case was, by a conspiracy, concealed from the defendant; the false history of the case was given to the various doctors for the defendant, and even to one of the plaintiff's own doctors, either by the plaintiff himself or by another of his doctors. On this false and fraudulent foundation these medical experts rested their conclusions. In other words, they were induced by trickery to testify directly opposite to what they would undoubtedly have testified had they known the truth. The jury was deceived; the court was deceived; the witnesses, many of them, were deceived,—all by this conspiracy and fraud, a fraud consisting not merely in the testimony of plaintiff on the trial, but also in this concocted plan outside of court, pursuant to which a false history of the case was made up and proclaimed. By this fraud the witnesses for defendant, and one at least of the witnesses for the plaintiff, were led to give entirely different testimony from what they would have given but for this fraud. The examination tests on the plaintiff himself and the history of the case were the two main factors on which the experts rested their conclusions. Had these experts been caused to make tests on a real paralytic fraudulently substituted in place of plaintiff, no one would hesitate to

**Judgment—
injunction
against
enforcement—
extrinsic fraud.**

say that the fraud was extrinsic and collateral; yet to substitute a false history of the case

in place of the true one, by deception and conspiracy, was equally an extrinsic and collateral fraud, and did "not merely consist in false and fraudulent documents or testimony submitted to the tribunal and the truth of which was contested before it and passed upon by it," as the rule was stated in the case of *Hilton v. Guyot*, 159 U. S. 113, 207, 40 L. ed. 95, 123, 16 Sup. Ct. Rep. 139. In our judgment the facts take the case out of the rule announced in the

Throckmorton Case and restated in the *Hilton Case*.

All of the elements essential to a good cause of action in equity are present in the case. In *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593, this court stated those elements as follows: "The indispensable elements of such a cause of action are: (1) A judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; (5) the absence of any adequate remedy at law."

As to the last element, it is to be noted that, at the time of the trial in the court below, appeals were pending in the supreme court of Missouri from the original judgment, and also from the order denying the writ of error coram nobis. This condition of affairs—the possibility that the plaintiff company might obtain relief at law in the state court in the original case—apparently had considerable influence, and properly so, in causing the trial court to deny relief in the present suit. But the remedy at law has now been exhausted and yet the merits of the company's application for relief have not been passed upon in the state courts, the supreme court of Missouri holding (*Callicotte v. Chicago, R. I. & P. R. Co.* — Mo. —, 204 S. W. 528; *Id.*, 274 Mo. 689, 204 S. W. 529) that the lower court had no jurisdiction to entertain a motion for a writ of error coram nobis after the term and while an appeal from the original judgment was pending in the supreme court; and holding, further, that, on the appeal from the judgment, relief from the alleged fraud could not be granted in the supreme court, because that court was restricted to the record in the case as made at the trial. One of the judges in concurring stated

that he did so on the ground that relief in equity was not precluded by their decision. Relief in the present equitable suit is, we conclude, not barred by the proceedings in the state courts.

3. That the judgment against which relief is sought was rendered in the state court is not material. In cases of this character the injunction acts not on the court rendering the judgment, but on the party. *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep.

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237; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep.

62; *McDaniel v. Traylor*, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369; *Simon v. Southern R. Co.* 236 U. S. 115, 59 L. ed. 492, 35 Sup. Ct. Rep. 255; *Graver v. Faurot*, 22 C.

C. A. 156, 46 U. S. App. 268, 76 Fed. 257; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; *Lehman v. Graham*, 67 C. C. A. 513, 135 Fed. 39; *Union R. Co. v. Illinois C. R. Co.* 125 C. C. A. 283, 207 Fed. 745; *Northwestern Port Huron Co. v. Babcock*, 139 C. C. A. 27, 223 Fed. 479.

Decree dismissing the bill is reversed, with instructions to grant the injunctive relief prayed for.

Petition for rehearing denied October 25, 1920.

Petition for writ of certiorari denied by the Supreme Court of the United States March 7, 1921 (U. S. Adv. Ops. 1920-21, p. 582) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 375.

ANNOTATION.

Fraud or perjury as to physical condition resulting from injury as ground for relief from or injunction against a judgment for personal injuries.

Generally as to power of legislature to set aside or impair judgment, see annotation commencing on page 450 of 3 A.L.R.

With the exception of the reported case (*CHICAGO, R. I. & P. R. CO. v. CALLICOTTE*, ante, 386), the authorities upon the question under annotation, applying the general rule that a judgment will not be set aside for fraud or perjury unless it be extrinsic or collateral to the matter originally tried, have denied relief against the judgment.

Thus, *Springfield Traction Co. v. Dent* (1911) 159 Mo. App. 220, 140 S. W. 606, in holding that a bill could not be maintained in equity to set aside a judgment in an action for personal injuries, on the ground that it was recovered by reason of the injured person wilfully, falsely, and corruptly testifying that her impaired condition was caused by the injury complained of, whereas it was the result of prior illness, the court said: "The legal proposition asserted by the appellant is that where a judgment is the product of false testimony adduced by the

successful litigant with a full knowledge of its falsity, and especially when it is the false testimony of the litigant and is of such character as lies peculiarly within the knowledge of such litigant and is of such character as makes it particularly difficult for an adversary to discover, and the judgment is exclusively predicated on such testimony, that of itself is such fraud in procuring such decree as will warrant the vacation thereof in equity. If the action of the trial court in overruling the demurrer to the petition were not sustained and the principles contended for by appellant were recognized, the effect would be to declare as a rule of law that a plaintiff can set aside a former judgment and retry the issues therein made by application to a court of equity. . . . The appellant's present bill to set aside the former judgment discloses that it is deficient in material allegations, because it alleges that appellant did not know of the former injuries to respondent until after the judgment, and fails to allege that it did not discover the alleged fraud at the time

of the filing of the motion for a new trial in the original action. In other words, it was the duty of appellant to present the matter now complained of in its motion for a new trial because of newly discovered evidence, unless there was an allegation and proof that it did not know of this at said time. The precise question arising on ultimate facts identical with those in the present case has been exhaustively examined and the law luminously declared by our supreme court in the case of *Wabash R. Co. v. Mirrielees* (1904) 182 Mo. 126, 81 S. W. 437, to the following effect: Fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. It cannot be set aside on the ground that witnesses falsely testified as to issues settled by the judgment, unless the party obtaining the judgment, by some trick, or artifice, or fraudulent conduct, in some manner deceived the other as to what the witnesses would testify to. A bill in equity asking that a judgment in a suit at law be set aside on the ground that it was founded on false testimony should show that the plaintiff exercised diligence to discover the falsity of such testimony, or was prevented by some trick or the fraudulent conduct of the successful party in that suit from exercising such diligence. . . . Fraud for which a judgment may be vacated or enjoined must be collateral to the issues adjudicated in the case, and must exist in the very procurement of the judgment. . . . The vitality of the old common-law maxim is yet unabated,—‘*interest republicæ ut sit finis litium*,’—meaning, it concerns the commonwealth that there be a limit to litigation. The establishment of the right in the defeated party, claimed by the appellant, would open the way for another contest in equity in almost if not in every suit decided by a court of law. . . . One of the special grounds of equity jurisdiction is the prevention of a multiplicity of suits; but if courts of equity were to assert a right to retry every case in which a judgment or decree had been procured on the evidence of perjured witnesses, equity would itself become an instrument of

mischievousness, and engender an endless strife between litigants which it was instituted to prevent.”

So, in *Wabash R. Co. v. Mirrielees* (Mo.) supra, in holding that perjury committed by a plaintiff in a personal injury action, for the purpose of increasing damages, was not such fraud as authorized a court of equity to set aside the judgment for fraud, especially as it was not shown that the defeated party exercised diligence in meeting the same or was prevented from exercising such diligence, or that he had a good defense to the action, the court said: “The substantive charges are that, with the purpose of increasing the damages, Mirrielees ‘falsely and fraudulently testified as a witness in his own behalf, at said trial of said cause, that his injuries received in said accident were both serious and permanent, and in consequence greatly impaired and reduced his earning capacity, all of which was untrue.’ . . . It is also averred that said false testimony of Mirrielees was given in pursuance of a ‘conspiracy’ between him and his brother-in-law, who was counsel in the case, without stating any facts constituting said conspiracy, and, finally, that said judgment was obtained as a direct consequence of the fraud and false testimony of said defendant Mirrielees at the trial as aforesaid, and which this plaintiff had no opportunity to meet, and could not meet, nor disprove at the trial at law, as hereinbefore set forth, whereby said Mirrielees imposes upon the trial court and the jury as well as the supreme court, and to permit said Mirrielees, or his assigns, or either of them, to profit by a judgment thus obtained, would be a fraud upon this plaintiff and contrary to equity and good conscience. It thus appears that the bill rests wholly and alone upon the theory that, the amount of the judgment in the suit for damages having been increased by the alleged false testimony of the plaintiff testifying as a witness, the defendant in that suit may now maintain its bill to set aside the judgment on the ground that it was obtained by ‘fraud.’ It will be observed that the bill contains no averment of any fraud whatever, ex-

trinsic or collateral to the matters involved in the issues on trial in the suit in which the judgment now attacked was rendered. On the contrary, it affirmatively appears that the only 'fraud' propounded or suggested is this alleged false testimony given by the then plaintiff in the case. It appears on the face of the petition that such testimony was given on clearly defined issues then on trial; to wit, the nature and extent of plaintiff's injuries and his earning capacity before and after receiving said injuries. There is no allegation as to what diligence, if any, was exercised by the railroad company in preparing to meet these essential issues on the trial, nor that it was hindered or prevented by any act of the plaintiff in said suit from exercising such diligence. There is no averment of any artifice, trick, promise, or fraudulent conduct of the said plaintiff, whereby the company was in any manner deceived or lulled into security, or by any means prevented from obtaining testimony to rebut the said evidence of plaintiff. The bill nowhere sets out the newly discovered evidence, or the names of the witnesses by whom the same could be established, and entirely fails to show a valid defense to such action. From the foregoing summary it will be noted that the only fraudulent act alleged in the bill against the defendant Mirrieles, the plaintiff in the damage case, is that he falsely testified as to the nature and extent of his injuries. It necessarily related to the cause of action then on trial, and was in no sense a fraud committed on the court in the procurement of the judgment. . . . The fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. If the cause of action is vitiated by fraud, this is a defense which must be interposed, and, unless its interposition is prevented by fraud, it cannot be asserted against the judgment. . . . The bill does not show any meritorious defense to the cause of action. It proceeds solely upon the ground that the alleged fraud and perjury were for the purpose of increasing plaintiff's damages. This court cannot assume that

there was not sufficient evidence outside of said alleged perjury to sustain the verdict."

And in *New York C. R. Co. v. Harold* (1883) 65 How. Pr. (N. Y.) 89, it was held that perjury as to the extent of injuries received in a railroad accident was not ground for equitable relief against a judgment for such injuries. This was upon the theory that the extent and permanency of the injuries was the only question litigated on the trial, and consequently that the fraud and false swearing do not go to the judgment itself, but only to the excessive damages received, which, having been once litigated, is not a ground for equitable relief. And generally to the effect that a court of equity will not grant relief from a judgment alleged to have been obtained by fraud, where the complaint is based solely upon excessive damages, see *Essex County v. Berry* (1829) 2 Vt. 161.

And while the principle applied in the foregoing cases was approved in the reported case (*CHICAGO, R. I. & P. R. Co. v. CALLICOTTE*, ante, 386), it will be remembered that the court, upon consideration of the particular facts involved, arrived at a contrary conclusion. This finding that fraud and perjury in respect of physical condition resulting from injury may constitute ground for equitable relief from a judgment for personal injuries renders the case of especial importance, since it demonstrates that fraud and perjury, under some circumstances, afford ground for equitable relief. It should be borne in mind, however, that the decision was clearly upon the theory that the facts established fraud extrinsic of the issues presented in the original action, in that there was simulated paralysis and perjured testimony, together with a conspiracy between the injured person and others, to prevent the defendant and his witness learning his true condition and the history of the case, by swearing falsely, etc., and that this conspiracy was directed against the defendant, the defendant's witnesses, and certain of the plaintiff's own witnesses, as well as against the court and jury.

G. J. C.

STATE OF MISSOURI

v.

PRESS W. ROZELL et al., Appts.

Missouri Supreme Court (Div. No. 2)—December 1, 1920.

(— Mo. —, 225 S. W. 931.)

Evidence — discrediting dying declarations — infidel.

1. Upon the question of the credibility of a dying declaration, evidence is admissible that deceased was an infidel, a disbeliever in God and a future state of man.

[See note on this question beginning on page 411.]

Criminal law — waiver of preliminary examination.

2. Want of preliminary examination is waived by pleading not guilty to a formal arraignment without calling attention of the court to the absence of such examination.

[See 8 R. C. L. 105.]

Evidence — dying declaration.

3. A declaration made by an injured person when he insists that he cannot live and is planning for those who will survive him is admissible in evidence as a dying declaration.

[See 1 R. C. L. 544-546.]

Trial — instruction — manslaughter — sufficiency.

4. An instruction on manslaughter is erroneous which states that if from

the evidence the jury believe that the defendants intentionally did shoot, strike, and mortally wound, they would be guilty, without submitting the question of assault upon deceased.

Appeal — refusal of instruction — right to complain.

5. One accused of homicide who testifies that he had nothing to do with the killing cannot complain if he is not given the benefit of instructions on self-defense and sudden passion.

— singling out one item for instruction.

6. It is reversible error to single out one item in submitting a homicide case to the jury, and to comment upon the evidence.

[See 14 R. C. L. 740 et seq., 781.]

APPEAL by defendants from a judgment of the Circuit Court for Taney County (Stewart, J.) convicting them of murder in the second degree. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. L. F. Bearden and Moore, Barrett, & Moore for appellants.

Messrs. Frank W. McAllister, Attorney General, and George V. Berry, Assistant Attorney General, for the State.

Mozley, C., filed the following opinion:

This case originated in Taney county, Missouri. Defendants, Press W. Rozell and I. E. Smith, were informed against on the 18th day of October, 1918, in the circuit court of said county, by the prosecuting attorney; for the killing of Abner B. Holcomb, under such circumstances as to constitute murder in the first degree. On December 29, 1919, at the October term of said

court, defendants were formally arraigned and entered pleas of not guilty.

On January 1, 1920, trial before a jury resulted in the following verdict:

We, the jury, find the defendants, Press W. Rozell and I. E. Smith, guilty of murder in the second degree, and assess their punishment at a term in the state penitentiary, for I. E. Smith fifteen years, and Press W. Rozell ten years.

W. A. Bayles, Foreman.

Sentence was duly pronounced upon said verdict. Motions for new trial and in arrest of the judgment were filed and overruled, and the

cause was duly appealed to this court.

The facts will be adverted to more in detail in the following opinion:

1. Defendants filed a motion to quash the information for two reasons: (1) That the information charges no offense against the defendants; and (2) because defendants were not given a preliminary examination.

2. No defect or supposed defect in the information has been pointed out by defendants, but, in compliance with our duty in a criminal case under the assignment that it fails to state an offense under the law against defendants, we have examined the information, and hold that it properly charges the offense of murder. Rev. Stat. 1909, § 4448; State v. Kindred, 148 Mo. 270, loc. cit. 279, 49 S. W. 845; State v. Myers, 198 Mo. 225, loc. cit. 232, 94 S. W. 242; State v. Long, 201 Mo. 664, loc. cit. 667, 100 S. W. 587; State v. Clay, 201 Mo. 679, loc. cit. 681, 100 S. W. 439; State v. Conley, 255 Mo. 185, loc. cit. 187, 164 S. W. 193.

As to the assignment that the defendants were not accorded a preliminary examination, the record

discloses that they were formally arraigned, and pleaded the general issue

of not guilty, without calling the attention of the court to the fact that they had not been given a preliminary examination. Under such circumstances the right to such examination was waived. State v. Doods, 280 Mo. 84, 217 S. W. loc. cit. 46.

3. Deceased made a dying declaration in which he told of the injuries done to him by the defendants, and how, and the weapons with which, they were inflicted. Defendants objected to its admission for any purpose as a dying declaration.

When the matter first came up, on objection of defendants, the court sent the jury out, and heard all the testimony relating to said dying declaration, and ruled that its admission to the jury was proper. This

16 A.L.R.—26.

ruling will necessitate the setting out of the testimony heard by the court by which said dying declaration was established. It is as follows:

Rebecca Holcomb, wife of deceased, testified as follows:

Q. What is your husband's name?

A. Abner Holcomb.

Q. Is he living?

A. No, sir; he was killed on the 5th day of August.

Q. Now what did your husband say about getting well? (Objected to by defendants.)

By the court: At this stage of the proceedings the jury is excluded, and the matter of the admissibility of the dying declaration is taken up by the court in the absence of the jury.

Q. Now, Mrs. Holcomb, you talk to the court now. Now, you tell the court what your husband said about his condition; whether he expressed any hope of getting well. Tell the court just what he said about getting well.

A. He told me he couldn't get well.

Q. Tell what he said about getting well?

A. He told me he couldn't get well; he told me that he had to die. I asked him, "What do you want me to do for you?" "You can't do anything; I am bound to die, for Press Rozell and Ibe Smith has shot me." He prayed and begged all the time. He told me that he wanted me to sell the stuff and go to live with Brays. "I ain't got but a little while to stay here."

Q. From then on, what did he say about the trouble?

A. He said he went down there to look up his hogs. He was in the road to put his shoes on, and Press Rozell and Ibe Smith rode up, and he said Ibe said, "which one of you three cut that steer?" He said, "What steer?" Ibe said, "Mine." He said, "I didn't do it; who said I did?" "John Comer and John Roberts said you did." He said, "I didn't do it." Then he said Press spoke up, and said, "Shoot the God

damned son of a bitch," and Ibe shot him. Then he started off up the lane, and then Ibe shot him, and then Press shot him. Then they made him stop, and then they made him go on, and then they made him stop and go on till they shot him in the hip. Ibe shot him and his pistol hung up, and Press reloaded his pistol again and shot him in the hip. Then he fell, and when he fell, why, Press Rozell jumped off his horse and beat him with rocks, and told him if he had anything to say, it was time. He said, "You're nothing but a pest and no good to the country, anyway." He said he lay there until they were gone. They got on their horses and went in a hurry towards Ibe's. He lay there till they were gone. Then he crawled through the wire fence, out in the bushes, and lay there till dark. When dark come, he crawled back through the wire fence and lay there. Then he crawled out to the side of the road where he knew he would be found when the boys come along from Bradleyville. When they came along by him he sorta raised up on his elbow, and called to them, and told them, "Here I am." He told the same state of facts again to Dr. Haskins.

Paralee Gray, daughter of deceased, testified to the same state of facts. Lula Holcomb, the wife of Andrew Holcomb, son of the deceased, testified substantially to the same state of facts. Andrew Holcomb, son of deceased, testified to substantially the same state of facts.

We think the court ruled properly in admitting the dying declaration in evidence. State

**Evidence—
dying declaration.**

v. Nocton, 121 Mo. loc. cit. 549, 26 S. W. 551; *State v. Evans*, 124 Mo. loc. cit. 408, 28 S. W. 8; *State v. Garth*, 164 Mo. 553, 65 S. W. 275; *State v. Parker*, 172 Mo. 191, 72 S. W. 650; *State v. Lovell*, 235 Mo. loc. cit. 344, 138 S. W. 523; *State v. Gow*, 235 Mo. loc. cit. 326, 327, 138 S. W. 648; *State v. Dipley*, 242 Mo. loc. cit. 477, 147 S. W. 111; *State v. Lewis*, 264 Mo. loc. cit. 427, 175 S. W. 60.

In the case last above cited it was held: "It is elementary that dying declarations are admissible when made under an impression of impending death. . . . 'It is enough if it satisfactorily appears in any mode that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances in the case, all of which are resorted to in order to ascertain the state of declarant's mind.'"

We overrule this assignment.

4. Each of the defendants went on the stand in their own defense, and in their examination in chief, and on cross-examination, went extensively into all the facts of the tragedy from their standpoint.

Q. (inquiring of defendant Rozell). What did you do?

A. We went in the creek there. Our horses was drinking, and Smith said he wasn't going to put up with them hogs any longer. He was going to kill them if he couldn't get rid of them any other way. He rode out of the creek, and old man Holcomb jumped from behind a brush pile.

Q. What did he say and what did he do?

A. "You are going to kill them, are you, God damn you?" Ibe said he wasn't going to put up with them any more; they had ruined his corn, and he aimed to kill them if he didn't keep them out. "You are the God damn son of a bitch that cut my wire? You can't kill my hogs," and he jumped in to throwing rocks at him. About the second rock come over towards me, and I had to dodge it. About the third rock hit him, it looked like, in the side, in the body like. He jerked his little old pistol out, and began shooting at him. He shot until his pistol went empty. I guess it was empty; anyhow he quit shooting. He slid off his horse, and it reared around toward me, and I caught it. Now old man Holcomb

had come around the bank and up by this brush pile about even with Smith. They were about seven or eight steps apart, I judge. Smith began throwing rocks, and they threw at each other for ever so long. Ibe Smith hit him a few times; I don't know how many times; anyway, the last time he hit him, he knocked him down. I guess you would call it down—he was down on his all fours. Holcomb said, "I'll kill you, you God damn son of a bitch, if I have to kill you from the brush." He went up the road.

He further testified that the "gunshots did not seem to have any effect on deceased, but the rocks did," and that he had no part in the tragedy except to dodge one rock hurled by deceased, and to catch Smith's horse during the fight.

On cross-examination he said:

They went to fighting and fighting rough, and I just set there and kept my mouth shut.

Q. When you went away, you never said anything about this to anybody?

A. No, sir.

Q. You knew the condition he was in, when you left him?

A. No, sir; I didn't know he was hurt like he was.

Defendant Smith testified substantially the same as Rozell, and that Rozell took no part in the difficulty. He further testified that he shot at deceased six or seven times, and threw six or seven rocks at him and hit him four or five times, after having emptied his pistol; that the pistol he used was a 25-caliber and shot a steel-jacket ball. This testimony furnished a material contradiction of the state's testimony, and the utmost that could be said concerning the matter is that it presented a jury question to be harmonized by their verdict.

5. Error is assigned on the part of the court for that he excluded evidence offered by defendants tending to show that deceased was an infidel; a disbeliever in God and in

a future state of man. That ruling is sought to be sustained here, but the authorities cited do not, in our opinion, reach the point raised. Was testimony tending to show that deceased was an infidel, a disbeliever in God and in a future state of man, competent to affect the credibility of the dying declaration? When a dying declaration is made and proved in court, its credibility is tendered, and the defendant has the right to assault it by any available legal testimony which accomplishes or tends to accomplish that purpose.

In Underhill, on Crim. Ev. pp. 203-205, ¶ 110, it is held that "*the admission of a dying declaration in evidence is solely for the determination of the court, in the absence of the jury, and after its admission its weight and credibility are wholly for the jury.*"

It is laid down in Wharton's Crim. Ev. vol. 1, p. 506, that "*the fact that the declarant was a disbeliever in a future state of rewards and punishments may be used to discredit his testimony.*"

In Hill v. State, 64 Miss. 431, 1 So. 494, it was held: "Where, in the trial of a case of homicide, proof of a statement made by the deceased is admitted in evidence as a dying declaration in relation to the killing, it is *error for the court to exclude testimony offered by the defendant, with the view of detracting from the value of such declaration, to the effect that the deceased had in his lifetime often said 'that there was no hell or hereafter, and all the punishment a man got was in this world.'*"

In 4 Enc. Ev. p. 1014, the rule is laid down that "for the purpose of affecting the credibility of the declaration, it is competent to show that the declarant, *because of his want of religious belief, was not a person of such character as was likely to be impressed with a religious sense of his approaching dissolution, and that consequently no reliance is to be placed upon what he said.*" 1 R. C. L. § 97, p. 549.

In *Goodall v. State*, 1 Or. 333, 80 Am. Dec. 396, it was held: "Dying declarations admitted in evidence *may be discredited by showing that the deceased was a disbeliever in a future state of rewards and punishments.*" (Italics ours.)

We hold that it was error on the part of the court to exclude said testimony from the jury.

6. Defendants complain that instruction No. 4, on manslaughter, is erroneous because it singles out defendant Smith and does not mention defendant Rozell. This is a mistake on the part of defendants. Both of them are included in said instruction. It reads: "If from the evidence in this case, and under the instructions, you find and believe that in the county of Taney and state of Missouri, on or about the 5th day of August, 1919, *the defendants* intentionally did shoot, strike, and mortally wound with pistols loaded with gunpowder and leaden balls, and with rocks of the weight of 2 pounds, and that said Abner Holcomb died from the effects of such shooting, striking, and wounding, and that defendants were so far under the influence of a passion suddenly aroused by said Abner Holcomb as to make *them* incapable of thinking coolly of the natural consequences of their act, then you should *convict defendants* of manslaughter in the fourth degree," etc. (Italics ours.)

This instruction is erroneous for two reasons: (1) It does not submit to the jury the question of an assault having been committed on deceased; and (2) it improperly includes defendant Rozell.

The instruction on self-defense, however, was limited to defendant Smith, and properly so. *Rozell testified that he had nothing whatever to do with the difficulty in which the deceased lost his life.* If this was true (and whether true or not, his testimony bound him to the prop-

osition that it was), he needed no defense except to satisfactorily show to the jury that he was not in any wise connected with the assault which resulted in the death of deceased.

The instruction on manslaughter was error because, manifestly, if he had no connection with said difficulty, he could not insist by instruction to the jury that he killed or aided in killing deceased in a *heat of passion suddenly aroused by deceased*. Nor would it have been proper to have included Rozell in the instruction on self-defense. An instruction that *he killed or aided in killing* deceased intentionally, but without deliberation, would have been in the very teeth of his own testimony and highly improper. (Italics ours.)

7. Defendants complain of instruction No. 10, which reads: "The jury are instructed that in law it is the same offense to kill a bad man as it is to kill a good man, and, although the jury may believe from the evidence that deceased was a bad or quarrelsome man, this fact alone will not justify or excuse the defendants for the killing of deceased."

This instruction should not have been given. It singles out as influencing the act of defendants in killing the deceased one item,—that he was bad or quarrelsome,—instead of submitting the facts upon this feature, as a whole, for the consideration of the jury. It is also clearly a comment on the testimony, and, we think, reversible error.

Aside from this instruction and the one on manslaughter, the others given fairly cover all of the matters necessary for the information of the jury, and there was no error in refusing the instructions asked by defendants.

For the errors pointed out, the case will be reversed and remanded for a new trial.

It is so ordered.

Railey and White, CC., concur.

Appeal—refusal
of instruction
—right to
complain.

—discrediting
dying declara-
tions—innocent.

Trial—instruction—
manslaughter—
sufficiency.

—singling out
one item for
instruction.

Per Curiam:

The foregoing opinion of Mozley, C., is hereby adopted as the opinion of the court.

All concur.

NOTE.

The impeachment or discrediting of

dying declarations is the subject of the annotation following LIDDELL v. STATE, post, 411; and see specifically subd. III. g, of that annotation for the question considered in the reported case (STATE v. ROZELL, ante, 400) as to the admissibility for that purpose of evidence of the declarant's unbelief in God and a future state.

HANEY LIDDELL, Plff. in Err.,
v.
STATE OF OKLAHOMA.

Oklahoma Criminal Court of Appeals — November 12, 1920.

(— Okla. Crim. Rep. —, 193 Pac. 52.)

Evidence — conviction of felony — effect.

1. A dying declaration may be discredited by showing that the declarant has been convicted of a felony or other crime involving moral turpitude.

[See note on this question beginning on page 411.]

Jurors — summoning — prejudiced officer.

2. It is essential to the fair and impartial administration of justice that an open or special venire of jurors should be summoned by an officer who is not disqualified by reason of interest, bias, or prejudice.

[See 16 R. C. L. 233.]

— material witness in case — bias.

3. Section 5848, Revised Laws 1910, authorizes a challenge to the panel of an open or special venire of jurors on account of the bias of the officer who summoned such jury, upon any ground which would be good ground of challenge to a juror. Held, that where the sheriff who serves an open or special venire of jurors is a material witness for the state, and a challenge to the panel of such open or special venire is interposed by defendant on such ground, it is reversible and prejudicial error for the trial court to overrule such challenge in a cause where a substantial defense is made to the charge.

[See 16 R. C. L. 240.]

Evidence — dying declaration.

4. Statements of material facts concerning the cause and circumstances of the homicide, made by the

victim under the solemn conviction of impending death, are properly admitted as a dying declaration.

[See 1 R. C. L. 527, 537.]

— testimony at examining trial.

5. Upon proper proof of a sufficient predicate therefor, the transcript of the testimony of a witness given in the examining trial may be read in evidence at the trial.

[See 8 R. C. L. 214, 215.]

Homicide — threats — justification.

6. An instruction, in substance, that "proof of communicated and uncommunicated threats could not be considered as justifying the killing on the part of defendant, unless the threats themselves were accompanied by some overt act or demonstration on the part of deceased," is disapproved. The court should have instructed that neither communicated nor uncommunicated threats would tend to mitigate or justify a homicide, unless at the time of the killing deceased made some demonstration or overt act towards defendant which evidenced an intention to carry such threats into immediate execution, because in a self-defense case the jury is not limited, in the consideration of proof of threats, only to such threats as were themselves accompanied by some

Headnotes by MATSON, J.

overt act or demonstration of hostility, but the jury may consider both communicated and uncommunicated threats, which are made by deceased against defendant to other parties for the purpose of showing the condition

of deceased's mind with reference to his feelings towards defendant, and also for the purpose of determining who was the probable aggressor in the difficulty.

[See 13 R. C. L. 821.]

ERROR to the District Court for Love County (Freeman, J.) to review a judgment convicting defendant of manslaughter in the first degree, and sentencing him to four years' imprisonment in the state penitentiary. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Graham & Logsdon, A. E. Waldon, and G. H. Culp for plaintiff in error.

Messrs. S. P. Freeling, Attorney General, and W. C. Hall, Assistant Attorney General, for the State:

A juror is not disqualified on account of implied bias by reason of being a witness in the cause.

Remer v. State, 3 Okla. Crim. Rep. 707, 109 Pac. 247; *State v. Hall*, 16 S. D. 6, 65 L.R.A. 151, 91 N. W. 325; *State v. Hayes*, 23 S. D. 596, 122 N. W. 652.

Testimony of witness James given at the former trial was admissible.

Hawkins v. United States, 3 Okla. Crim. Rep. 652, 108 Pac. 561; *Edwards v. State*, 9 Okla. Crim. Rep. 306, 44 L.R.A.(N.S.) 701, 131 Pac. 956; *Jeffries v. State*, 13 Okla. Crim. Rep. 146, 162 Pac. 1137.

A dying declaration by the victim of a homicide that the act was without provocation, although very general, is as a rule admissible as the statement of a collective fact, and not a mere conclusion.

Boyle v. State, 97 Ind. 322; *Darby v. State*, 79 Ga. 63, 3 S. E. 663; *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 So. 264; *State v. Saunders*, 14 Or. 300, 12 Pac. 441; *State v. Lee*, 58 S. C. 335, 36 S. E. 706; *House v. State*, 94 Miss. 107, 27 L.R.A.(N.S.) 840, 48 So. 3; *State v. Cream*, 43 Mont. 47, 114 Pac. 608, Ann. Cas. 1912C, 424; *State v. Williams*, 168 N. C. 191, 83 S. E. 714; *State v. Klute*, 160 Iowa, 170, 140 N. W. 864; *Autrey v. State*, 190 Ala. 10, 67 So. 237; *Haney v. Com.* 12 Ky. Ops. 207; *Pippen v. Com.* 117 Va. 919, 86 S. E. 152; *Wright v. Com.* 109 Va. 847, 65 S. E. 19; *State v. Black*, 42 La. Ann. 861, 8 So. 594; *Payne v. State*, 61 Miss. 161, 4 Am. Crim. Rep. 155.

It was not error to exclude from the proof the court record in Texas,

showing the conviction of deceased for conducting a house of prostitution, and proof that deceased had an immoral character.

Lester v. State, 37 Fla. 382, 20 So. 232; *State v. Yee Gueng*, 57 Or. 509, 112 Pac. 424; *Carter v. State*, 191 Ala. 3, 67 So. 981; *State v. Tomassi*, 75 N. J. L. 739, 69 Atl. 214; *Thompson v. State*, 6 Okla. Crim. Rep. 51, 117 Pac. 216; *State v. Long*, 103 Kan. 302, 175 Pac. 145; *State v. Hiers*, 107 S. C. 411, 93 S. E. 124; *Biddle v. State*, 131 Ark. 537, 199 S. W. 913; *State v. Sella*, 41 Nev. 113, 168 Pac. 278; *Spannell v. State*, 83 Tex. Crim. Rep. 418, 2 A.L.R. 593, 203 S. W. 357.

Even positive testimony is not required, if a fact in issue reasonably may be inferred from circumstances proved.

Turner v. State, 138 Ga. 808, 76 S. E. 349; *State v. Erie R. Co.* 83 N. J. L. 231, 84 Atl. 693; *Holmes v. State*, 6 Okla. Crim. Rep. 541, 119 Pac. 430, 120 Pac. 300.

Matson, J., delivered the opinion of the court:

This is an appeal from the district court of Love county, wherein Haney Liddell was convicted of the crime of manslaughter in the first degree, and sentenced to serve a term of four years in the state penitentiary, for the killing of one T. M. Boyd, which occurred in the town of Thackerville, in said county, on or about the 25th day of April, 1917. In view of the disposition made of this appeal, we deem it unnecessary to narrate the facts and circumstances surrounding the commission of this alleged homicide.

The first error assigned as ground for reversal is the alleged erroneous

action of the trial court in overruling the motion of defendant to quash the special venire of jurors summoned and returned for jury service by F. N. Smith, the sheriff of Love county, Oklahoma, who was then and there a material witness for the state in the trial of this cause, and whose name as such witness was indorsed on the information. The record bearing upon this assignment is substantially as follows:

On the 5th day of November, 1917, the trial court made an order directing the sheriff of Love county to summon in this cause a special venire of forty men to be and appear before the court on November 13, 1917, at the hour of 9 o'clock A. M., for the reason that the regular venire of jurors drawn for that term was insufficient for the purpose of obtaining a jury in this cause. Thereafter, on the 13th of November, 1917, this cause came on regularly for trial, with all the necessary parties present, and after both sides had announced ready for trial, the selection of the jury to try the cause was begun, and after the regular panel of jurors had been exhausted, and before the special venire of forty men summoned by the sheriff had been sworn, counsel for defendant interposed a motion in writing to quash said special venire upon two grounds: (1) Because said special venire was summoned by F. N. Smith, sheriff of Love county, the said F. N. Smith being a material witness for the state in said cause, and biased and prejudiced against defendant; (2) because the said venire was not drawn from the body of the county—the said motion being duly verified by the oath of defendant. Counsel for the state filed an answer to said motion, which was, in substance, as follows: (1) The state of Oklahoma admits that F. N. Smith is the sheriff of said county, and is a witness for the state, and did serve said process, as is alleged in said motion. (2) The state denies each and every other allegation contained

in said motion; the said answer being duly verified by the county attorney of Love county. Whereupon the trial court, after considering the motion and answer thereto, overruled the said motion, to which action of the trial court counsel for defendant then and there excepted. Thereupon the special venire of forty men summoned by the sheriff were duly sworn, and counsel for defendant further objected to the calling of any member of the special venire for jury service in the cause for the same reasons and objections urged as grounds in the motion to quash the panel, which general objection to each of said jurors was overruled by the court, to which action counsel for defendant excepted. Thereupon the selection of a jury to try said cause was proceeded with, and nine members of the said special venire served by the sheriff became jurors and sat in the trial of the cause.

The question here presented is not one of first impression in this court. In the case of *Koontz v. State*, 10 Okla. Crim. Rep. 553, 139 Pac. 842, Ann. Cas. 1916A, 689, it is held: "It is essential to the fair and impartial administration of justice that an open or special venire shall be summoned by an officer who is not disqualified by reason of interest, bias, or prejudice."

Jurors—
summoning—
prejudiced
officer.

Section 5848, Revised Laws 1910, provides: "When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner as if made to a juror."

In the *Koontz Case*, construing § 5848, it is said: "The language of the statute is so plain that no room is left for interpretation. It authorizes a challenge to the panel, on account of the bias of the officer who summoned a jury on an open or spe-

cial venire, upon what would be good ground of challenge to a juror for bias. If, then, a challenge for cause would have been sustained against a person called as a juror because he was a material witness for the state, a challenge would also lie upon the same ground to a panel summoned by him."

We think it not necessary to support with the citation of authority the proposition that, if a juror was called to serve in the trial of a criminal case, who was challenged by defendant upon the ground that he was a material witness for the state in the prosecution, whose name was indorsed upon the indictment or information, and that fact should be admitted by the county attorney, and the challenge to such a juror should be overruled, over the exception of defendant's counsel, and said person should serve as a juror in the trial of the cause, the action of the trial court in overruling the challenge and permitting the said juror to serve under such circumstances would be clearly prejudicial to the substantial rights of defendant, and such action of the trial court would be reversible error, and not harmless in any cause where a substantial defense was interposed to the charge. It is absolutely inconsistent with the administration of justice that a jury composed of witnesses against a defendant can render a fair and impartial verdict. The impartiality of the jury goes to the very foundation of the accused's liberty. Without an impartial jury, the accused cannot be accorded that fair trial guaranteed to him by the Constitution and laws of this state. It requires the unanimous consent of the jury to return a verdict in a felony cause, and if the trial court should permit a witness for the state to sit in the trial of one charged with a felony, there could, under such circumstances, be no fair and impartial trial, because an impartial jury is not had by eleven impartial men and one shown to be prejudiced against the defendant's cause by reason of knowledge of material

facts against him. It follows, therefore, that if a witness for the state may not serve as a juror, when challenged by defendant, such a witness, by reason of the statute above set out, cannot serve a special or open venire of jurors to serve in the trial of a criminal cause in which he is a witness, and that, when such fact is made to appear to the trial court upon a challenge to the panel of an open or special venire, it would be a denial of a statutory right and safeguard for the trial court to overrule such challenge.

It is apparent that in the service of an open or special venire the officer would have the power to exercise his judgment and discretion in the service and summoning of such jurors, and the fact that the officer might exercise such power to the detriment of defendant is a sufficient reason for the enactment of § 5848, *supra*. Under such statute, a witness for the state may not serve an open or special venire of jurors, even though he be the sheriff of the county, and a special or open venire served by such a disqualified officer should be quashed upon proper motion. Likewise should a special or open venire, served by a witness for defendant, be quashed upon proper motion by the state. This has become the established practice in this jurisdiction since the rule was first announced in the case of *Koontz v. State*, *supra*; the opinion in that case having been published long prior to the time of the trial of this cause. The doctrine established in the *Koontz Case* has been adhered to in the recent case of *Shepherd v. State*, 17 Okla. Crim. Rep. —, 192 Pac. 235, and, in the opinion of this court, it is essential to the fair and impartial administration of justice that an open or special venire of jurors must be summoned by one who is not a witness against the party interposing the challenge to such a panel, and where a substantial defense is made to the charge, as was done in this case, it is reversible and prejudicial error to overrule a challenge by defendant to the

panel of an open or special venire served by an officer or person who is a witness for the state.

In this case it was admitted in the answer to the motion to quash the panel that the sheriff who served the same was a witness for the state, and the record shows that the said officer's name was indorsed upon the information filed in this cause, and that he testified as a witness for

—material witness in case—
bias.

the state, both in chief and in rebuttal. For the reasons stated, the trial court erred, to the substantial prejudice of defendant in this cause, in overruling defendant's motion to quash the panel of the special venire of jurors served by the sheriff.

The deceased signed a written dying declaration, portions of which were admitted in evidence over the objection and exception of defendant, and it is contended in this court that the trial court erred in admitting certain portions of deceased's dying declaration. The question of the admissibility of this evidence is a matter which will necessarily arise upon a retrial of this cause.

"Dying declarations are statements of material facts concerning

Evidence—dying declaration.

the cause and circumstances of the homicide, made by

the victim under the solemn conviction of impending death." *Addington v. State*, 8 Okla. Crim. Rep. 703, 130 Pac. 315.

We have carefully examined the portions of the dying declaration admitted, and, under the definition of dying declarations above given, the conclusion is reached that the trial court committed no error prejudicial to defendant in the instant case in admitting the portions of the dying declaration of which defendant here complains.

During the progress of the trial, defendant offered to prove, in order to affect the credibility of the dying declaration of deceased, that deceased, about one year previous to his death, had been convicted in the county court of Cook county, Texas,

of the crime of keeping a house of ill fame, and for the purpose of establishing such conviction the record thereof was offered in evidence, and upon objection by the state was excluded, to which action of the trial court counsel for defendant then and there excepted. We think that defendant had the right to impeach or discredit the dying declaration, by —conviction of felony—effect.

showing that deceased had been convicted of a felony, or of a misdemeanor involving moral turpitude, and that the record of the court showing such conviction was a proper method of proof thereof. Professor Wigmore, in his treatise on Evidence, in § 1446, states, in respect to dying declarations, that "the declarant is open to impeachment and discrediting in the same way as other witnesses, so far as such a process is feasible," and, further, that a showing of conviction of crime is one of the feasible methods by which the declarant may be impeached. The reason for such rule seems to be that the proof of the conviction of declarant of such a crime, by producing the record thereof, raises no collateral issue of fact, and presents nothing for further inquiry; the record of conviction being conclusive evidence of guilt of the offense. In the case of *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650, the supreme court of Washington say: "There was some testimony to show that the deceased had been convicted of a felony, and appellants contend that for this reason the dying declaration should not have been received, as it would have been inadmissible under the common-law rule. But this is because such person would not have been a competent witness, if alive. In this state the statute has changed the rule (2 Hill's Code, § 1647), and the deceased would have been a competent witness, had he been living, the conviction having been for stealing cattle. The conviction could be shown for the purpose of affecting his credibility. As the statute has changed the rule ad-

mitting such testimony by a living witness, the same results should follow as to a dying declaration, for the same proof of conviction can be made to affect the credibility of the declaration, and it was done in this instance."

A conviction of keeping a house of ill fame is for an offense involving moral turpitude, and, had the declarant been living, there would have been no question about the right of counsel for defendant to cross-examine him relative to such a conviction, for the purpose of discrediting his testimony, and, should such conviction be denied, evidence thereof was proper by way of impeachment. We are of opinion, therefore, that the trial court erred in refusing to permit defendant in the instant case, for the purpose of affecting the credibility of the dying declaration, to show that deceased had been convicted of the crime of keeping a house of ill fame in the state of Texas about one year previous to his death.

It is also contended that the trial court erred in permitting the state to read the transcript of the testimony of G. L. James, given at the examining trial, for the reason that no sufficient predicate of absence from the jurisdiction of the court was laid for the introduction of such evidence. We think there is no merit in this contention, as the evidence clearly showed that the witness was beyond the jurisdiction of the trial court, and had been absent from the state for a considerable length of time, and that his attendance upon the court could not be obtained by compulsory process.

Other alleged errors are relied upon as grounds for the reversal of this judgment, particularly certain paragraphs of the court's instructions to the jury relative to certain alleged threats made upon the life of defendant by deceased.

Paragraph 7 is open to the criticism lodged against it by counsel for defendant, and apparently said

paragraph of the charge conflicts with other portions thereof on the subject of communicated and uncommunicated threats, and the charge as a whole, therefore, tended in our opinion to be somewhat confusing and misleading. Paragraph 7 should not have been given in the form it was read to the jury. In said paragraph the trial court told the jury that "proof of communicated and uncommunicated threats could not be considered as justifying the killing on the part of defendant, unless the threats themselves were accompanied by some overt act or demonstration on the part of deceased."

Apparently, it was the intention of the trial court to tell the jury that neither communicated nor uncommunicated threats would mitigate or justify a homicide, unless at the time of the killing deceased made some demonstration or overt act towards defendant, which evidenced an intention to carry such threats into execution. The instruction as given, however, would tend to limit the consideration of proof of threats only to threats made directly to defendant himself, and then only as to such of those threats which were accompanied by some overt act or demonstration of hostility. Apparently such is not the law, but the jury may consider both communicated and uncommunicated threats, which, of course, are made against defendant to other parties, for the purpose of showing the condition of deceased's mind with reference to his feelings toward defendant, and also for the purpose of determining who was the probable aggressor in the difficulty, where the plea of self-defense is interposed, and there is evidence reasonably tending to support the same.

Other matters called to the attention of the court in the brief of counsel representing defendant, and relied upon as grounds for reversal, are considered to be without prejudice to the substantial rights of defendant. We have in this opin-

Homicide—
threats—
justification.

—testimony at
examining
trial.

ion covered those errors committed by the trial court which we deem to have been prejudicial to the substantial rights of defendant, sufficient to require the reversal of this judgment of conviction; also, we have treated of other alleged errors, respecting matters of procedure, which are likely to arise upon a retrial of this case.

Upon a careful consideration of the entire record, it is the opinion of the court that the judgment of

conviction of manslaughter rendered against the defendant, Haney Liddell, in the district court of Love county, in which the defendant was sentenced to serve a term of four years' imprisonment in the state penitentiary for the killing of one T. M. Boyd, be reversed, and the cause remanded for a new trial; and it is so ordered.

Doyle, P. J., and Armstrong, J., concur.

ANNOTATION.

Impeaching or discrediting dying declarations.

I. Scope and introduction, 411.

II. Why dying declarations are open to impeachment, 412.

III. Grounds for impeaching dying declarations:

- a. Declarant's conviction of crime, 413.
- b. Declarant in the position of an accomplice, 413.
- c. Declarant's bad character, 414.
- d. Declarant's reputation for untruthfulness and want of veracity, 414.

I. Scope and introduction.

This annotation begins at that stage of a trial of one accused of murder or homicide when the dying declarations of the victim of the crime respecting its circumstances and the identity of the slayer, uttered under the shadow of death and when all hope of recovery had been abandoned, have been admitted in evidence against the prisoner.

The competency of dying declarations as evidence, in such cases and under such conditions, has been assumed, and the propriety of receiving them in evidence has not been questioned. The annotation, in consequence, includes no cases concerned with the admissibility of dying declarations in evidence; it embraces only cases that discussed the weight and credibility of dying declarations already put in evidence.

The limitation stated necessarily made irrelevant cases that involved

III.—continued.

- e. Declarant's moral and physical weakness, 414.
- f. Declarant's mental aberration, 414.
- g. Declarant's unbelief in God and a future state of rewards and punishments, 415.
- h. Declarant's profanity, 417.
- i. Declarant's contradictory, conflicting, and inconsistent statements respecting the crime under investigation, 417.

IV. Conclusion, 422.

the impeachment of the deceased as a man of turbulent and violent disposition, who had threatened the accused's life, unless his dying declarations had been received in evidence.

It is one thing to impeach a dying declaration actually uttered by the deceased, and another and quite a different thing to impeach the version of such declaration given by the living witness to it, in his testimony. And the impeachment of the declarant himself is a very different thing from the impeachment of the witness who heard and repeats on oath a dying declaration. The deceased may be unworthy of belief and his hearer of unassailable veracity, or the deceased may be truthful and his hearer may falsify or distort his language. If the witness misstates or garbles what the deceased said in the face of death, the true and correct declaration may be proved. And either the deceased, or his witness,—or both, if such is the

fact,—may be shown to be of bad character for truth and veracity, or unworthy of belief for other reasons.

The distinction seems obvious enough between impeaching an original declaration of the deceased who made it and discrediting the subsequent recital of it on the witness stand or the witness who testified to it.

Because of this distinction, there has not been included in this annotation any case in which the accuracy or truth of the version of a dying declaration repeated on the witness stand, or the veracity and credibility of the living witness who testified to it, was assailed.

To afford the student who may be desirous of pursuing this branch of the subject a starting point for his investigation, a single illustrative case may here be cited.

In *State v. Fong Loon* (1916) 29 Idaho, 248, L.R.A.1916F, 1198, 158 Pac. 233, the defendant, a Chinese, was convicted of manslaughter committed in a fatal affray with a fellow countryman. The dying declaration of the deceased, made in his own language and rendered into English by a Chinese interpreter, was put in evidence by the prosecution on the trial, against the objection and over the exception of the accused, who insisted that it was inadmissible because not made in apprehension of certain death and after the declarant had abandoned all hope of recovery. After the admission of the declaration the accused attacked its credibility, and offered to prove that the interpreting witness was incapable of truthfully and correctly rendering into the English language the dying declaration he attempted to translate, and incapable of correctly repeating and understanding it in the original Chinese, because the reporting and interpreting witness was so addicted to the use of opium and other destructive drugs that his mind was weakened, his memory distorted, and his mental operations were wholly unreliable. The trial court having refused to allow the defendant to prove this, he accepted.

The reviewing court was unanimously of the opinion that it was error to admit the proffered dying declaration, as it clearly appeared that the deceased still cherished a hope of recovery when he made it, and, with one dissent from a member who thought the statute excluded such method of impeaching the interpreter, held that the accused had a right to discredit the testimony of the witness to the English meaning and accuracy of the dying declaration in the manner offered.

The editor of *English Ruling Cases*, commenting upon the case of *Reg. v. Bedingfield* (1879) 14 Cox, C. C. 341, 11 Eng. Rul. Cas. 298, in which Chief Justice Cockburn ruled out evidence in a murder trial of the victim's dying declarations, but nevertheless brought these plainly to the attention of the jury in summing up, gives a synopsis of the discussion which followed anent the soundness of this ruling, and says that there was a strong movement in favor of the prisoner on the ground that the dying declaration might have been in his favor, or have been proven false, and that such movement might have succeeded, had the circumstances been less conclusive of the accused's guilt.

II. Why dying declarations are open to impeachment.

According to Lord Halsbury (9 *Laws of England*, 384, title *Crim. Law & Proc.* pt. 6, subsec. 4), the credibility of any witness in a criminal trial who gives evidence to the facts, either for the prosecution or defense, is material to the issue. He has cited *Reg. v. Baker* [1895] 1 Q. B. (Eng.) 797, in support of the statement.

Now dying declarations admitted in evidence in trials for homicide are esteemed as testimony of the decedent, and classed with testimony given under oath by living witnesses in open court.

These declarations, say the authorities, may be contradicted in the same manner as other testimony. They may be discredited just as if the deceased was a living witness testifying orally to their content. They are

open to impeachment in any way in which his testimony could have been impeached if he had lived and testified under oath. Their credibility is subject to the same attacks and is determined by the same rules that apply to other testimony. And the declarant may be impeached in any way that the law authorizes a living witness to be impeached. In short, dying declarations are no more sacred against attack than is other testimony; the declarant is no more immune than a living witness from impeachment.

United States.—*Carver v. United States* (1897) 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228.

Alabama.—*Carter v. State* (1915) 191 Ala. 3, 67 So. 981.

California.—*People v. Lawrence* (1863) 21 Cal. 368.

Florida.—*Lester v. State* (1896) 37 Fla. 382, 20 So. 232.

Georgia.—*Battle v. State* (1884) 74 Ga. 101; *Hall v. State* (1906) 124 Ga. 651, 52 S. E. 891; *Robinson v. State* (1912) 10 Ga. App. 462, 73 S. E. 622.

Iowa.—*State v. Elliott* (1877) 45 Iowa, 486, 2 Am. Crim. Rep. 322.

Mississippi.—*Gambrell v. State* (1908) 92 Miss. 728, 17 L.R.A. (N.S.) 291, 131 Am. St. Rep. 549, 46 So. 138, 16 Ann. Cas. 147.

Missouri.—*State v. Diple* (1912) 242 Mo. 461, 147 S. W. 111.

And see note to *Reg. v. Davidson* (1897) 1 Can. Crim. Cas. 351.

III. Grounds for impeaching dying declarations.

a. Declarant's conviction of crime.

The court in *LIDDELL v. STATE* (reported herewith) ante, 405, is in harmony with the authorities in holding that a defendant on trial for homicide has a right to impeach or discredit the dying declaration of the victim of the crime, admitted in evidence for the prosecution, by showing that the deceased had been convicted of a felony or misdemeanor involving moral turpitude, and to introduce in evidence the record of the conviction for that purpose.

A convict has always been regarded

in the law as disqualified to testify as a witness in a court of justice. It was early held in England that the declarations of a convicted felon on the eve of his execution were not admissible in evidence in a later trial of another criminal, as dying declarations, because that, being attainted, the declarant's testimony had he been alive and offered as a witness on oath, would have been incompetent. *Rex v. Drummond* (1784) 1 Leach, C. L. (Eng.) 337, 1 East, P. C. 353, note.

In a jurisdiction where the common law, which rendered a person convicted of a felony incompetent to testify as a witness in a trial, has been abrogated by statute, the dying declarations of the victim of a homicide, accusing a prisoner of killing him, cannot be excluded from evidence on the ground that the deceased was a convicted and unpardoned felon, because, notwithstanding his conviction, he would have been, if living, a competent witness to testify to the content of such declarations; but as it may be shown, to affect the credibility of a living witness, that he is, an unpardoned convict, the like proof may be made concerning the deceased, to impeach his dying declaration. *State v. Baldwin* (1896) 15 Wash. 15, 45 Pac. 650.

It is competent for a defendant on trial for murder to impeach and discredit the dying declaration of the deceased by legal proof (if he is able to produce it) that the declarant had been convicted in another state, in a police court, of a criminal offense (in the instant case, cruelty to animals). *State v. Diple* (1912) 242 Mo. 461, 147 S. W. 111.

b. Declarant in the position of an accomplice.

On the trial of a man for producing a criminal abortion, the accused is entitled to, and it is prejudicial error for the trial court to refuse, an instruction to the jury, on his request, to the effect that in determining the weight and credibility of the dying declarations of the deceased, admitted in evidence against him, the jury should consider the fact that the dece-

dent, by her own admission, herself used upon her person the lethal instrument in order to induce a miscarriage, since, while the deceased could not technically be classed as an accomplice, nevertheless the moral quality of her act and her participation in the offense were such as to affect her credibility in the same way. *Seifert v. State* (1902) 160 Ind. 464, 98 Am. St. Rep. 340, 67 N. E. 100.

c. Declarant's bad character.

It has been asserted in several cases that dying declarations admitted in evidence in homicide cases may be discredited, by proof that the character of the deceased was bad. *Carver v. United States* (1897) 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; *Redd v. State* (1896) 99 Ga. 210, 25 S. E. 268; *Hall v. State* (1906) 124 Ga. 651, 52 S. E. 891; *Robinson v. State* (1912) 10 Ga. App. 462, 73 S. E. 622; *State v. Reed* (1913) 250 Mo. 379, 157 S. W. 316.

This view was accepted by the annotator of the case of *Reg. v. Davidson* (1897) 1 Can. Crim. Cas. 351. And it has been said to have been the rule at common law. *Battle v. State* (1884) 74 Ga. 101.

The proposition has not, however, commanded unanimous assent from all courts.

In one modern case it was held that evidence that the victim of a homicide, whose dying declarations were admitted on the trial of his alleged slayer, bore a general bad character, was immaterial on the question of the truth of such declarations and did not affect the declarant's veracity, and, therefore, was inadmissible. *State v. Tomassi* (1908) 75 N. J. L. 739, 69 Atl. 214.

d. Declarant's reputation for untruthfulness and want of veracity.

The courts and jurists who have spoken on the subject have been unanimous in the opinion that proof that the victim of a homicide bore so bad a reputation for truth and veracity as to render him unworthy of belief in a court of justice is competent and admissible to impeach his dying

declarations. *Carter v. State* (1915) 191 Ala. 3, 67 So. 981; *Lester v. State* (1896) 37 Fla. 382, 20 So. 232; *Battle v. State* (1884) 74 Ga. 101; *Redd v. State* (1896) 99 Ga. 210, 25 S. E. 268; *State v. Burt* (1889) 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631; *State v. Tomassi* (1908) 75 N. J. L. 739, 69 Atl. 214; *State v. Thomason* (1854) 46 N. C. (1 Jones, L.) 274.

Mr. Bishop, in his treatise on criminal procedure (1 Crim. Proc. § 1209), has expressed the same opinion, and the Louisiana supreme court, in *State v. Burt* (1889) 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631, *supra*, quoted him with approval.

e. Declarant's moral and physical weakness.

A dying declaration of the victim of a homicide containing nothing relating to the infidelity of the accused's wife is not open to impeachment by testimony as to his acknowledgment of having had illicit relations with her. *Land v. State* (1912) 11 Ga. App. 761, 76 S. E. 78.

In *State v. Thawley* (1845) 4 Harr. (Del.) 562, where defendant was acquitted, a majority of the court was apparently of the opinion that the credibility of dying declarations in a homicide case might be open to attack by proof as to the condition of the deceased at the time they were made, in connection with testimony respecting his intemperate habits and low state of health.

f. Declarant's mental aberration.

The credibility of the dying declarations of the victim of a homicide identifying the prisoner as his slayer, admitted in evidence in a murder trial, may be assailed by proof that the deceased met and talked with people with whom he was well acquainted, and mistook them at the time for others not resembling them, and that he habitually was mistaken in this way. *Com. v. Cooper* (1862) 5 Allen (Mass.) 495, 81 Am. Dec. 762.

Evidence that a hypodermic injection of morphia was administered to the victim of a homicide on the morning that he made a dying declaration

will not overcome testimony by a number of witnesses that his mind was perfectly clear when he made such declaration. *People v. White* (1911) 251 Ill. 67, 95 N. E. 1036.

g. Declarant's unbelief in God and a future state of rewards and punishments.

The disbelief of the deceased in accountability after death for deeds done in the body, and in a future state of rewards and punishments, impeaches dying declarations, and impairs, if not destroys, their value as evidence, according to several decisions. *Carver v. United States* (1897) 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; *Lambeth v. State* (1852) 23 Miss. 322; *Donnelly v. State* (1857) 26 N. J. L. 463, affirmed in (1857) 26 N. J. L. 601; *Goodall v. State* (1861) 1 Or. 333, 80 Am. Dec. 396.

And see note to *Reg. v. Davidson* (1897) 1 Can. Crim. Cas. 351.

A court will not presume a disbelief of a declarant in a state of rewards and punishments after death in order to exclude dying declarations from, or to impeach them after admission in evidence. *Donnelly v. State* (1857) 26 N. J. L. 463, affirmed in (1857) 26 N. J. L. 601, *supra*.

And this is so even where the dying declarant was not a Christian believer, but a heathen of an alien race. *People v. Lim Foon* (1915) 29 Cal. App. 270, 155 Pac. 477.

If, said the court in the latter case anent this subject, it should appear that the victim of a homicide whose dying declarations were admitted in evidence on the trial of his accused slayer, "was wholly obtuse to religious convictions, and that he entertained complete disbelief in a future spiritual existence, or had no regard whatsoever for the theory of rewards and punishments in the hereafter, his statement in extremis would not be supported by those considerations which may naturally be supposed to exercise an overruling influence upon the minds of men in such circumstances; and in such case, even if, nevertheless, the competency of the declaration as evidence would not be

destroyed, the credibility of it would be greatly impaired, and when given under such circumstances it should never be submitted to a jury unaccompanied by an explicit admonition that it should be viewed with great caution." *Ibid*.

In a very similar case, another court, when reversing for different reasons a conviction of manslaughter, said: "No error was committed in refusing a requested instruction to the effect that the jury could take into consideration as affecting his credibility the fact, if established to its satisfaction, that the deceased did not believe in future rewards and punishments at the time of making his dying statement. Had the declarant lived and taken the witness stand this objection would not have been tenable, and, since dying declarations are admitted only on account of the exigencies of the occasion, so often discussed and so well understood, no reason exists in such a case for relying on any certain belief with reference to a future life, its rewards, or punishments, any more than could be urged against a witness testifying in the presence of a jury. Every witness is presumed to speak the truth, and under the law the statements of a person made with full knowledge of impending death are entitled to the same presumption. The natural inclination of every sane person is to speak the truth on all occasions, exceptions thereto existing only by reason of some motive therefor. Testimony relative to dying declarations is admitted to show a motive for false statements; for example, such circumstances surrounding the last statements as may indicate a spirit of revenge or otherwise, a lack of ability to distinguish between persons or things, or incidents or statements tending to disclose doubts in the mind of the declarant as to whether death is near at hand, are admissible; but a religious belief, or want thereof, or lack of confidence in future rewards or punishments, as the case may be, is not an adequate basis for that purpose. *State v. Yee Gueng* (1910) 57 Or. 509, 112 Pac. 424.

In England, it has twice been held a prerequisite to admitting dying declarations in evidence in homicide cases that the deceased should have had a sense of religious responsibility. *Rex v. Pike* (1829) 3 Car. & P. (Eng.) 598; *Reg. v. Perkins* (1840) 9 Car. & P. (Eng.) 395, 2 Moody, C. C. 135.

The courts in the United States hold otherwise.

It is not a condition precedent to admitting in evidence a dying declaration that it shall be made to appear that the deceased believed in a Supreme Being and a future state of rewards and punishments. *State v. Hood* (1907) 63 W. Va. 182, 15 L.R.A. (N.S.) 448, 129 Am. St. Rep. 964, 59 S. E. 971.

That question, however, as distinguished from the question of the admissibility of evidence of lack of religious responsibility for the purpose of impeaching dying declarations which have been received in evidence, is not within the scope of the annotation.

In a trial for homicide in which the dying declarations of the deceased are offered in evidence, it is not competent for the accused to prove, in order to prevent their admission, that the declarant was a materialist who believed there was no God or future conscious existence, but when the dying declarations have been received in evidence, the defendant is at liberty to prove that the deceased was of such a character as to be unlikely to be impressed religiously with a sense of impending death, and that his dying utterances were unreliable. *State v. Elliott* (1877) 45 Iowa, 486, 20 Am. Crim. Rep. 322.

In such a case, the prisoner is entitled to prove the facts respecting the disbelief of the deceased in God and a future state, to affect the credibility of his dying declarations, and when the court refuses to allow evidence of such facts to come in for that purpose it commits prejudicial error. *Ibid.*

It is prejudicial error in the court in a trial for homicide, after admitting the dying declarations of the de-

ceased against the accused, to refuse to receive testimony offered by defendant tending to prove that the deceased disbelieved in God and in a future state of man beyond death. *STATE v. ROZELL* (reported herewith) ante, 400.

It is prejudicial error to exclude, on a trial for homicide in which the dying declarations of the deceased have been admitted in evidence against the accused, proffered proof that the declarant was an infidel who boasted of his disbelief in God and the devil, regardless of the time when such a state of mind existed. *Gambrell v. State* (1908) 92 Miss. 728, 17 L.R.A. (N.S.) 291, 131 Am. St. Rep. 549, 46 So. 138, 16 Ann. Cas. 147.

In affirming a judgment of conviction of manslaughter where the appellant alleged error in the refusal of the trial court to allow him to prove, as an impeachment of the dying declarations of the deceased which had been admitted in evidence, that in his lifetime the deceased had often stated that there was no hell or hereafter, and that all the punishment a man got he got in this world, the Mississippi supreme court said: "We are clearly of the opinion that the court erred in not permitting the testimony to show that [deceased's] religious belief was such as to detract from the value of his dying declarations;" but, as the verdict is one of which the appellant cannot complain in view of his own testimony, we do not regard the errors as entitling him to a new trial. *Hill v. State* (1886) 64 Miss. 431, 1 So. 494.

A motion for a new trial in a homicide case, on the ground that the deceased, whose dying declarations had been received in evidence without an exception by defendant's counsel, was a skeptic, an infidel, an unbeliever without a sense of accountability to his Creator, was denied in part because no diligence before or during the trial to ascertain his religious opinions had been used, and in part because it was not shown that he disbelieved in the existence of God and a future state of rewards and punishments, but only that he was irreligious, and thought all the modern

religions were humbugs. *Hartigan v. Territory* (1874) 1 Wash. Terr. 448.

h. Declarant's profanity.

The fact that the deceased used profane language both before and after making the dying declarations put in evidence by the prosecution in a trial for homicide does not, according to one decision, constitute an impeachment of such declarations—certainly not to the extent of rendering them inadmissible. *Kirby v. State* (1907) 151 Ala. 66, 44 So. 38.

It is none the less true that dying declarations of the deceased, admitted in evidence in a trial for homicide, suffer in weight and credibility with the jury when it is shown that the declarant was of a wicked character, blasphemous of speech, and wantonly disregarding of the laws of God. *Nesbit v. State* (1871) 43 Ga. 238.

And it is prejudicial error in a trial court to exclude evidence offered by the accused in a trial for homicide that, immediately before making the dying declarations admitted in evidence, the deceased was in a reckless and irreverent frame of mind and used profane language, for such facts tend to impair the evidential value and credibility of the declarations. *Tracy v. People* (1880) 97 Ill. 101.

i. Declarant's contradictory, conflicting, and inconsistent statements respecting the crime under investigation.

The courts have differed widely over the question of whether or not the dying declarations of the victim of a homicide, when put in evidence on the trial of his accused slayer, may be impeached by proof that the deceased had made other statements inconsistent with or contradicting such declarations.

There are decisions both affirmative and negative, the greater number being on the former side.

In sundry cases, as the citations immediately following attest, it has been held that the dying declarations of the victim of a homicide, if admitted in evidence on the trial of one accused

of killing him, cannot be impeached by proof that the deceased made other statements contradictory to, or in conflict and inconsistent with, such declarations. These cases hold such statements incompetent. *Maine v. People* (1876) 9 Hun (N. Y.) 118; *Wroe v. State* (1870) 20 Ohio St. 460; *State v. Taylor* (1900) 56 S. C. 360, 34 S. E. 939; *State v. Stuckey* (1900) 56 S. C. 576, 35 S. E. 263; *State v. Mills* (1908) 79 S. C. 187, 60 S. E. 664; *State v. Brown* (1917) 108 S. C. 490, 95 S. E. 61.

These cases hark back to *Wroe v. State* (1870) 20 Ohio St. 460, *supra*, in which the Ohio supreme court held inadmissible statements made by deceased at another time and occasion, when not in extremis, which were in conflict with his dying declarations, chiefly on the ground that no predicate had been laid by calling attention to the inconsistent statements, as the rules of evidence required when living witnesses were sought to be thus discredited.

The United States Supreme Court afterwards pronounced this case contrary to the weight of authority, and adopted the contrary doctrine. *Carver v. United States* (1897) 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228.

The New York case of *Maine v. People* (N. Y.) *supra*, followed and rested upon the authority of *Wroe v. State* (Ohio) *supra*. In that case the defendant was accused of causing the death of a woman by a criminal abortion, and her statements attesting his innocence, made at a time when she was not moribund and which were no part of the *res gestæ*, were held inadmissible by way of impeaching her declarations in extremis accusing defendant of acts which brought about her death. To support that conclusion the court there reasoned as follows: At various times during the progress of the trial, it said in its opinion affirming defendant's conviction, the plaintiff in error offered to prove declarations of the deceased, not in extremis, by way of contradiction of her dying declarations. Such evidence was rejected and exceptions

taken. . . . The theory upon which such evidence was claimed to be proper was this: The deceased gave her dying declarations in the absence of the plaintiff in error, and he therefore had no opportunity to cross-examine her and so lay the foundation for such contradictions. As a consequence it is claimed that he should have the same right to establish these contradictory facts as though she had been examined in relation thereto. Such, however, is not the law. The general rule requires an examination of every witness as to any contradictory or inconsistent statements made by him before the same may be proved against him by way of impeachment of his evidence.

. . . . The principle on which the rule is founded is that both party and witness have a right to the explanation which the latter may give of the statements imputed to him. The case under consideration is not an exception to this general rule, as is expressly decided in *Wroe v. State* (1870) 20 Ohio St. 460.

Runyan v. Price (1864) 15 Ohio St. 1, 86 Am. Dec. 459, sustains the same view and reviews the history of the law upon this subject.

Continuing, the court, offered another reason for its conclusion that the contradictory statements alleged were not competent to impeach the dying declaration, to wit, that they were narratives of past transactions and within the rule applying to hearsay evidence. And finally, advertent to the contention that the deceased's statements exculpating the accused were competent under the rule making declarations against the interest of the declarant admissible, the court said: This principle has no application to the facts offered to be proved. The interest with which the declarations are at variance must be of a pecuniary nature.

The courts of South Carolina have, for a score of years, consistently adhered to the doctrine of *Wroe v. State* (Ohio) *supra*, and *Maine v. People* (1876) 9 Hun (N. Y.) 113, *supra*.

In the first of a line of cases in point, it was said by the court that to

hold it competent to impeach the dying declarations of a decedent by testimony tending to prove that she had made other statements in conflict with such declarations, when not under oath nor in the shadow of impending death, would both offer a strong temptation to fabricate false testimony to save the life of the accused when death had made refutation impossible, and would tend to nullify the dying declarations as evidence. *State v. Taylor* (1900) 56 S. C. 360, 34 S. E. 939.

In the most recent reported case (*State v. Brown* (1917) 108 S. C. 490, 95 S. E. 61, *supra*), the same court quoted with approval the language just given in substance, and followed the *Taylor* Case in affirming a conviction of manslaughter where the accused had not been allowed to prove deceased's statements in conflict with his dying declarations.

As in the *Taylor* Case, it was held in *State v. Stuckey* (1900) 56 S. C. 576, 35 S. E. 263, that unsworn statements alleged to have been made by the victim of a homicide when he did not contemplate impending death, and at a time too long after the event to be part of the *res gestæ*, inconsistent and in conflict with his dying declarations, were incompetent and inadmissible in evidence in a trial for murder.

In *State v. Mills* (1908) 79 S. C. 187, 60 S. E. 664, the trial court was declared to have been strictly correct in refusing to allow the accused in a homicide case to offer testimony to show that the deceased had made to the proffered witnesses statements in conflict with his dying declarations, since the established rule in South Carolina precludes the admission of such statements.

And finally, in *State v. Brown* (1917) 108 S. C. 490, 95 S. E. 61, where the defendant had been convicted of manslaughter and complained on appeal that the trial court would not allow him to prove statements made by deceased to a hospital nurse in contradiction of his previous dying declarations, which had been admitted in evidence against him, the

court held there had been no error, and in affirming the conviction said: In the case of *State v. Taylor* (S. C.) *supra*, the court decided that dying declarations cannot be impeached by statements made by deceased to another person, at another time, and when not under shadow of impending death. . . . That decision was reaffirmed in *State v. Stuckey* (S. C.) *supra*, and those cases are conclusive of the question under consideration.

But these cases comprise all upon that side of the question, unless *Sutton v. State* (1877) 2 Tex. App. 342, cited and discussed *infra*, and having unique features, be aligned with them; that case, however, stands alone in its own state.

That the dying declarations of the victim of a homicide when admitted in evidence on the trial of one accused of slaying him, may be impeached and discredited by proof that the deceased made other statements contradictory to them, or inconsistent and in conflict with them, has been held in a great number of cases.

United States.—*Carver v. United States* (1897) 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228.

Alabama.—*Moore v. State* (1848) 12 Ala. 764, 46 Am. Dec. 276; *Shell v. State* (1889) 88 Ala. 14, 7 So. 40; *Gregory v. State* (1903) 140 Ala. 16, 37 So. 259; *Parker v. State* (1909) 165 Ala. 1, 51 So. 260.

California.—*People v. Lawrence* (1863) 21 Cal. 368; *People v. Amaya* (1901) 134 Cal. 531, 66 Pac. 794.

Colorado.—*Salas v. People* (1911) 51 Colo. 461, 37 L.R.A. (N.S.) 252, 118 Pac. 992.

Delaware.—*State v. Lodge* (1892) 9 Houst. 542, 33 Atl. 312; *State v. Fleetwood* (1906) 6 Penn. 153, 65 Atl. 772; *State v. Uzzo* (1906) 6 Penn. 212, 65 Atl. 775.

Florida.—*Morrison v. State* (1900) 42 Fla. 149, 28 So. 97.

Georgia.—*Battle v. State* (1884) 74 Ga. 101; *Hall v. State* (1906) 124 Ga. 651, 52 S. E. 891; *Washington v. State* (1911) 137 Ga. 218, 73 S. E. 512; *Pyle v. State* (1908) 4 Ga. App. 811, 62 S. E. 540.

Illinois.—*Dunn v. People* (1898)

172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447.

Indiana.—*Green v. State* (1900) 154 Ind. 655, 57 N. E. 637.

Kentucky.—*Coyle v. Com.* (1906) 122 Ky. 781, 93 S. W. 584; *Allen v. Com.* (1909) 134 Ky. 110, 119 S. W. 795, 20 Ann. Cas. 884; *Tolliver v. Com.* (1914) 161 Ky. 81, 170 S. W. 515.

Louisiana.—*State v. Burt* (1889) 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631; *State v. Charles* (1904) 111 La. 933, 36 So. 29.

Michigan.—*Hurd v. People* (1872) 25 Mich. 405.

Mississippi.—*Nelms v. State* (1850) 13 Smedes & M. 500, 53 Am. Dec. 94.

Missouri.—*State v. Hendricks* (1903) 172 Mo. 654, 73 S. W. 194.

North Carolina.—*State v. Blackburn* (1879) 80 N. C. 474.

Oklahoma.—*Morris v. State* (1911) 6 Okla. Crim. Rep. 29, 115 Pac. 1030.

Oregon.—*State v. Shaffer* (1893) 23 Or. 555, 32 Pac. 545; *State v. Fuller* (1908) 52 Or. 42, 96 Pac. 456.

Pennsylvania.—*Com. v. Silcox* (1894) 161 Pa. 484, 29 Atl. 105.

Tennessee.—*M'Pherson v. State* (1836) 9 Yerg. 279; *Morelock v. State* (1891) 90 Tenn. 528, 18 S. W. 258.

Texas.—*Felder v. State* (1887) 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145; *Hamblin v. State* (1895) 34 Tex. Crim. Rep. 368, 30 S. W. 1075; *Herd v. State* (1902) 43 Tex. Crim. Rep. 575, 67 S. W. 495; *McCorquodale v. State* (1905) 54 Tex. Crim. Rep. 344, 98 S. W. 879; *Hunter v. State* (1910) 59 Tex. Crim. Rep. 439, 129 S. W. 133; *Lyles v. State* (1912) 64 Tex. Crim. Rep. 621, 142 S. W. 592.

Washington.—*State v. Mayo* (1906) 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881.

The reasons which seem to have been most persuasive in leading to their conclusions the courts which have held evidence of conflicting, contradictory, and inconsistent statements of the victim of a homicide, competent in impeachment of his dying declarations, have been stated, first, by an eminent English jurist, and second, by an equally distinguished American judge: When, said Baron Alderson, in *Ashton's Case* (1837) 2

Lewin, C. C. (Eng.) 147, a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are, nevertheless, open to observation, for, though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination.

Later, in *People v. Lawrence* (1863) 21 Cal. 368, Mr. Justice Field, then the chief justice of the supreme court of California, and afterwards a member of the Supreme Court of the United States, said that though the condition of the person making a declaration in the last hours of life under a sense of impending dissolution might compensate for the want of an oath, it can never make up for the want of a cross-examination, and therefore there would be no justice in any rule which would deprive the accused in such circumstances of the right to impeach the credit of the deceased by proof that he had made contradictory statements as to the homicide and its cause.

According to the supreme court of Georgia, the same public policy which requires dying declarations to be received in evidence to promote public justice requires the admission in evidence of contrary or inconsistent statements of the deceased, favorable to life and liberty of the accused. *Battle v. State* (1884) 74 Ga. 101.

The same rules of evidence that apply to contradictory statements of living witnesses testifying under oath apply to contradictory statements of a deceased person when dying. *M'Pherson v. State* (1836) 9 Yerg. (Tenn.) 279.

Statements of a deceased, inconsistent with his dying declarations put in evidence by the prosecution on a trial for murder, which were favorable to the defense and were made at

virtually the same time, in the same place, and when the deceased was in extremis, have been held competent evidence for the accused as original dying declarations in his behalf and of a dignity surpassing mere inconsistent or contradictory statements impeaching the dying declarations proved by the state. *Tittle v. State* (1914) 188 Ala. 46, 52 L.R.A. (N.S.) 910, 66 So. 10.

A statement by the victim of a homicide, separated in time, and made to another person than the one who testified to a dying declaration accusing the defendant of slaying the speaker, which throws light upon the dying declaration and gives it a different meaning from what it seems at first blush to bear, the accused is entitled to have in evidence as explanatory matter. *State v. Wilks* (1919) 278 Mo. 481, 213 S. W. 118.

It is open to the defendant in a homicide case in which have been admitted in evidence several dying declarations, oral and written, made by deceased in extremis to show, if such is the fact, any inconsistencies and contradictions in them. *Morris v. State* (1911) 6 Okla. Crim. Rep. 29, 115 Pac. 1030.

The writer of the opinion in *Hamblin v. State* (1895) 34 Tex. Crim. Rep. 385, 30 S. W. 1075, arguendo declared it well settled, and correctly so, that dying declarations might be impeached by proving contradictory statements of the deceased.

Mr. Wharton was at pains to say (Crim. Ev. 8th ed. § 298) that the same principles of law applied to contradictory statements of persons in extremis as to those of a witness examined under oath; and Mr. Bishop has expressed the opinion (1 Crim. Proc. § 1209) that contradictions in dying declarations may be shown, to detract from their weight with the jury. These views received explicit approval of the Louisiana supreme court in the case of *State v. Burt* (1889) 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631.

A defendant on trial for murder is entitled to attack the credibility of and impeach the dying declarations of

the deceased charging him with the crime, and admitted in evidence against him, by proof that deceased, within a few hours of receiving his mortal wound, told one person that defendant did not shoot intentionally, but that the shooting was accidental, that a few days later deceased told another person that he and the accused were warm friends and had no quarrel on the occasion of the shooting, and repeated the statement to the first person that the shooting was unintentional and accidental, as accused and he had been drinking when defendant staggered back and stumbled so that the gun went off, and, finally, that deceased, to a third person, afterwards repeated that defendant did not shoot on purpose, but accidentally while both were fooling with a gun, and that deceased, as soon as he was able to get out, would go to court and get defendant out of jail—it, therefore, is prejudicial error, requiring the reversal of a conviction, to exclude testimony of such statements of deceased contradictory of and inconsistent with his dying declarations. *Lyles v. State* (1912) 64 Tex. Crim. Rep. 621, 142 S. W. 592.

We come now to the case of *Sutton v. State* (1877) 2 Tex. App. 342, above mentioned, in which the question of admissibility in evidence of statements of the victim of a homicide, inconsistent with and contrary to his dying declarations, was discussed. The defendant in that case was convicted of murder, but obtained a reversal for error of the trial judge in instructing the jury respecting the laws of self-defense. During the trial the court allowed a witness for the prosecution to testify to dying declarations of the deceased against the accused, but afterwards withdrew such declarations from the consideration of the jury. The defendant contended that there was prejudicial error in the refusal of the court to allow him to counteract the effect of the dying declarations by proving that deceased had made contradictory statements to two other persons. In answer to this contention the reviewing court said that the accused could

not be heard to complain of the action of the trial court in withdrawing from the jury the dying declarations, because that was a ruling in his favor, and, notwithstanding the assertion that the withdrawal failed to erase from the jurors' minds a necessarily unfavorable impression made through hearing the dying declarations, which the accused ought to have been allowed to remove, the court held that the counteracting testimony he offered for the purpose "was neither dying declarations nor *res gestæ*, but was simply hearsay testimony not coming within any known rule of evidence admitting such testimony."

This case, later, was distinguished, and upon this question, was virtually overruled, in *Felder v. State* (1887) 23 Tex. App. 477, 59 Am. Dec. 777, 5 S. W. 145, which held that the introduction by the state in a trial for homicide, of the dying declarations of the victim accusing the prisoner of the crime, entitled the defendant to prove that the deceased, soon after he received his mortal wound and subsequently, made statements to the effect that he did not know who inflicted that wound, and that to rule out such proof constituted prejudicial error in the trial court.

According to the court in this case, the precise question involved in the last point was then one of first impression in the courts of last resort in Texas. The *Sutton Case* was cited as holding statements contradicting dying declarations inadmissible in the circumstances there, where the dying declarations had previously been withdrawn from the jury, and consequently when there was nothing to contradict. The reasoning of that decision, said the court in that connection, is not harmonious with the conclusion here reached. Neither from citations to authorities furnished by the state, nor from our own researches, have we been able to find a precedent for excluding evidence of statements made by deceased contradictory of his dying declarations, save one case in 20 Ohio (evidently a reference to *Wroe v. State* (1870) 20 Ohio St. 460).

When an affidavit made by deceased on the day he was killed differs in sundry respects from his dying declarations admitted in evidence on the trial of his alleged slayer, and contains some additional statements, and omits others, but includes nothing contradictory to such declarations and is in substantial accord therewith, no error is committed by the trial court in refusing to admit it in evidence when offered by the accused for the purpose of impeaching the dying declarations. *Leigh v. People* (1885) 113 HL 372.

No error is committed in a trial for homicide in refusing to permit a witness to testify that deceased made to him statements differing from his dying declarations, when the witness cannot state even the substance of such variant statements, or aught concerning them except his conclusion that they were different. *Snell v. State* (1890) 29 Tex. App. 236, 25 Am. St. Rep. 723, 15 S. W. 722.

While queries of defendant's counsel in a murder trial, put in cross-examining a witness for the prosecution who had testified in chief respecting some occurrences at the victim's dying bedside, aimed to bring out statements alleged to have been made by the deceased contradicting or materially qualifying accusations made by him in presence of the accused, were held improper cross-examination, and objections to them to have been rightly sustained on that ground by the trial court, it was, in the same case, said that the prisoner would have been entitled to elicit the evidence sought in the irregular way, had he offered it as a part of his own case to impeach dying declarations. *People v. Amaya* (1901) 134 Cal. 531, 66 Pac. 794.

According to the Washington supreme court, the proper way to prove that deceased made statements inconsistent with and contradictory of his dying declarations, which were admitted in evidence in a homicide case for the purpose of impeaching them or impairing their probative force, should be to direct the witness's attention to the matter and let him, in

his own language, relate what the deceased said concerning it, and not to draw out his testimony by answers to questions of counsel embodying the alleged remarks coupled with innuendoes and explanations. *State v. Mayo* (1906) 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881.

A victim of manslaughter, whose dying declarations completely exonerating himself from all fault in the fatal encounter with his slayer has been received in evidence on the latter's trial, cannot be impeached by proof that on the morning of the affray his father went to his house and urged him not to have any difficulty with the accused, because he may only be impeached by what he himself said or did, and not by the speech or conduct of another person. *Phillips v. State* (1914) 11 Ala. App. 15, 65 So. 444.

IV. Conclusion.

It will have been noted that virtually the only serious difference among jurists in respect of impeaching or discrediting dying declarations admitted in evidence in trials for homicide has been over the use for that purpose of the declarant's statements that conflicted or were inconsistent with such declarations. Those at odds on the question have differed because they held contrary views respecting the application and potency of the general rule of evidence which requires, as a condition precedent to discrediting the living witness by proving his statements contradictory of or inconsistent with his testimony on the stand, that his attention shall first be called to them, and to the time and place where they were made, in order that he may explain or negative them, and as, manifestly, this rule cannot be complied with in respect of dying declarations, some courts have held that proof of the declarant's contradictory statements is incompetent and inadmissible. By far the greater number of courts have held that inasmuch as dying declarations are themselves exceptional bits of evidence, admissible only from public policy to prevent crime from going

unpunished, the defendant ought not to be prevented from impeaching them by any lawful means, by a technical rule with which it is impossible to comply. The declarant being dead, the prosecution cannot produce him as a witness and the accused cannot cross-examine him. The law does not require the impossible from either the state or the prisoner.

Aside from this dispute, it may be

said that all courts are virtually in accord in holding that dying declarations are open to impeachment upon any ground and by any means which the law regards as legitimate to employ to impeach a living witness and discredit his testimony.

It follows that *LIDDELL v. STATE* (reported herewith) ante, 405, was decided in harmony with the authorities.
J. B. G.

CHARLES S. TODD, Admr., etc., of Mary A. Rhodes, Deceased,
v.

R. O. RHODES, Appt.

Kansas Supreme Court — December 11, 1920.

(108 Kan. 64, 193 Pac. 894.)

Divorce — attorney representing both parties — effect.

1. A husband who employs an attorney to foster the bringing of an action for divorce by his wife, and to represent him as well as her in such litigation, with instructions to do whatever is necessary to bring about a judgment for divorce, cannot be heard, after the rendition of such judgment, to attack its validity on the ground that public policy forbids an attorney to represent both parties to a divorce action.

[See note on this question beginning on page 427.]

Attorney and client — dismissal of suit — effect on authority.

2. Where a husband employs an attorney to represent him in negotiations and litigation relative to a divorce, with instructions to take such steps as may seem desirable to bring about an action by the wife and a judgment for divorce, and the attorney, with the full knowledge and consent of each party, undertakes to represent both of them, signing the

petition as attorney for the plaintiff, his authority to act for the husband does not cease upon a judgment of dismissal for want of prosecution, brought about by his illness, and he is still authorized to consent in behalf of the husband to a reinstatement of the case at a subsequent term of court, unless a disability results from a dual representation.

[See 2 R. C. L. 993.]

Headnotes by MASON, J.

APPEAL by defendant from a judgment of the District Court for Shawnee County (Whitcomb, J.) denying a motion to set aside a judgment in favor of plaintiff in an action for a divorce. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Z. T. Hazen and J. J. Schenck, for appellant:

When the case was dismissed at the January, 1919, term of the district court for want of prosecution, the order of the court dismissing the case was a final order, and the court lost

jurisdiction of the cause and of the parties at the close of that term of court.

Oberlander v. Confrey, 38 Kan. 462, 17 Pac. 88; *Allen v. Dodson*, 39 Kan. 220, 17 Pac. 667; *Brown v. Galena Min. & Smelting Co.* 32 Kan. 532,

4 Pac. 1013; *Smith-Frazer Boot & S. Co. v. Derse*, 41 Kan. 150, 21 Pac. 167; *Moore v. Toennisson*, 28 Kan. 608; *Gooden v. Lewis*, 101 Kan. 483, 167 Pac. 1133; *Sylvester v. Riebolt*, 100 Kan. 245, 164 Pac. 176; *Welling v. Welling*, 100 Kan. 139, 163 Pac. 635; *Vail v. School Dist.* 86 Kan. 808, 122 Pac. 885; *Martindale v. Battey*, 73 Kan. 92, 84 Pac. 527; *Johnson v. Jones*, 58 Kan. 745, 51 Pac. 224; *Evangelical Asso. Pub. House v. Heyl*, 61 Kan. 634, 60 Pac. 317; *Mulcahy v. Moline*, 101 Kan. 532, 171 Pac. 597; *State ex rel. Noble v. Langmade*, 101 Kan. 815, 168 Pac. 847; *Jarvis v. Martin*, 77 Conn. 19, 58 Atl. 15; *Jameson v. Hilton*, 85 Mo. App. 298; *Gray v. Ames*, 220 Ill. 251, 77 N. E. 219, 5 Ann. Cas. 174.

Mr. Branaman, as attorney for defendant, could not agree with himself, as attorney for the plaintiff, to set aside the judgment of dismissal and thus confer jurisdiction upon the court, without some kind of notice to the defendant.

Owen v. Smith, 155 Iowa, 463, 136 N. W. 119; *Owens v. Cocroft*, 14 Ga. App. 322, 80 S. E. 906; *Grames v. Hawley*, 50 Fed. 319; *Sibbald v. United States*, 12 Pet. 488, 9 L. ed. 1167; *Jackson v. Ashton*, 10 Pet. 480, 9 L. ed. 502; *Wawrzyniakowski v. Hoffman & B. Mfg. Co.* 137 Wis. 629, 119 N. W. 350; *Frowley v. Superior Ct.* 158 Cal. 220, 110 Pac. 817; *Emanuel v. Cooper*, 153 Iowa, 572, 133 N. W. 1064; *Scott v. Scott*, 174 Iowa, 740, 156 N. W. 834.

Messrs. D. H. Branaman and W. E. Atchison for appellee.

Mason, J., delivered the opinion of the court:

On March 14, 1918, Mary A. Rhodes brought an action for divorce against R. O. Rhodes, who waived the issuance and service of summons and entered a voluntary appearance, signing a writing to that effect, which included an agreement that the case might be taken up and tried at any time without further notice to him. On March 31, 1919, the case was called for trial, and, no response being made, it was dismissed for want of prosecution. On April 10, 1919, at a new term of court, the order of dismissal was set aside and upon a

trial the plaintiff was granted a divorce. She died on June 15, 1919. On July 20, 1919, the defendant moved to set aside the judgment on the ground that he had had no notice of the proceedings subsequent to the dismissal. The motion was resisted by the administrator of the plaintiff's estate and was denied the present appeal being taken from that ruling.

In view of the evidence and the findings of the trial court, the following facts must be regarded as established: About February 1, 1918, the defendant, a resident of Kansas City, Missouri, came to an attorney of Topeka and asked him to represent both parties in procuring a divorce, saying that he had no grounds for bringing such an action himself, and desired one to be brought by his wife, who lived there, and who had abundant basis therefor. An arrangement was then made, to which the plaintiff later became a party, that such an action was to be brought by the attorney, who was to appear upon the records as her attorney, while in reality representing the defendant as well, being authorized by him to do whatever might be necessary in order to obtain the divorce. A property settlement and the payment of alimony was agreed upon, and the action was brought. Several continuances were had, because of the defendant being unable to pay off a real estate mortgage, which by the agreement he was to satisfy. The order of dismissal grew out of the fact that the plaintiff and the attorney were both sick at the time the case was reached, and neither had notice of its having been set for trial. As soon as the attorney learned of the dismissal, he applied for a reinstatement in behalf of both parties, advising the court of the facts substantially as here stated.

1. The order setting aside the dismissal, having been made at a subsequent term of court, depends for its validity upon the consent of

the parties. The defendant asserts that, even leaving out of account any question of dual representation, and assuming the situation to be the same as though he had been represented by a separate attorney, his attorney could not give an effective consent in his behalf, because his authority necessarily ceased with the judgment of dismissal. Language tending to support that view is used in *Wawrzyniakowski v. Hoffman & P. Mfg. Co.* 137 Wis. 629, 119 N. W. 350; but we cannot accept it as the expression of a general rule applicable to the facts of this case. Doubtless the presumption is that an attorney is employed to conduct litigation to judgment and no further, and an order dismissing an action may often bring the employment to an end. 6 C. J. 672, 673; 3 Am. & Eng. Enc. Law, 329. But there can be no hard and fast rule on the subject. Much must necessarily depend upon the particular circumstances and the character of the employment. For an illustration see *Macpherson v. Bacon*, 180 Ky. 773, 785, 203 S. W. 744. If an attorney is employed to endeavor to attain a certain result, and through some accident or inadvertence, or even through neglect or oversight on his part, an order is made dismissing an action brought by him for the purpose, it cannot be that a new employment is necessary to authorize him to ask for its reinstatement; and if the client is a defendant, who has employed counsel to represent him for the purpose of having an affirmative judgment rendered, the situation is not essentially different. If the defendant in the present case had employed some other attorney to represent him in negotiations and litigation with regard to a divorce, instructing him to do whatever he deemed advisable to bring about the granting of the divorce and a division of property, it would scarcely be contended that such at-

torney could not bind his client by a consent to the reinstatement of the case after its dismissal, as readily as by an original entry of appearance. Here the waiver of summons was embodied in a writing signed by the defendant in person, but would, of course, have been equally effective if made by a properly authorized attorney. Whether or not the fact that an attorney represented the plaintiff in a divorce action would prevent his making a valid entry of appearance for the defendant is not a question which affects the particular feature of the case we are now discussing. We entertain no doubt that the court had jurisdiction to set aside the order of dismissal upon the consent of the attorney representing the defendant, unless such result was prevented by the fact that the same attorney was representing the plaintiff.

2. The general rule that an attorney may not at the same time represent parties whose interests conflict is subject to an exception, where he so acts with the full knowledge and consent of both. If, in the present instance, the double representation was fatal to the validity of the order of reinstatement, it must be because, in an action of divorce, it is against public policy for the same attorney to represent both parties. The public has an interest in seeing that a divorce is not granted except upon legal grounds, and of course the willingness of both spouses to sever the marital relation is quite beside the purpose. To allow the same attorney to represent them would obviously pave the way to judgments by agreement, and it may be assumed that such a practice is not to be tolerated. But we agree with the trial court that the defendant has no standing to invoke that principle for his own relief. He has himself brought about the condition of which he complains. He deliberately set the machinery to work to bring about a result which he de-

Attorney and client—dismissal of suit—effect on authority.

sired,—his release from the marriage tie and the adjustment of property interests. By reason of the death of the plaintiff the divorce is no longer necessary to his freedom, and is now merely a bar to a claim upon property which he might otherwise assert. The interest of good morals or the welfare of society would be in no way promoted by permitting a rule designed to

Divorce—
attorney
representing
both parties—
effect.

that end to be made use of to accomplish so entirely selfish a purpose as that for which it

is now invoked. While there is some conflict in judicial opinion on the subject, there is much authority for the rule that neither party to a divorce can be heard to attack it on the ground of consent or collusion. 9 R. C. L. 451; L.R.A. 1917B, 460, note; Bledsoe v. Seaman, 77 Kan. 679, 95 Pac. 576. The motive for the assault upon the decree may well be a determining factor in case of doubt. The following quotations give expression to this view:

"Independently of any other considerations, if the motion was properly made, and in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside, not from any regard to the parties concerned, but from motives of public policy. In such a case, however, it should be made apparent that the party so moving was acting from good motives, and not for any expected personal advantage." *Singer v. Singer*, 41 Barb. 139, 140.

"Upon the plaintiff's own statement, she was a party to the perpetration of a fraud upon the court. She made an illegal agreement in order to secure \$1,000, which she alleges the defendant promised to pay her, and she now complains because of the defendant's failure to pay the amount which he promised. The purpose of the plaintiff is pure-

ly mercenary. She was willing to be a party to the perpetration of the fraud upon the court; but, because the defendant has not paid her the money which he promised her, she proclaims the fraud and asks a court of equity to set aside a judgment entered against her. The plaintiff is not in a position to invoke the aid of the court to relieve her from a situation in which, according to her testimony, she has been placed by her own participation in the fraud of which she now complains." *Whitley v. Whitley*, 60 Misc. 201, 202, 111 N. Y. Supp. 1079.

"The public, however, has an interest in the proper maintenance of the marriage relation, and public policy forbids that the parties shall agree to its dissolution, or shall enter into any collusion to bring about that result. . . . But this writ of error is not sued out to restore the marriage relation. Death has prevented that. The sole reason for entertaining this writ of error after the death of Mrs. Mallory is in order that plaintiff in error may be restored to his statutory rights in the property left by her. . . . We are of the opinion that it would be inequitable and unjust to permit plaintiff in error to now prosecute this writ of error to a reversal of the decree for the sole purpose of permitting him to procure a share of that estate." *Mallory v. Mallory*, 160 Ill. App. 417, 423.

"It is clear to us that the appellant, in making such motion [to vacate a decree of divorce], was not actuated by proper motives or proceeding in good faith. . . . It was for her to make it appear that she was acting with good motives, and not from any increase of advantage that she hoped or expected to gain thereby." *Wiemer v. Wiemer*, 21 N. D. 371, 376, 377, 130 N. W. 1018.

The judgment is affirmed.

ANNOTATION.

Validity and effect of divorce as affected by representation of both parties by same attorney.

Generally, as to collusion as bar to divorce, including collusion as ground for vacation of decree, see annotation following *Edleson v. Edleson*, 2 A.L.R. 689, 714; and as to collateral attack on divorce decree by party at whose instance it was obtained, see annotation following *Laird v. State*, 3 A.L.R. 522.

It would seem, as is held in the reported case (*TODD v. RHODES*, ante, 423), that public policy will not tolerate the representation of both parties to a suit for divorce by the same attorney, but that as the public is the party interested in seeing that a divorce is not improperly granted, the parties to the suit, at least in the absence of fraud, have no standing to attack the validity of a decree obtained under such circumstances, upon the ground that public policy forbids double representation by a single attorney.

And there is additional judicial support for the latter conclusion. Thus, in *Hamilton v. McNeill* (1911) 150 Iowa, 470, 129 N. W. 480, Ann. Cas. 1912D, 604, it was held that a husband who counseled with and employed the attorney who brought a divorce suit for his wife against him, and colluded in the obtaining of the decree in her favor, adjudging him to be the guilty party, could not contest the validity of the decree when it was pleaded in defense to an action brought by him for the alienation of his wife's affections. And see *Moor v. Moor* (1901) — Tex. Civ. App. —, 68 S. W. 347, wherein it was held that a husband who employed attorneys to procure a divorce for his wife, pursuant to their collusive agreement, cannot have the decree set aside because of his own fraudulent participation, even though the wife overreached the husband by subsequently refusing to keep her agreement regarding certain property. In discussing the effect of the overreaching, the court said: "By enter-

ing into a collusion with the appellee, and employing counsel to institute suit and obtain a decree of divorce, though entered into and done by him for the purpose of effecting a settlement with his wife of their community effects, he is as much estopped from questioning the validity of the decree as he would have been had he appeared and answered in the case. That his wife may have overreached him, and intended not to abide by the settlement after the decree was obtained, does not relieve the appellant from the effect of the alleged fraud and collusion on his part, nor place him in any better light than he would appear in had his wife's intention concurred only with his, and not have reached beyond his in fraud. It is well settled that the validity of a decree of divorce cannot be collaterally attacked by parties who voluntarily appear and submit to the jurisdiction, on the ground that neither of the parties was subject to the jurisdiction of the court, although the divorce might not be effectual to protect them against the state." And in *Johnson v. Johnson* (1913) 182 Ala. 376, 62 So. 706, where a wife permitted her husband and his attorney to institute in her name proceedings against the husband for a divorce, whereupon a decree in her favor was collusively obtained, it was held that she could not, after the husband's death, attack the decree in a collateral proceeding for the purpose of acquiring the property of the decedent as his widow. So, in *Robinson v. Robinson* (1914) 77 Wash. 663, 51 L.R.A.(N.S.) 534, 138 Pac. 288, the petition of a wife to set aside a divorce obtained by her, based on the theory that she had been induced to obtain it by duress, was denied upon the ground of collusion; it appearing that the husband employed the attorney to represent the wife, that the wife consented to the bringing of suit merely to aid the husband in his busi-

ness and with the understanding that there would be a remarriage, and the only evidence of duress being the husband's representation that her refusal to secure a divorce from him greatly embarrassed him in his business, and that her continued refusal would compel him to leave the state.

And in *Harft v. Harft* (1883) 16 N. Y. Week. Dig. 461, where it appeared that the wife's attorney had been introduced to her by the husband after previously agreeing with the husband to secure a divorce for a specified sum which the husband agreed to pay, that thereafter an action was commenced and an order for alimony and counsel fees entered, which it was agreed between the attorney and the husband should not be enforced, and that a judgment of divorce was obtained in good faith by the wife upon evidence proving that she was entitled to the decree,—it was held that the decree would not be set aside on the motion of the husband on the ground of fraud and collusion, the court saying: "Since plaintiff was not a party to the collusion between her attorney and defendant, the judgment recovered by her was not necessarily invalidated by reason of this fraudulent misconduct, and since plaintiff was entitled to the judgment, the fact that it was brought about by fraud and collusion between her attorney and defendant, presented no reason for setting it aside.

But fraud may entitle a party who has consented to a dual representation by a single attorney to attack a decree for divorce. At least in *Megarge v. Megarge* (1876) 2 N. Y. Week. Dig. 352, a wife was allowed to vacate by motion a decree of absolute divorce rendered against her on the charge of adultery, where it appeared that the parties, mutually desiring a divorce, applied to an attorney and made arrangements to secure a divorce on the ground of abandonment, and that the wife supposed the decree was granted on that ground, and therefore made no defense; but, by means of manufactured evidence, an absolute decree was fraudulently entered against her on the ground of adultery. In this case it expressly appeared that the at-

torney was consulted by both the parties and that he gave them both advice in the matter, but no point was made against the wife on account of her consent, the relief being granted wholly on the ground of fraud practised on her; the judge stating that courts have always intervened on motion to vindicate their own process and proceedings against oppressive, fraudulent, and collusive uses of them. Compare *Moor v. Moor* (Tex.) as set out and quoted supra.

In connection with the point made in the reported case (*TODD v. RHODES*, ante, 423) to the effect that public policy forbids representation of both parties to a divorce proceeding, see the analogous case of *Johnson v. Johnson* (1906) 141 N. C. 91, 53 S. E. 623, where, in holding that upon the hearing of a motion to set aside a decree annulling a marriage for incapacity of the plaintiff, the respective parties cannot be represented by the same counsel, but must appear by individual counsel, the court said: "Reasons based upon principles of sound public policy compel us to dismiss this proceeding to set aside the judgment. We are of opinion that the same counsel cannot represent both parties to the action. In so holding, we mean no reflection whatever upon the reputable and eminent counsel, who have undertaken together to represent both parties in making the motion. They have argued strenuously before us that there are no conflicting interests, and that therefore they can properly represent both parties. We are compelled to differ from them. In *Moore v. Gidney* (1876) 75 N. C. 34, the court says: 'The law does not tolerate that the same counsel may appear upon both sides of an adversary proceeding even colorably, and in general will not permit a judgment so affected to stand, if made the subject of exception in due time by the parties injured thereby.' . . . To permit both parties to be represented jointly by the same counsel upon this motion would be simply laying the foundation for future complaint, upon the part of the plaintiff or defendant, in case either should be dissatisfied with the action

of the court if the judgment should be set aside. If the plaintiff was so feeble-minded that she could not contract a valid marriage, how do we know that she is capable now to take legal action to set aside the judgment? The judg-

ment rendered cannot be set aside by consent. If either party desires to move to set it aside, it must be done in an adversary proceeding after due notice served upon the other party."

G. J. C.

THEODORE P. DARVIRIS, Appt.,

v.

BOSTON SAFE DEPOSIT & TRUST COMPANY.

Massachusetts Supreme Judicial Court—February 26, 1920.

(235 Mass. 76, 126 N. E. 382.)

Landlord and tenant — relief from forfeiture for nonpayment of rent.

A tenant for a short term who is habitually delinquent in payment of rent and is two months overdue when the landlord enters to terminate the lease is not entitled to equitable relief against the forfeiture.

[See note on this question beginning on page 437.]

APPEAL by plaintiff from a decree of the Superior Court for Norfolk County (Chase, J.) dismissing a bill filed to enjoin defendant from expelling plaintiff for nonpayment of rent. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. James W. Milne for appellant.

Mr. Charles M. Rogerson, for appellee:

The tenant, having wilfully and persistently failed to pay rent, has no right to relief in equity.

Gordon v. Richardson, 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027; Sanders v. Pope, 12 Ves. Jr. 282, 33 Eng. Reprint, 108; Story, Eq. Jur. § 1322; Pom. Eq. Jur. § 452; Hancock v. Carlton, 6 Gray, 39; Livingston v. Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598; Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 938.

Rugg, Ch. J., delivered the opinion of the court:

The plaintiff, a tenant under a written lease for a term of three years, half expired, by this suit in equity seeks to enjoin expulsion of himself from the demised premises by his lessor, which, pursuant to a condition of the lease, has entered for nonpayment of rent and given notice of intention to terminate the lease. The case was tried before a judge of the superior court, who found that "the plaintiff had gener-

ally been slow in the payment of his rent, and had been warned by the landlord's agent that unless he paid more promptly he would have to vacate the premises. At the time of the entry, the rent for two months was in arrears."

The evidence is reported. It came chiefly from witnesses who testified orally. A careful examination shows that the finding of facts made by the judge was not only not plainly wrong, but fully warranted. Therefore it must stand. The judge ruled that a case for equitable relief was not made out, and entered a decree dismissing the bill. The plaintiff's appeal brings the case here.

It was said by Chief Justice Morton in Nactier v. Osborn, 146 Mass. 399, at page 402, 4 Am. St. Rep. 323, 15 N. E. 645: "The result of the authorities, supported by sound principle, is that, where there has been a breach of a covenant to pay rent, equity will relieve against a

forfeiture although the breach is wilful on the part of the lessee."

It further was said by Mr. Justice Loring in *Gordon v. Richardson*, 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027, where all the Massachusetts cases and numerous other authorities are collected, that "the ground on which a tenant gets relief in equity from the forfeiture of his estate for a failure to pay rent is that in equity the landlord's right of re-entry is given as security for the payment of the rent, and on the rent being paid the very thing is done for which the security was given. Although the payment in that case is made after it is due, on interest being paid compensation is made for the delay in performance, and on compensation being made the plaintiff is entitled to relief."

These just principles are accepted in all their amplitude. They do not reach, however, to the case at bar. We have here a lease for a comparatively short term. The failure to pay rent when due was not once or twice, but was so settled a habit as to be rightly described as a general course of conduct. The circumstances of continued delay were annoying in nature, and were accompanied by the frequent drawing of checks when there were no funds to meet them. This is not an instance of temporary financial em-

barrassment or fleeting wilfulness of purpose. Much less is it the result of accident or mistake. When measured by the term of the lease, it has become a custom. The state of being behindhand appears to have been not only wilful but contumacious. There is, however, no finding of bad faith.

It is a familiar maxim in equity that he who seeks equity must do equity. The plaintiff has made an express contract in writing for the payment of rent at specified times, with provision, in case of failure, for entry by the landlord. He asks equity to relieve him from the consequences stipulated in his agreement to follow from failure to perform that obligation. While in the ordinary case of delayed payment of rent that will be done, equity will not interfere in his behalf where, as in the case at bar, the plaintiff has violated fundamental principles of fair dealing.

Decree affirmed.

NOTE.

The power of equity to relieve against forfeiture of a lease for nonpayment of rent is considered in the annotation following *BONFILS v. LEDOUX* (reported herewith) post, 437.

FREDERICK G. BONFILS et al.

v.

WILFRID LEDOUX et al.

(Two cases.)

United States Circuit Court of Appeals, Eighth Circuit — May 22, 1920.

(266 Fed. 507.)

Equity — power to relieve from forfeiture of lease.

1. Equity may relieve a tenant from forfeiture of his estate because of failure to pay the rent reserved at the time required by the terms of the lease, when it is just to do so.

[See note on this question beginning on page 437.]

Landlord and tenant — release from forfeiture — when refused.

2. Release from forfeiture of a lease of a theater for nonpayment of rent will not be granted where the lessee left the property in possession of the lessor for several weeks without paying rent or attempting to take possession, and the lessor had executed a new lease under which the lessee had expended large sums in making alterations and improvements in the building, under circumstances which imparted knowledge to the first lessee, without objection from him.

[See 16 R. C. L. 1146, 1147.]

— failure to take possession — effect on claim for rent.

3. Failure of a lessee to take possession is no defense to a claim for rent.

— implied promise to pay rent.

4. The law implies a promise to pay rent by one who enters and occupies premises by permission of the owner without express promise to pay.

[See 16 R. C. L. 910.]

— accountability of lessor remaining in possession.

5. Lessors, who, after payment by the lessee of rent for a period in advance, remain in possession during that period with knowledge of the lessee, are accountable to him for the value of such use and occupation.

CROSS APPEALS from a decree of the District Court of the United States for the District of Colorado (Lewis, Dist. J.) in plaintiffs' favor in part only, in a suit to compel defendants to account to them as trustees for all money received from the operation of a certain theater, for an accounting of money expended, and to enjoin them from interfering with plaintiffs' use and enjoyment of such theater; defendants appealing from so much of the judgment as allowed a recovery to plaintiffs; plaintiffs appealing from so much as denied them a decree for possession of the premises for the remainder of the term, and an accounting for the use of the property. *Reversed on defendants' appeal.*

Statement by Munger, Dist. J.:

Appeals and cross appeal challenge the decree of the trial court. The bill sought to have the defendants held to be trustees of the lease of a theater building. This theater building, known as the Empress Theater, in Denver, was held under a lease by the defendant Greaves, as lessee. Although he was the title holder, the defendant Bonfils and one Tammen, who is not a party to the suit, were co-owners, each having a third interest in the lease. Greaves was managing the building and conducting a theater therein in the fall of 1915. On October 9, Greaves executed a written lease of the building to the plaintiffs, who were experienced managers of theaters. The term was to begin on November 1, and to continue about five years, and the rental fixed was \$500 per week, payable in advance on the first day of each week. No rent was to be paid for the period from November 1 to November 15.

The plaintiffs paid \$5,000 of the rental in cash at the time of the execution of the lease, to cover the first ten weeks of their term, beginning November 15, 1915, and ending January 24, 1916. Among the covenants of the lease were the following:

"It is further expressly understood and agreed by and between the parties hereto that if the rent herein reserved, or any part thereof, stipulated herein to be paid by the said lessees, shall be behind or remain unpaid for 5 (five) days from and after the day and date whereon the same ought to have been paid, or if the said lessees shall fail or make default in the performance of any one or more of the covenants or promises herein set forth to be by said lessee kept and performed, the same and each and every instance thereof shall work a forfeiture of this lease, and upon the occurrence of any one default it shall and may be lawful for the said lessor, its assigns, agent, or attorney, at its or

their election, to declare said term ended and into the said premises or any part thereof, either with or without process of law, to re-enter, and the said lessee, or any person or persons occupying in or upon the same, to expel, remove, and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in its first and former estate without first making any demand for said rent, either upon the premises or elsewhere, or giving any notice that said lease is forfeited, anything in the statutes of Colorado to the contrary notwithstanding.

"It is hereby agreed and understood between the parties hereto that the authority above given to re-enter and take possession of said premises in case of a forfeiture of the lease as above provided is a license in law to the lessor and its agent to so enter and take possession of said premises, and no action of forcible entry, unlawful detainer, trespass, or like action shall be brought by the lessee, in case said lessee is forcibly dispossessed from said premises by reason of the forfeiture of this lease as aforesaid."

The plaintiffs never took possession, and did not pay any rent after the first payment of \$5,000. Greaves continued in possession, and on February 17, 1916, assigned the lease held by him as lessee to a corporation known as the Empress Theater Company, which had been organized on January 26, 1916, and in which Bonfils, Greaves, and Tammen were the principal stockholders. That corporation thereafter conducted a theater in the building. The plaintiffs and Bonfils had some extended negotiations looking to the acquirement of another theater in Kansas City, Missouri, also known as the Empress Theater. The plaintiffs claimed in their bill, and there was proof tending to show, that shortly before the term of the Denver lease began Bonfils stated to the plaintiff that he was about to get possession of the Kansas City theater and that there was an urgent

necessity for the plaintiffs to go there, as someone was needed to take and hold possession of that theater because of some legal complications, and that he depended upon the plaintiffs to do that work; that, in reply to plaintiffs' expostulations that it was necessary for them to take possession of the Denver theater, Bonfils stated that they need not worry about that theater, because he would have Greaves continue to operate it until the plaintiffs came back from Kansas City and were ready to take possession. The plaintiffs claimed that, relying on their statements, they agreed to go to Kansas City, and there entered into a lease of that theater, also, from a lessor who held the title in trust for Bonfils and Tammen. They took possession of the Kansas City theater and operated it for several months. It proved a losing venture, and the plaintiffs organized a corporation, in which they were the chief stockholders, and to which they assigned the lease. This company continued operations for some months, and then became a bankrupt. The plaintiffs conducted a theater at Omaha, and were interested in similar enterprises elsewhere. Greaves notified the plaintiffs, about the time when his lease required him to deliver possession, that he did not wish to operate the Denver theater longer, and asked them to take possession. Thereupon the plaintiffs again consulted Bonfils, and plaintiffs assert that Bonfils, in the hearing of Greaves, again stated that Greaves would continue to operate the Denver theater, and that the plaintiffs could return to Denver after they were through at Kansas City; that they need not worry about Denver, as he would look after their interests there. The plaintiffs also claim that Bonfils again made statements to the same effect about November 13, when they assured him that their affairs in Kansas City were such that they could then go to Denver. The plaintiffs claimed that in March, 1916, they again inquired of Bonfils about

their taking possession of the Denver theater, but that he informed them that he would not permit them to have possession, because they had forfeited their lease. About the middle of June, 1916, the plaintiffs demanded possession of the Denver theater from Bonfils and Greaves, but were notified that their leasehold rights had been forfeited. Based on this assumed state of facts, plaintiffs' bill prayed that the defendants be decreed to be trustees for plaintiffs in the operation of the Denver theater, and required to account, and that possession of the theater should be surrendered to them.

The claim of the defendants was that no such statements as those relied upon by the plaintiffs had been made to them by either Bonfils or Greaves, and their evidence supported this denial. They also claimed that early in December, 1915, the plaintiffs had abandoned and surrendered the lease of the Denver property, and that they had accepted the surrender, and after the assignment of Greaves's lease to the new corporation, it was shown that that company had expended \$14,000 in making alterations and improvements in the theater building, removing the storerooms, building a lobby, inside foyer, and a new box office, and in refurnishing and redecorating, before the plaintiffs made demand in June for possession. The plaintiffs' testimony denied that any surrender or abandonment had been made. Other defenses were asserted in the answers, and the defendants prayed that the rights of the defendants Bonfils and Greaves to the \$5,000 paid by plaintiffs be determined, and for general equitable relief. The decree dismissed the bill as to the Empress Theater Company, and gave judgment in favor of the plaintiffs against Bonfils and Greaves for the \$5,000, which plaintiffs had paid them, with interest and costs. The court expressed the opinion that the plaintiffs had not proved the statements they had alleged Bonfils

to have made, and that no trust was established. The recovery of the \$5,000 and interest was allowed, because defendants had rendered nothing of value to the plaintiffs in return therefor, and because possession was not taken by the plaintiffs. The defendants have filed two appeals on a single record, but the later one must be regarded as in substitution for the earlier.

Argued before Hook, and Stone, Circuit Judges, and Munger, District Judge.

Messrs. John T. Bottom and John M. Waldron for defendants.

Messrs. Francis A. Brogan, Alfred G. Ellick, Anan Raymond, and T. J. O'Donnell, for plaintiffs:

The defendants held and now hold the demised premises as trustees for plaintiffs.

United States v. Carter, 96 C. C. A. 587, 172 Fed. 1, 217 U. S. 286, 54 L. ed. 769, 30 Sup. Ct. Rep. 515, 19 Ann. Cas. 594; Re Berry, 77 C. C. A. 434, 147 Fed. 208; Cook v. Basom, 164 Mo. 594, 65 S. W. 227; Aspinall v. Jones, 17 Mo. 209; Luse v. Rankin, 57 Neb. 632, 78 N. W. 258; Bell v. McJones, 150 N. C. 85, 65 S. E. 646; Danzeisen's Appeal, 73 Pa. 65; Cerro Cobre Development Co. v. Duvall, 16 Ariz. 485, 147 Pac. 695; Lane v. Wentworth, 69 Or. 242, 133 Pac. 348, 138 Pac. 468; Winters v. Winters, 34 Nev. 323, 123 Pac. 17, 1135; Orr v. Perky Invest. Co. 65 Wash. 281, 118 Pac. 19; Ullman v. Kelley, 65 Colo. 77, 173 Pac. 423; Fine v. Lawless, 139 Tenn. 160, L.R.A. 1918C, 1045, 201 S. W. 160; Cook v. Flagg, 147 C. C. A. 362, 233 Fed. 426; Wheatley v. Kissinger, 61 Colo. 264, 156 Pac. 1099; O'Day v. Annex Realty Co. — Mo. —, 191 S. W. 41.

Constructive trusts arising by operation of law are not within the Statute of Frauds and other statutes prohibiting parol trusts.

Ullman v. Kelley, 65 Colo. 77, 173 Pac. 423; Crabtree v. Potter, 150 Cal. 710, 89 Pac. 791; Walker v. Bruce, 44 Colo. 109, 97 Pac. 250; Fisk's Appeal, 81 Conn. 433, 71 Atl. 559; Hilt v. Simpson, 230 Ill. 170, 82 N. E. 588; Crossman v. Keister, 223 Ill. 69, 8 L.R.A.(N.S.) 698, 114 Am. St. Rep. 305, 79 N. E. 58; Catalani v. Catalani, 124 Ind. 54, 19 Am. St. Rep. 23, 24 N. E. 375; Gilpatrick v. Glidden, 81 Me. 137, 2 L.R.A. 662, 10 Am. St. Rep. 245, 16 Atl. 464; Bowler v. Curler, 21 Nev.

158, 37 Am. St. Rep. 501, 26 Pac. 226; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Hanson v. Svardverud, 18 N. D. 550, 120 N. W. 550; Kroll v. Coach, 45 Or. 459, 78 Pac. 397, 80 Pac. 900; Schrage v. Cool, 221 Pa. 627, 70 Atl. 889; Morris v. Reigel, 19 S. D. 26, 101 N. W. 1086; Brookings Land & T. Co. v. Bertness, 17 S. D. 293, 96 N. W. 97; Orr v. Perky Invest. Co. 65 Wash. 281, 118 Pac. 19; Goss v. Rothrock, 102 Kan. 272, 169 Pac. 1161; Arntson v. First Nat. Bank. 39 N. D. 408, L.R.A. 1918F, 1038, 167 N. W. 760; Whitney v. Hay, 181 U. S. 77, 45 L. ed. 758, 21 Sup. Ct. Rep. 537; Kern v. Beatty, 267 Ill. 127, 107 N. E. 794; Westphal v. Heckman, 185 Ind. 88, 113 N. E. 299; Meador v. Manlove, 97 Kan. 706, 156 Pac. 731; Clark v. Mitchell, 35 Neb. 447, 180 Pac. 760, 134 Pac. 448; Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430; McCoy v. McCoy, 30 Okla. 379, 121 Pac. 176, Ann. Cas. 1913C, 146.

A court of equity has inherent power to relieve against forfeiture, this power being applicable to a forfeiture of lease for nonpayment of rent.

Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933; Semidey v. Central Aguirre Co. 152 C. C. A. 444, 239 Fed. 610; Henderson v. Carbondale Coal & Coke Co. 140 U. S. 25, 35 L. ed. 332, 11 Sup. Ct. Rep. 691; Elevator Case, 3 McCrary, 463, 17 Fed. 200; Kann v. King, 204 U. S. 43, 51 L. ed. 360, 27 Sup. Ct. Rep. 213; Sunday Lake Min. Co. v. Wakefield, 72 Wis. 204, 39 N. W. 136, 16 Mor. Min. Rep. 97; Wylie v. Kirby, 115 Md. 282, 80 Atl. 692, Ann. Cas. 1913A, 825; Giles v. Austin, 62 N. Y. 486; Thropp v. Field, 26 N. J. Eq. 82.

Munger, Dist. J., delivered the opinion of the court:

The plaintiffs, in support of a cross appeal, urge that the evidence shows that there was a constructive trust established whereby the defendants held the property in trust for the plaintiffs, while the defendants urge that the plaintiffs' evidence shows nothing more than an express trust concerning lands and relating thereto, and that such a trust is invalid under the Colorado Statute of Frauds (Colo. Rev. Stat. 1908, § 2660), which forbids the creation or declaration of such a trust otherwise than by deed or conveyance in writing, subscribed by

the party, or by his agent authorized by writing. It is not necessary to determine this issue, because the court below decided on conflicting evidence that no such agreement as the plaintiffs rely upon had been made. That conclusion is supported by direct evidence and by many circumstances in the case, and should not be set aside.

The defendants assert that the court should have dismissed the plaintiffs' bill, because, when it turned out that the equitable relief sought by the bill, the declaration of a trust, could not be granted, the court was without jurisdiction to proceed further, leaving the parties to their actions at law for further relief sought. The correctness of this conclusion may be conceded, if the bill had sought only the establishment of a trust relationship; but the bill also proceeded upon a familiar ground of equitable jurisdiction for relief from a forfeiture asserted by the defendants. A court of equity has power to relieve a tenant from forfeiture of his estate, because **Equity—power to relieve from forfeiture of lease.** of a failure to pay the rent reserved at

the time required by the terms of his lease, when it is just to do so. Sheets v. Selden, 7 Wall. 416, 19 L. ed. 166; Kann v. King, 204 U. S. 43, 51 L. ed. 360, 27 Sup. Ct. Rep. 213; Elevator Case (C. C.) 3 McCrary, 463, 17 Fed. 200; 1 Pom. Eq. Jur. §§ 433, 434, 450, 453.

When the conclusion of the lower court is accepted that there was no agreement on the part of the defendants to hold the Denver theater as trustees for the plaintiffs until they should be ready to assume possession of it, we have the fact remaining that the plaintiffs did not take possession of the leased property, but allowed the lessor to remain in possession for 7½ months before demanding possession. The lessor did not refuse or withhold possession. Finding no one claiming possession on the part of the lessees, he continued to use and occupy the premises, conducting a theater as he had done

before the execution of the lease. After the ten-weeks period had expired for which plaintiffs had paid the rent in advance, and when more than three weeks had elapsed thereafter without payment of the rent reserved by the terms of the lease, the lessor assigned his interest to a corporation as a new tenant, and thereafter insisted that the plaintiffs had forfeited their estate. Under the terms of the lease, as they have been quoted, no demand was necessary as a foundation for a legal forfeiture. *Lewis v. Hughes*, 12 Colo. 208, 20 Pac. 621; *Fifty Associates v. Howland*, 5 Cush. 214; 24 Cyc. 1355; 16 R. C. L. 1128.

We perceive no equitable grounds for relief from the forfeiture which the defendants have declared. The default in the payment of the rent must be taken to be wilful. The rent due amounted to the sum of \$9,500 before possession was demanded of the lessor. A valuable business property was left without attempt at occupation by the tenants, when a large portion of its leasehold value consisted in the uninterrupted continuance of its use as a theater; the new lessee was allowed to expend \$14,000 in making substantial alterations and improvements of the building, under circumstances that imparted knowledge to the plaintiffs, and without objection on their part, and, when possession was demanded, no tender or offer to pay the rent due was made. In the case of *Sheets v. Selden*, supra, the court said, in refusing equitable relief from a forfeiture declared against a tenant: "Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent,^a interest, and costs must be paid or tendered."

And in the case of *Kann v. King*, 204 U. S. 43, 51 L. ed. 360, 27 Sup. Ct. Rep. 213, the same court said: "In considering this subject two propositions are obvious: First, where the forfeiture from which re-

lief is sought has been occasioned by the gross negligence of the person claiming to be relieved, the default so occasioned is not one brought about by accident or mistake; and, second, that even where accident or mistake has been shown, especially in the absence of culpability or fraud on the part of the other party, a court of equity will not grant relief from the forfeiture, unless it can be done with justice to that party."

For these reasons the cross appeal must fall.

The defendants insist that there is no basis for allowing a recovery from the defendants of the \$5,000 paid by the plaintiffs in advance as rental from November 15 to January 24, because it was paid according to their express covenant in the lease. It is the general rule that the failure of the lessee to take possession is no defense to a claim for rent, because that liability is fixed, not by the fact of possession, but by the covenant to pay rent. *Oregonian R. Co. v. Oregon R. & Nav. Co.* (C. C.) 27 Fed. 277; *Moore v. Dove*, 1 Hayw. & H. 161, Fed. Cas. No. 9,757; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 164 Ill. 88, 45 N. E. 488; *Tiffany, Land. & T.* 1154; *Taylor, Land. & T.* § 15.

The mere fact that the lessor remains in possession after the term of the lease has begun does not involve any exclusion from the premises, in the absence of any request for possession by the lessee. If the tenant desires to occupy the premises, he should manifest that intention in a decisive way. *Millie Iron Min. Co. v. Thalmann*, 34 App. Div. 281, 54 N. Y. Supp. 276; *Vanderpool v. Smith*, 4 Abb. App. Dec. 461; *Fitzhugh v. Baird*, 134 Cal. 570, 66 Pac. 723; *Little v. Hudgins*, 117 Ark. 272, 174 S. W. 520. The continued occupation by the lessor awaiting the tenant's entry often is a protection to the interests of both against possible injury of the building by fire, by trespass, by lapse of

Landlord and tenant—release from forfeiture—when refused.

—failure to take possession—effect on claim for rent.

insurance, or by deterioration. So long as such possession by the lessor is permissive, or not adverse to the lessee, it cannot amount to an eviction or termination of the lease, or excuse the tenant from payment of rent according to his contract, nor can it be a basis for recovery from the lessor of rent that has already been advanced. The portion of the decree awarding a judgment against the defendants for the recovery of the rent paid must therefore be reversed.

As the parties are in a court of equity, and as the defendants Bonfils and Greaves ask affirmative relief in having determined the rights of those defendants to the \$5,000 paid by the lessees, we think that the denial of relief from the forfeiture of the lease should be coupled with a determination of the rights of the parties before the court, arising from the payment of this sum, and the occupation of the leased premises by the lessor during the term in which the lease was in full effect, in order that the whole controversy between the parties may be settled.

It is evident that the trial court found that there was no abandonment or surrender of the leased premises in December, as claimed by the defendants, because the decree for the restoration of the \$5,000 presupposes that the lessees were entitled to a possession under their lease for the full term of the ten weeks ending January 24. We may accept this conclusion, also, as the testimony was in direct conflict. What was, then, the legal effect of the continued possession by the lessor with the acquiescence of the lessees? The law

—implied promise to pay rent.

implies a promise by the occupier who has entered and occupied the premises by permission of the owner, and without any express contract, to pay the owner a reasonable rent for his occupation. *Carpenter v. United States*, 17 Wall. 489, 21 L. ed. 680;

Lazarus v. Phelps, 152 U. S. 81, 38 L. ed. 363, 14 Sup. Ct. Rep. 477; *United States v. Whipple Hardware Co.* 112 C. C. A. 357, 191 Fed. 945; *Cobb v. Kidd* (C. C.) 19 Blatchf. 560, 8 Fed. 695. The vendor may become liable to his vendee, or the lessor to his lessee, for use and occupation of the land conveyed, when he continues in possession after the time the grantee was entitled to possession. *Preston v. Hawley*, 139 N. Y. 296, 34 N. E. 906; *Larrabee v. Lumbert*, 34 Me. 79. Greaves and Bonfils each obtained a one-third portion of the beneficial use of the theater building during a period of ten weeks, for which period the plaintiffs had paid the rent demanded by their lease, and this occupation was with the knowledge and consent of the plaintiffs. It was the opinion of the trial court that the failure of the lessees to take possession was with the knowledge and acquiescence of the lessor, and the evidence sustained this conclusion. The plaintiffs are therefore entitled to recover from each of these two defendants one third of the value of such use and occupation. The answer of the defendant Bonfils asserted a set-off as assignee of legal demands against the plaintiffs, but there was no evidence given to show that he was such assignee.

—accountability of lessor remaining in possession.

The decree will be affirmed as to the Empress Theater Company, and will be reversed as to the defendants Bonfils and Greaves, with directions to the trial court to allow proofs of the value of the use and occupation by Bonfils and Greaves, as has been indicated, and to enter a judgment for that sum against them, and to deny other relief prayed for by the parties other than the Empress Theater Company. The appellants will recover their costs in cases numbered 5439 and 5440, and no costs to be taxed in this court in favor of either of the parties in case numbered 5444.

ANNOTATION.

Power of equity to relieve against forfeiture of lease for nonpayment of rent.

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I. Introductory.

The present annotation is concerned only with the question of relief in equity from a forfeiture of a lease for the nonpayment of rent, excluding cases involving equitable relief from a breach of a covenant in a lease to perform some collateral duty, as, for example, to insure, to repair, to support and render personal services, or the like.

Forfeitures, in equity, are regarded with extreme disfavor, and, where compensation can be made for non-performance, a court of equity will ordinarily give relief against forfeiture. This is on the principle that a court of equity is a court of conscience, and will permit nothing to be done within its jurisdictions which is unconscionable, and that a person having a legal right shall not be permitted to avail himself of it for the purposes of injustice and oppression.

"As a proposition pervading this doctrine of the right of re-entry by the forfeiture of a lease of land, it is to be observed that the power to be exercised is a very strong power, and it is one which is exercised without the judgment of a court of justice or of anybody else but the party who is exercising it. The party determines for himself whether he has the right of re-entry, without any resort to a court of justice. This is always a harsh power. It has always been considered that it was necessary to

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restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised. Hence it is that the old common law provided in this class of contracts that it was the duty of the court to see that no injustice was done. It is reasonable, it is natural, that when a contract puts it into the power of one man to say that under certain contingencies, of which he is to be the judge, he shall enter upon the house, or home, or property of another, and eject him instantly, and take possession—it is reasonable, it is proper, that the contract and the acts which justify such a course of conduct should be construed rigidly against the exercise of the right. A court of equity, when necessary, when this power has been exercised, will come in and afford relief." *Kansas City Elevator Co. v. Union P. R. Co.* (1881) 3 McCrary, 463, 17 Fed. 200.

II. Existence of power.

That a court of equity has inherent power to relieve a tenant from a forfeiture of his estate, because of a failure to pay rent at the time required by the terms of his lease, is unquestioned. *Sheets v. Selden* (1869) 7 Wall. (U. S.) 416, 19 L. ed. 166; *Kansas City Elevator Co. v. Union P. R. Co.* (1881) 3 McCrary, 463, 17 Fed. 200; *Abrams v. Watson* (1877) 59 Ala. 524; *Thompson v. Coe* (1921) — Conn. — A.L.R. —, 115 Atl. 219; *Charles*

Mulvey Mfg. Co. v. McKinney (1914) 184 Ill. App. 476; *Lombardo v. Clifford Bros. Co.* (1921) — Md. —, 114 Atl. 849; *South Penn Oil Co. v. Edgell* (1900) 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596, 21 Mor. Min. Rep. 106. See also *Kann v. King* (1907) 204 U. S. 43, 51 L. ed. 360, 27 Sup. Ct. Rep. 213; *Garner v. Hannah* (1857) 6 Duer (N. Y.) 262. And see the reported case (*BONFILS v. LEDOUX*, ante, 430), and the cases cited throughout this annotation, wherein the power was exercised without comment as to its existence.

While it was not necessary to the decision of the case, the court in *Kann v. King* (U. S.) supra, said: "That a court of equity, even in the absence of special circumstances of fraud, accident, or mistake, may relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee, is elementary."

In *Sunday Lake Min. Co. v. Wakefield* (1888) 72 Wis. 204, 39 N. W. 136, 16 Mor. Min. Rep. 97, it was held that a court of equity might relieve against a forfeiture for the nonpayment of rent of mining property situated in another state, but that it had no power, in any event, to restore possession of such property.

It has been held that equity will not relieve against forfeiture of a lease of municipal lands for the nonpayment of rent, incurred under the provisions of a municipal ordinance. *Woodson v. Skinner* (1855) 22 Mo. 13; *Taylor v. Carondelet* (1855) 22 Mo. 105; *Carondelet v. Lannan* (1858) 26 Mo. 461; *Huth v. Carondelet* (1858) 26 Mo. 466; *Carondelet v. Wolfert* (1866) 39 Mo. 305.

Thus, in *Woodson v. Skinner* (Mo.) supra, wherein it appeared that a city, by an ordinance, declared a forfeiture, for the nonpayment of rent, of a lease of a part of the city common, it was held that the forfeiture could not be relieved against, though compensation could be made. The court said: "The city, in leasing her commons, did not act of her mere volition, as an

individual proprietor would in leasing lands belonging to him. She acted under a law of the state, and that law expressly empowered her to enforce the performance of the conditions of the lease by means of a forfeiture. The case is as though the general assembly had declared that the lease should be forfeited in the event of nonpayment of the interest on the purchase money. There is a marked difference between a forfeiture imposed by a statute and one arising under the contract of the parties. The legislature can impose it as a punishment, whilst individuals can only make it a matter of contract. In the one case it cannot be relieved against; in the other, it may. In the one case it may be taken advantage of in the manner prescribed by the law imposing it; in the other, only according to the course of the common law."

So, in *Taylor v. Carondelet* (1855) 22 Mo. 105, under facts similar to those of the foregoing case, the court said: "From the view we take of the subject, the clause of forfeiture was as binding on the lessee as though it had been enacted by the general assembly. The legislature delegated its judicial powers over the matter to the corporation, and the corporation, within the sphere of its delegated power, could act as authoritatively in relation to it as the legislature. The law-making power, in fact, made the board of trustees a miniature general assembly, and gave their ordinances, on this subject, the force of laws passed by the legislature of the state. In giving the corporation legislative powers on the subject of leases, the general assembly must have necessarily intended that its ordinances should operate as laws and not as contracts."

To the same effect, see *Carondelet v. Lannan* (1858) 26 Mo. 461, and *Huth v. Carondelet* (1858) 26 Mo. 466, affirming *Taylor v. Carondelet* (Mo.) supra.

III. Exercise of power.

a. Rule stated.

Equity will relieve against the forfeiture of a lease for the nonpayment

of rent whenever it is just and equitable to do so, the only condition precedent to such relief being the tender or payment of the arrears of rent, with accrued interest.

United States.—*Kansas City Elevator Co. v. Union P. R. Co.* (1881) 3 McCrary, 463, 17 Fed. 200; *Sheets v. Selden* (1869) 7 Wall. 416, 19 L. ed. 166. And see the reported case (*BONFILS v. LEDOUX*, ante, 430).

Alabama.—*Abrams v. Watson* (1877) 59 Ala. 524. See also *Attalla Min. & Mfg. Co. v. Winchester* (1898) 102 Ala. 184, 14 So. 565.

Arkansas.—See *Little Rock Granite Co. v. Shall* (1894) 59 Ark. 405, 27 S. W. 562.

Connecticut.—See *Morey v. Hoyt* (1893) 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127; *Thompson v. Coe* (1921) — Conn. —, — A.L.R. —, 115 Atl. 219.

Georgia.—See *Laurence v. Savannah* (1883) 71 Ga. 392.

Illinois.—*Palmer v. Ford* (1878) 70 Ill. 369; *Rooney v. Crary* (1881) 8 Ill. App. 329; *Charles Mulvey Mfg. Co. v. McKinney* (1914) 184 Ill. App. 476. See also *Watson v. Smith* (1913) 180 Ill. App. 289.

Kentucky.—*Wender Blue Gem Coal Co. v. Louisville Property Co.* (1910) 137 Ky. 339, 125 S. W. 732; *Wilson v. Jones* (1867) 1 Bush, 173.

Maine.—*Shriro v. Paganucci* (1915) 113 Me. 213, 93 Atl. 358.

Maryland.—*Carpenter v. Wilson* (1904) 100 Md. 13, 59 Atl. 186; *Wylie v. Kirby* (1911) 115 Md. 282, 80 Atl. 962, Ann. Cas. 1913A, 825; *Lombardo v. Clifford Bros. Co.* (1921) — Md. —, 114 Atl. 849.

Massachusetts.—*Atkins v. Chilson* (1846) 11 Met. 112; *Lilley v. Fifty Associates* (1869) 101 Mass. 432; *DARVERIS v. BOSTON SAFE DEPOSIT & T. Co.* (reported herewith) ante, 429. See also *Finkovitch v. Cline* (1920) 236 Mass. 196, 128 N. E. 12; *Mactier v. Osborn* (1888) 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641; *Gordon v. Richardson* (1904) 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027.

Michigan.—*Murphy v. Sayles* (1918) 201 Mich. 78, 166 N. W. 990.

New Jersey.—*Thropp v. Field* (1875) 26 N. J. Eq. 82. See also

Warne v. Wagenor (1888) — N. J. —, 15 Atl. 307.

New York.—*Horton v. New York C. & H. R. R. Co.* (1883) 12 Abb. N. C. 30, affirmed in (1886) 102 N. Y. 697; *Palmer & S. Mfg. Co. v. Barney Estate Co.* (1912) 149 App. Div. 186, 138 N. Y. Supp. 876. See also *Garner v. Hannah* (1857) 6 Duer, 262.

Pennsylvania.—*Kemble v. Graff* (1867) 6 Phila. 402; *Times Co. v. Siebrecht* (1882) 15 Phila. 235; *Lynch v. Versailles Fuel Gas Co.* (1895) 165 Pa. 518, 30 Atl. 984, 18 Mor. Min. Rep. 149; *Pershing v. Feinberg* (1902) 203 Pa. 144, 52 Atl. 22; *Merrill v. Trimmer* (1885) 2 Pa. Co. Ct. 49.

Texas.—*Crawford v. Texas Improv. Co.* (1917) — Tex. Civ. App. —, 196 S. W. 195; see also *Randolph v. Mitchell* (1899) — Tex. Civ. App. —, 51 S. W. 297.

West Virginia.—*South Penn Oil Co. v. Edgell* (1900) 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596, 21 Mor. Min. Rep. 106. See also *Pyle v. Henderson* (1904) 55 W. Va. 125, 46 S. E. 791.

On a bill in equity to redeem a lease, forfeited because of nonpayment of rent, all arrears of rent, interest, and costs must be paid or tendered, and if there is no special reason to the contrary, an injunction thereon will issue to restrain further steps to enforce the forfeiture. *Charles Mulvey Mfg. Co. v. McKinney* (1914) 184 Ill. App. 476.

In *Abrams v. Watson* (1877) 59 Ala. 524, the rule was stated as follows: "Covenants of this kind, for the forfeiture of a lease and the re-entry of the lessor by a breach of the lessee's covenant for the payment of rent, in courts of equity and of law, are regarded as intended as a mere security for the payment of the rent. In a court of equity they are treated as the condition in a mortgage, by which, at law, on default of the mortgagor in payment of the mortgage debt, the estate of the mortgagee becomes absolute and indefeasible. They are relieved against, as the mortgagor is relieved, on payment of the rent due, and damages which the lessor may have sustained."

"The grounds upon which a court

of equity proceeds are: That the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain; and that, when the principal and interest are paid, the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign." *Sheets v. Selden* (1869) 7 Wall. (U. S.) 416, 19 L. ed. 166.

So, in *Gordon v. Richardson* (1904) 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027, it was said: "The ground on which a tenant gets relief in equity from the forfeiture of his estate for a failure to pay rent is that in equity the landlord's right of re-entry is given as security for the payment of the rent, and on the rent being paid the very thing is done for which the security was given. Although the payment in that case is made after it is due, on interest being paid, compensation is made for the delay in performance; and on compensation being made, the plaintiff is entitled to relief."

And see *Laurence v. Savannah* (1883) 71 Ga. 392, wherein the court said: "The right to redeem and continue the lease, even after forfeiture and re-entry, exists whenever the lessee will pay what is due, and, if the lessor declines to receive it when tendered, the amount will be ordered paid into court, and he will be enjoined from ousting the tenant."

b. Application of rule.

1. Relief granted.

(a) Generally.

The lease involved in *Rooney v. Crary* (1881) 8 Ill. App. 329, contained a provision that "all buildings erected, or other improvements made or to be made by the said party of the second part, upon the above-described premi-

ses at any time during the time of this lease, shall be held and deemed as a party and parcel of the realty, and shall not be removed in any case, except by consent in writing by the said party of the first part, which said party is to give when full payment of all the rent reserved shall be fully paid, and all dues, duties, and burdens assumed by or obligatory upon the said party of the second party duly performed." On its execution the lessee erected several buildings on the demised premises. Subsequently, for nonpayment of rent, the lessor declared a forfeiture, and shortly afterwards recovered the possession of the premises. Later he filed a bill in chancery, alleging that the lessee threatened to tear down and carry away parts of the buildings and fixtures, and praying for an injunction restraining the lessee from so doing. The lower court granted the relief asked, giving the lessee no opportunity to redeem the buildings and fixtures according to the terms of the covenant. On appeal the decree was reversed, it being said: "We think the decree under the original bill should not have barred and foreclosed the tenant of all right to the buildings and fixtures, as it practically does, without according him an opportunity to redeem. The amount of the rent in arrears should have been ascertained and a reasonable time given the tenant to pay it, and on failure to make payment within the time limited, the decree might properly foreclose his rights and perpetually enjoin him from interfering with the property. It should be remembered that, so far as the original bill is concerned, the landlord has presented himself before a court of equity, asking to have his rights in the property in question settled and protected. A court of equity will not aid him in taking advantage of, and enforcing, the forfeiture of his tenant's term, except upon equitable conditions. The least that can be required of him is that he give his tenant an opportunity, within a reasonable time, to avail himself of the terms of the covenant, by paying the rent, and thus entitling himself to the

possession of the buildings and fixtures."

In *Ostenberg v. Scottsbluff Invest. Co.* (1921) — Neb. —, 183 N. W. 95, where relief was granted against a forfeiture for breach of a covenant to pay monthly instalments due during the fourth year of a five-year term, it appeared that \$1,800 had been paid at the beginning of the term, to be applied on the last year's rent, there being a further provision for the payment of \$160 each month for four years, and \$120 for the first month of the fifth year, at which time payment of rent was to cease, it being understood that the monthly instalments, together with the \$1,800, would be full payment for the entire period, but there being a provision that it was to be forfeited to the landlord if the lessor terminated the lease for breach of the covenant as to rent. The court observed that the lessor was not only seeking to terminate the leasehold, but also to avail itself of the \$1,800 cash deposit, and that was clearly a penalty against which equity should grant release. It appeared in this case that the lessor, shortly after the rent days, had mailed checks for the instalments on account of which the forfeiture was asserted, the last one, however, being returned to him by the lessor.

In *Atkins v. Chilson* (1846) 11 Met. (Mass.) 112, it appeared that a lessee, by mistake, tendered a quarter's rent a day or two before it was due. Because of a pending action by the lessor against the lessee for the supposed breach of another condition of the lease, the lessor could not accept the rent without waiving that breach, and so refused it. It was held that forfeiture proceedings against the lessee for the nonpayment of the rent would be stayed on the lessee's payment of the accrued rent with interest.

In *Kansas City Elevator Co. v. Union P. R. Co.* (1881) 3 McCrary, 463, 17 Fed. 200 (elevator case), it was held that equity would afford relief from a forfeiture, where it appeared that a re-entry was made for nonpayment of rent without a demand for the payment thereof. It will be observed,

however, that if the lease expressly waives a demand, no such demand is necessary as a foundation for a legal forfeiture. See the reported case (*BONFILS v. LEDOUX*, ante, 430).

Although there has been a judgment in forcible entry and detainer against the lessee for nonpayment of rent, this will not preclude him from relief against the forfeiture in equity. *Abrams v. Watson* (1877) 59 Ala. 524. Neither will relief be denied because the lessor has recovered the possession of the premises in ejectment. *Charles Mulvey Mfg. Co. v. McKinney* (1914) 184 Ill. App. 476, wherein the court said: "In an action of ejectment, or the statutory action of unlawful detainer, the right of possession alone is involved, and the judgment in such action does not conclude the lessee from relief in equity."

Nor is the right of the lessee to relief affected by the lessor's assignment of the lease and alienation of the premises. The alienee succeeds to the rights accruing subsequent to the alienation, but is subject to all the rights and equities of the lessee against the lessor. *Abrams v. Watson* (Ala.) and *Charles Mulvey Mfg. Co. v. McKinney* (Ill.) supra.

In *Murphy v. Sayles* (1918) 201 Mich. 78, 166 N. W. 990, it was held that a court of equity would not recognize a forfeiture, where it appeared that the lessor was retaining the exclusive use, possession, and enjoyment of the property to himself, and refusing the lessee's right of entry on other grounds. The court said that the lessor was in no position to declare a forfeiture for the nonpayment of rent, without first tendering the lessee the possession of the premises on payment, and that in the meantime an equitable suspension of payment arose against him.

In Massachusetts, it seems that a court of equity may grant relief against a forfeiture for the nonpayment of rent, by a stay of proceedings for forfeiture in support of an equitable defense, on the payment, by the tenant, of all rent in arrears, with interest. *Atkins v. Chilson* (1846) 11 Met. (Mass.) 12.

(b) Accidental default.

In *Thompson v. Coe* (1921) — Conn. — A.L.R. —, 115 Atl. 219, it was held that equity would relieve a lessee from forfeiture for nonpayment of rent, thus preventing the loss of an option to purchase, it appearing that the lessee, who had been accustomed without objection to send the rent by check or money order through the mail, mailed the rent in question in cash, in ample time to reach the lessor within the time fixed, but the money was lost or stolen in transit; that as soon as he learned of the disappearance of the money the lessee notified the lessor and assumed liability if the money was ultimately lost, the lessor making no disclaimer or objection until notice to quit was served, whereupon the lessee immediately tendered the rent and repeated the tender.

In *Wylie v. Kirby* (1911) 115 Md. 282, 80 Atl. 962, Ann. Cas. 1913A, 825, wherein it appeared that a default in the payment of rent was due to the negligence of a clerk of the lessee in failing to mail a check therefor, as was his duty, the court said: "It is apparent that the failure in this case to pay the rent at the time prescribed was not due to ordinary indifference or neglect on the part of the appellee. In the unusual situation in which he was placed with respect to the management of a great number of stores, it was not practicable for him to personally attend to the remittance of all the various instalments of rent, or to do more than provide the means and agencies for their regular and punctual payment. The failure to remit the December rent to the appellant occurred not only without the appellee's knowledge, but contrary to his express instructions. He was kept in ignorance of the inadvertence of one clerk in failing to forward the rent, by the mistake of another in assuming and reporting the payment as having been made in the usual course of business. It is quite evident, therefore, that the default upon which the appellant relies for the forfeiture of the lease was not justly attributable to any individual dereliction of the lessee, but happened in

spite of his reasonable provision for the faithful and punctual performance of his contractual duty. It would be obviously and grossly inequitable to deprive him of the benefit of his large expenditures for permanent improvements, so far in advance of the expiration of the term, merely because of a mischance which involved, on his part, no element of personal delinquency. It is an established doctrine that equity will grant relief from a forfeiture, where such a condition is provided to secure the payment of money, as in the case of a right of re-entry for the nonpayment of rent at the time designated in the lease. . . . The case at bar is clearly an appropriate one for the application of this equitable principle. There is nothing in the lease or in the record at large to justify the inference that the condition of forfeiture was intended to serve any other purpose than that of a security for the payment of the rent at the times and in the instalments prescribed; and all the compensation the appellant could rightfully demand was promptly tendered as soon as the appellee learned that the amount due had not in fact been paid. During the pendency of this suit all the rent has been paid as it accrued, and has been received by the appellant under a stipulation that it should not prejudice her efforts to enforce the forfeiture. The appellee has done all that could reasonably be required to make amends for the inadvertence which caused the brief delay in the December payment, and to continue the discharge of his obligations under the lease, and a court of equity will not permit him, under the circumstances of this case, to be subjected to unjustifiable loss, without blame or misconduct on his part."

In *Wilson v. Jones* (1867) 1 Bush (Ky.) 173, relief was afforded to a tenant, it appearing that the default in the payment of the rent was not intentional, but accidental or inadvertent. The court said that the "entry and intention of possession were legal rights; but equity considers such general stipulations for entry by the landlord as intended for securing

the rent, and not for forfeiting the lease, if the tenant shall have acted in good faith, and shall promptly pay the rent when demanded, or before the landlord shall have suffered loss or unreasonable inconvenience from the delinquency."

So, in *South Penn Oil Co. v. Edgell* (1900) 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596, 21 Mor. Min. Rep. 106, wherein it appeared that a default in the payment of rent was not a wilful violation of the contract, but merely a denial of certain rights secured to the lessee by the lease as a part of the consideration, the denial being due to oversight or mistake, relief from a forfeiture of the lease was granted.

In *Shriro v. Paganucci* (1915) 113 Me. 213, 93 Atl. 358, a lessee was afforded relief from a forfeiture, it appearing that the relation of landlord and tenant had existed four and one-half years, and that the rent had always been paid punctually, the default for which a forfeiture was claimed being accidental, and payment being delayed only thirty-six hours.

(c) Acquiescence of lessor in irregular payments.

When a landlord, by a course of dealing in accepting overdue rent, has put a tenant off his guard, a forfeiture of the lease for a delayed payment of rent cannot be enforced, unless notice has been given to the tenant calling on him for a compliance with the strict terms of the lease; and equity will relieve from such a forfeiture. *Merrill v. Trimmer* (1885) 2 Pa. Co. Ct. 40.

So, in *Thropp v. Field* (1875) 26 N. J. Eq. 82, wherein it appeared that the rent, from the commencement of the term, had been paid at irregular intervals, sometimes once a month and sometimes once in two months, and that the lessor never had enforced strictly the covenant for the payment of the rent according to the terms of the lease, the court said: "If the defendant, by his acquiescence, induced the complainants to believe that strict observance of their covenant to pay the rent was not required by him, it is inequitable in him, under the circumstances, to seek to enforce the for-

feiture. Besides, full compensation can be made to the defendant for the failure of which he complains, and under such circumstances equity will relieve."

Similarly, in *Carpenter v. Wilson* (1904) 100 Md. 18, 59 Atl. 186, wherein it appeared that a lessor, for a period of three years, had accepted rent between the 10th and the 14th of the month, though, under the terms of the lease, it was due on the 1st, the court, in affording to the tenant relief from a forfeiture, said: "A very different case would be presented if the landlord had not for a long time accepted the rent without objection, after it had accrued, and had, on the first attempted payment of the rent in arrear, refused it and claimed a forfeiture. We do not mean to say that the fact alone of the long-continued receipt of rent by the appellant, when it was overdue, constitutes an equitable defense. . . . But this fact, in connection with the allegations of the plea in regard to improvements made by the appellee, and with those relating to the provisions of the lease by which the lessee was enabled to acquire the property in fee, present just such a case as a court of equity would and should entertain. It cannot be questioned, we think, that if the appellant, instead of putting his defense in the shape of an equitable plea, had filed a bill in a court of equity, setting forth the same facts, an injunction would have issued prohibiting the appellant from prosecuting his ejectment."

And in *Lombardo v. Clifford Bros. Co.* (1921) — Md. —, 114 Atl. 849, where the written lease, which gave the lessee the right to re-enter in case the monthly rental, payable in advance, was ten days in arrears, was silent as to where the rent was to be paid, the court held that the lessor would not be permitted to enforce a forfeiture, with the effect of extinguishing the lessee's option to purchase, because of the failure of the latter to send a check for the rent for a certain month within ten days after it was due, even if it were assumed that there was an oral agreement that

checks should be sent for the rent, it appearing that the lessor had been in the custom of calling at the lessor's place of business for the rent, and that on other occasions, he had, without objection, received the monthly payments when they were overdue, and that she neither called at the lessee's office to collect the rent in question, nor in any other way asked for its payment before attempting to re-enter and take possession of the leased premises. It appeared in this case that all the rent accruing prior to the month in question had been paid, and that a check for that month, as well as checks for all succeeding months, had been drawn and signed, ready for delivery to the defendant upon her willingness to accept the same.

Likewise, in *Horton v. New York C. & H. R. R. Co.* (1882) 12 Abb. N. C. (N. Y.) 30, affirmed in (1886) 102 N. Y. 697, it was said: "By the proof given upon the trial, it was also made to appear that indulgence was extended to the lessees in the payment of the rent reserved by the lease. And while this did not strictly relieve them of the obligation to perform their covenant, it still constituted an excuse for the omission to pay the rent at the time when it matured. It was stated in substance, by one of the lessors, that the payment of the rent would not be insisted upon, but if the lessees failed to pay when, in the judgment of this lessor, payment ought to be made, notice would be given to them requiring payment. And it was upon the belief that this delay would be permitted, without prejudice to the tenants' right afterwards to pay, that the omissions to pay at the day were made. This was a very natural result from what was shown to have transpired, and, after the tenants had been in this manner lured into negligence, it would be a fraud upon them to permit the lessors or their grantee to insist upon the forfeiture." To the same effect, and following the *Horton Case* (N. Y.) *supra*, see *Palmer & S. Mfg. Co. v. Barney Estate Co.* (1912) 149 App. Div. 186, 133 N. Y. Supp. 876.

In *Pershing v. Feinberg* (1902) 203 Pa. 144, 52 Atl. 22, it was said, obiter: "Courts will relieve against forfeiture when the injured party has been misled, or an undue advantage has been taken of his reliance on a waiver of strict performance."

But where the tenant demands a strict compliance with the terms of the lease, he will no longer be deemed to be depending on any course of dealing theretofore established, and the lessor may enforce a forfeiture for the nonpayment of rent, although, formerly, he had acquiesced in the tenant's failure to pay the rent in advance. *Times Co. v. Siebrecht* (1882) 15 Phila. (Pa.) 235, wherein the court said: "The usual course of dealings between the parties to this suit had been such that, but for the act of the tenant himself, we would incline to open this judgment and thus relieve him. Equity will always relieve in a case of this nature against a forfeiture, and will not permit a landlord to entrap his tenant by establishing a certain course of dealing, and then, without notice, suddenly enter up a judgment and eject the tenant. The case before us is an exception to a general rule, and contains an element which is, we think, fatal to the tenant. On the 12th of January, 1882, he gave a written notice to his landlord by demanding his full 'three months' notice for removal previous to the expiration of any year' of the tenancy. After this notice the landlord had a right to believe that the parties, no longer depending upon any course of business theretofore established, would deal at arm's length. The tenant could thus compel an exact compliance with any covenant contained in the lease; so could the landlord; and if, in this contest, the tenant has overreached himself, he surely ought not to complain."

(d) *Set-off or recoupment against lessor.*

In *Abrams v. Watson* (1877) 54 Ala. 524, it appeared that a lessee had demands growing out of the lessor's breaches of covenant, equaling the rent for the remainder of the term, and refused to pay further instal-

ments. The lessor obtained a judgment in forcible entry and detainer, and insisted on the immediate issuance of "the writ of possession," whereupon the lessee filed a bill in equity seeking to enjoin the lessor from maintaining further proceedings to obtain possession of the property. Reversing the decision of the lower court in sustaining a demurrer to the bill, the court said: "The principle on which the court proceeds is that the right of the one party, and the duty of the other, are compensation. This may be afforded as well by extinguishing or reducing demands against the lessor, as by a payment in money, if these demands are such as would be the matter of set-off or recoupment in an action at law by the lessor for the recovery of the rent."

(e) *Insufficient notice to lessee.*

See also *Lombardo v. Clifford Bros. Co.* (1921) — Md. —, 114 Atl. 849, supra, III. b, 1 (c).

Under a long-term lease providing that the rent shall be paid in a particular commodity, the receipt of money for a considerable period of time in lieu of the commodity will not preclude the lessor from demanding the rent in the form specified in the lease. Unless, however, ample notice is given the lessor that the rent will be required to be paid as stipulated, where the commodity is difficult to procure, equity will relieve against a forfeiture for the nonpayment thereof, as stipulated. *Lilley v. Fifty Associates* (1869) 101 Mass. 432, wherein the court said: "It appears by the testimony of merchants of long experience in the Russian trade that Old Sables iron, though still manufactured in Russia, has not been imported into this country since 1856. Such being the case, the defendants having omitted for more than forty years ever to demand specific payment of the rent in such iron, and having thereby justified the lessee in supposing that they would not again require it and in taking no steps to procure the iron, it was manifestly unjust and inequitable in the defendants to insist

on receiving iron in payment of the rent for any quarter, without giving the lessee ample time and opportunity to import it; and we are all of opinion that, under the circumstances, less than three months' notice was unreasonable, and insufficient to justify the defendants in insisting upon a forfeiture of a leasehold estate of great value and extraordinary duration; and that the attempt to enforce the forfeiture was such an exercise of strict legal right as a court of equity, upon familiar principles, should restrain and relieve against."

In *Lynch v. Versailles Fuel Gas Co.* (1895) 165 Pa. 518, 30 Atl. 984, 18 Mor. Min. Rep. 149, where it appeared that the main purpose of the lease involved was to have the land tested and developed, and to secure for the lessor the profits of such development, and that the lessee expended large sums of money producing gas, it was held that a forfeiture for the nonpayment of rent could be relieved against, it appearing that notice of forfeiture was delayed several days after the rent was due. The court said: "Under the circumstances he could not equitably do so without notice. There was some evidence that in previous years the rent had not been paid or demanded on the precise day, but it was not strong enough to establish a usage between the parties, and therefore a ground of relief, though it adds something to the equity of appellant's case. But if plaintiff intended to insist on punctuality of payment he was bound to ascertain on the very day whether the rent had been paid or not, and to give notice promptly. A delay of six or seven days, it is true, would not ordinarily be conclusive and perhaps not even material, but in this case the appellant was, in that interval, expending on its well in good faith, and relying on its lease, a sum equal to nearly three years' rent per acre, or a year and a half's rent under a producing well. While making this expenditure, under the circumstances, the appellant was entitled to prompt notice, and the plaintiff was bound to observe and act upon that right. . . . A party entitled to enforce a

forfeiture of this kind must exercise his right promptly, and the result must not be unconscionable. In the present case, the action of the plaintiff was neither prompt nor conscionable."

(f) Insufficient declaration of forfeiture.

See also *Lombardo v. Clifford Bros. Co.* (1921) — Md. —, 114 Atl. 849.

In *Palmer v. Ford* (1873) 70 Ill. 369, the evidence failed to show that a declaration of the forfeiture of a lease was rightfully made. Affirming a decree for relief, the court said: "The lease conferred upon appellant the clear right to declare a forfeiture for the nonpayment of rents, and, if the power reserved was properly exercised, then the bill ought to have been dismissed; but if there was no declaration of forfeiture, and the contracts alleged, in regard to the collection of rents and the completion of the buildings, were made, then there were clear grounds for equitable relief. . . . There was clearly no effort to collect promptly the ground rent secured by the lease. The delay may have been, and doubtless was, for the benefit of appellee, and by reason of his importunities. It is certain great indulgence was granted to him, which is conceded by the answer and abundantly established by the testimony of both parties. There was but little doubt it was done to enable appellee to extricate himself from the difficulties he had experienced in procuring the funds with which to complete the work he had undertaken. . . . Negotiations had been going on between the parties for an adjustment of the difficulty. The propositions of appellee had been so favorably received that neither the lessor nor his agents had pressed him for the ground rents for more than a year, other than such as were received from the tenants of the building. It is said no notice under the lease was necessary, for the reason appellee had expressly waived his right to notice. It may be conceded such is the provision of the lease, but that fact would hardly excuse the want of notice, under the circumstances of this case. Appellant

had not elected to declare a forfeiture as the instalments of the rents severally became due, but had uniformly waived that privilege as favor to appellee, on his solicitation. No new instalment had become due, but, if a declaration of forfeiture was made, it was for all the previous unpaid rent. In the event the lessor had suddenly changed his purpose, to grant no further accommodation, good faith certainly required he should give some definite and specific notice of such change. . . . Forfeitures are not regarded by courts with any special favor. The party who insists upon a forfeiture must make clear proof, and show he is entitled to make such declaration. It is a harsh way of terminating contracts, and not infrequently works great hardships, and he who insists upon making such declaration cannot complain if he is held to walk strictly within the limits of the authority which gives the right. . . . There is not that clear and distinct evidence that a declaration of forfeiture was rightfully made that the law undoubtedly requires."

The act of a city government in forfeiting a lease for nonpayment of rent, being a legislative or quasi legislative act, must conform to all the requirements of the charter, to give it any force or validity whatever. Thus, in *Carondelet v. Wolfert* (1866) 39 Mo. 305, wherein it appeared that the lessee tendered the amount due, after the passage of the resolution of forfeiture by the city council, but prior to its being signed by the mayor as required by law, the court said: "The testimony shows that the attempted forfeiture in this case consisted in the passage of a resolution by the council declaring the fact that immediately thereafter the witness Chartrand, acting as agent of the respondent, tendered to the city collector, who was then present at the meeting of the city council, a warrant of the said city for the sum of \$45 in payment of the rent in arrear upon the property in question; that the amount of the warrant was much larger than the amount of rent due; and that no change was demanded of the officer to

whom the tender was made. It was further shown by the city ordinances that such warrants were made receivable for all dues to the city. Now, admitting that the simple resolution of the council was sufficient for the purpose intended, still it cannot be said to have been completed, for the reason that the charter required the proceedings of each meeting of the board to be signed by the mayor; and the covenant in the lease required that the 'order or resolution' by which the forfeiture was to be declared should be 'entered on record among the acts and proceedings of the said board,' etc. So that, in whatever light this transaction is to be regarded, the attempt on the part of the city to declare a forfeiture should be treated as a mere nullity."

2. Relief refused:

(a) Wilful default.

In the reported case (*BONFILS v. LÉDOUX*, ante, 430) it appeared that rent, was in default to the amount of \$9,500 before possession was demanded by the lessor, that the leasehold value of the property consisted in the uninterrupted continuance of its use as a theater, and also that a new lessee had made substantial alterations and improvements under such circumstances as imparted knowledge to the plaintiffs, and without objection on their part. When possession was demanded, no tender or offer to pay the rent due was made. It is held that the default in the payment of the rent must be taken as wilful and that relief from the forfeiture is barred.

Likewise, in *Crawford v. Texas Improv. Co.* (1917) — *Tex. Civ. App.* —, 196 S. W. 195, wherein it appeared that a default in the payment of rent was wilful, relief from a forfeiture was denied. The court said: "The evidence detailed shows beyond controversy that Crawford was persistently delinquent in the payment of his rent. But was he wilfully so? The rent instalments were obligations which he was legally and morally bound to meet in advance of the 1st day of every month. When a man ought to pay, can pay, and won't pay,

this is sufficient to warrant a finding that his conduct is wilful. Of itself, it evidences a bad motive and evil intention. Especially, when he persists in such conduct without adequate justification. Such persistency evidences that he is acting designedly and intentionally. According to Crawford's own testimony, he could have paid. He seems to have had a good borrowing capacity. But appellant insists that his own uncontradicted testimony shows that business had been bad, the collection of rent slow, etc. . . . Appellant cites numerous authorities to the effect that courts of equity do not favor forfeitures, and refers to cases where the courts have relieved against forfeitures in lease contracts where there has been a wilful failure to pay rent. The correctness of these authorities is unquestioned. But in order to justify the application of this doctrine in favor of a lessee who has wilfully and persistently defaulted in the payment of his rents, there should be some strong counter-balancing equity in his favor."

And in *Ostenberg v. Scottsbluff Invest. Co.* (1921) — *Neb.* —, 183 N. W. 95, though relief from the forfeiture was allowed, the court observed that the relief is not ordinarily granted when the failure to pay the rent is wilful, or the result of such culpable neglect as to amount to the same thing.

So, in *Randolph v. Mitchell* (1899) — *Tex. Civ. App.* —, 51 S. W. 297, it was said that equity will deny relief in all cases where the default has been wilful.

And in *Little Rock Granite Co. v. Shall* (1894) 59 Ark. 405, 27 S. E. 562, the court said that equity would relieve from a forfeiture for the breach of a covenant to pay rent, unless the violation was the result of gross negligence, or wilful and persistent.

However, in *Mactier v. Osborn* (1888) 146 Mass. 399, 4 Am. St. Rep. 328, 15 N. E. 641, wherein the forfeiture claimed was based on a breach of a covenant to insure, the court said: "The result of the authorities, sup-

ported by sound principle, is that, where there has been a breach of a covenant to pay rent, equity will relieve against a forfeiture, although the breach is wilful on the part of the lessee." The foregoing dictum was followed in the recent case of *Finkovitch v. Cline* (1920) 236 Mass. 196, 128 N. E. 12, although its statement was not necessary to the decision, the forfeiture being claimed for the breach of a covenant other than the nonpayment of rent. But in *DARVIRIS v. BOSTON SAFE DEPOSIT & T. CO.* (reported herewith) ante, 429, where in it appeared that the lessee's failure to pay rent when due was so settled a habit as to be rightly described as a general course of conduct, the court said: "The circumstances of continued delay were annoying in nature and were accompanied by the frequent drawing of checks when there were no funds to meet them. This is not an instance of temporary financial embarrassment or fleeting wilfulness of purpose. Much less is it the result of accident or mistake. When measured by the term of the lease, it has become a custom. The state of being behindhand appears to have been not only wilful, but contumacious. There is, however, no finding of bad faith. It is a familiar maxim in equity that he who seeks equity must do equity. The plaintiff has made an express contract in writing for the payment of rent at specified times, with provision, in case of failure, for entry by the landlord. He asks equity to relieve him from the consequences stipulated in his agreement to follow from failure to perform that obligation. While in the ordinary case of delayed payment of rent that will be done, equity will not interfere in his behalf, where, as in the case at bar, the plaintiff has violated fundamental principles of fair dealing."

(b) Failure of lessee to tender amount due.

In *Wender Blue Gem Coal Co. v. Louisville Property Co.* (1910) 137 Ky. 339, 125 S. W. 732, it was held that while a court of equity would relieve against a forfeiture for the nonpay-

ment of rent where the circumstances warranted it, the court would not interfere where it appeared that the rent was long past due, that there was no tender of the amount in arrears, that the tenant was insolvent, and that other liens were asserted against the property.

In an action to enjoin the execution of a judgment obtained by the lessor in a lease of a water power, for the failure of the tenant to pay rent, where an abatement of the rent was claimed by reason of a failure to supply water in the quantities agreed, it was held that the complainant, in order to make out a case for equitable relief, should tender the amount of the rent due, with interest, less the amount claimed in abatement. *Sheets v. Selden* (1869) 7 Wall. (U. S.) 416, 19 L. ed. 166.

So, in *Pershing v. Feinberg* (1902) 203 Pa. 144, 52 Atl. 22, wherein it appeared that a lessee attempted to collect a claim against his landlord by deducting the same from his rent, and the check was refused for that reason, and a forfeiture was declared, it was held that the return of the check was notice to the lessee that his claim was disallowed, and that, by his persistence in deducting the alleged claim, he had placed himself in a position in which the court could give no relief from the forfeiture incurred thereby.

See also, as to failure to tender the rent due, the reported case (*BONFILS v. LEDOUX*, ante, 430), set out in the preceding subdivision of this note.

(c) Other covenants broken.

Where other covenants besides the covenant for the payment of rent have been broken, and no relief can be given in equity from the breach, a forfeiture for the breach of the condition concerning rent will not be relieved against, as such relief would be of no effect. See *Sunday Lake Min. Co. v. Wakefield* (1888) 72 Wis. 204, 39 N. W. 136.

IV. Who entitled to relief.

Relief from a forfeiture for nonpayment of rent may be granted, not only to the lessee, but also to third

persons who have acquired an interest in the demised premises under the lessee, and whose rights will be defeated by the forfeiture. Thus, it may be granted to creditors of the lessee, who, before the forfeiture, have acquired rights in removable fixtures by a levy thereon of an attachment or execution, or to the tenants, vendee, or mortgagee of such fixtures. See *Morey v. Hoyt* (1893) 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127.

In *Kemble v. Grabb* (1867) 6 Phila. (Pa.) 402, the vendee at a sheriff's sale of a leasehold was held to be entitled to relief from the forfeiture of a lease for nonpayment of rent.

V. Rule in England and Canada.

In England, the cases decided under the common law held that, on the theory that a forfeiture provided for in the lease for the nonpayment of rent was for the security of the rent, equity would relieve against a forfeiture under such a provision where compensation could be made (*Davis v. West* (1806) 12 Ves. Jr. 475, 83 Eng. Reprint, 180; *Bowser v. Colby* (1841) 1 Hare, 109, 66 Eng. Reprint, 969, 11 L. J. Ch. N. S. 132, 5 Jur. 1178), if, as a condition precedent to such relief, the rent due and costs were tendered in court (*Phillips v. Doelittle* (1725) 8 Mod. 345, 88 Eng. Reprint, 247).

So, it has been held that where an account between the landlord and tenant was complicated so that a court of law would be incapable of adjusting the differences, equity would take jurisdiction to settle the account and relieve against a forfeiture for nonpayment of rent, and the tenant in such a case would not, as a condition to relief, be required to tender the rent due. *Beasley v. Darcy* (1800) 2 Sch. & Lef. (Ir.) 403, note; *O'Connor v. Spaight* (1804) 1 Sch. & Lef. (Ir.) 305; *O'Mahony v. Dickson* (1805) 2 Sch. & Lef. (Ir.) 400.

But where it appeared that one who had succeeded to the rights of a tenant declined to pay the arrears of rent and costs after a forfeiture for the nonpayment of rent had been declared, but endeavored unsuccessfully to obtain possession by other means, the

court held that he could not thereafter obtain relief in equity from the forfeiture by tendering the amount in arrears, with interest and costs, especially after the premises had been let to another. *Dorrington v. Jackson* (1687) 1 Vern. 449, 23 Eng. Reprint, 578.

It has been held that where a tenant leased to a number of subtenants and subsequently the lease was avoided for the nonpayment of rent, equity would not, at the suit of the subtenants, relieve against the forfeiture unless the whole rent in arrears was paid, as it would not attempt to apportion the rent. *Webber v. Smith* (1689) 2 Vern. 103, 23 Eng. Reprint, 676.

Although, it was held, a court of equity would relieve against a forfeiture for the nonpayment of rent, it would not do so if there had been a recovery in ejectment for a breach of other covenants. *Wadman v. Calcrafft* (1803) 10 Ves. Jr. 67, 32 Eng. Reprint, 768; *Nokes v. Gibbon* (1856) 3 Drew. 693, 61 Eng. Reprint, 1068, 26 L. J. Ch. N. S. 433, 3 Jur. N. S. 726, 5 Week. Rep. 400; and see *Lovat v. Ranelagh* (1814) 3 Ves. & B. (Eng.) 24.

From the later English cases it seems that relief against a forfeiture for the nonpayment of rent may be obtained under the ordinary equitable jurisdiction of the court and the Common-law Procedure Act. *Humphreys v. Morten* [1905] 1 Ch. 739, 74 L. J. Ch. N. S. 370, 53 Week. Rep. 552, 92 L. T. N. S. 834 (relief accorded sublessee).

And in a proper case relief from a forfeiture for the nonpayment of rent is authorized by the Common-law Procedure Acts of 1852 and 1860, and by the Conveyancing & Law of Property Act of 1892. *Croft v. London & C. Bkg. Co.* (1885) L. R. 14 Q. B. Div. 347, 49 J. P. 356, 52 L. T. N. S. 374, 54 L. J. Q. B. N. S. 277; *Hare v. Elmes* [1893] 1 Q. B. 604, 57 J. P. 309, 62 L. J. Q. B. N. S. 187, 5 Reports, 189, 68 L. T. N. S. 223, 41 Week. Rep. 297; *Howard v. Fanshawe* [1895] 2 Ch. 581, 43 Week. Rep. 645, 64 L. J. Ch. N. S. 666, 13 Reports, 663, 73 L. T. N. S. 77; *Gray v. Bonsall* [1904] 1 K.

B. 601, 78 L. J. K. B. N. S. 515, 52 Week. Rep. 387, 90 L. T. N. S. 404, 20 Times L. R. 335; *Moore v. Smee* [1907] 2 K. B. 8, 76 L. J. K. B. N. S. 658, 96 L. T. N. S. 594. In the case first cited it was said that the terms imposed by the statute governing the rights of tenants as to payment of rent and costs are conditions imposed by the act, without compliance with which an injunction to restrain ejection for nonpayment of rent cannot be granted by the court.

The Irish Act of 19 & 20 Geo. III. provided that equity, upon adequate compensation being made, shall relieve tenants against lapse of time for payment of rent, if no circumstances of fraud are proved, unless it shall appear that, after a demand made, the tenant has refused or neglected to renew within a reasonable time after such demand. Therefore, the court will relieve from a forfeiture for delay in payment of rent, where the delay is satisfactorily accounted for. *Jessop v. King* (1811) 2 Ball & B. (Ir.) 81.

In Canada it has been held that relief against a forfeiture for the nonpayment of rent will not be granted after the term has expired, although the lease contains an option to purchase. *Coventry v. McLean* (1894) 21 Ont. App. Rep. 176, affirming (1892) 22 Ont. Rep. 1.

In the case of *Re Bagshaw* (1918) 42 Ont. L. Rep. 466, 42 D. L. R. 596, it was held that the repudiation of a promise to vacate the premises was an act of bad faith, which barred the lessee from obtaining equitable relief from the forfeiture of his lease for the nonpayment of rent.

Where a lessee is served with a notice of re-entry on his failure to pay an instalment of rent, and it appears that, with the acquiescence of the lessor, it has been his custom to make irregular payments, and also that, when served with the notice of re-entry, he immediately tendered the amount due, equity will relieve from the forfeiture. *Balagno v. Leroy* (1913) 18 B. C. 127, 23 West. L. R. 621, 10 D. L. R. 601. A. S. M.

RE WILL OF FRANCES (Fannie Alice) SWARTZ, Deceased.

MARGUERITE GLEASON et al., Pliffs. in Err.,

v.

M. W. (Wesley) JONES.

Oklahoma Supreme Court—July 6, 1920.

(79 Okla. 191, 192 Pac. 203.)

Will — undue influence — immoral surroundings.

1. A devise to one associated with testatrix in an immoral environment, and the presence of the devisee in the room where testatrix was instructing her lawyer as to the disposition she wished to make of her property, and the lawyer, being at the time engaged in drafting the will, would not, because of the immorality of the association, or the presence of the devisee, standing alone, give rise to an inference of undue influence exerted by the devisee over the testatrix.

[See note on this question beginning on page 457.]

Witness — physician — nonconfidential communications.

2. Paragraph 6, § 5050, Rev. Laws 1910, providing that a physician or

surgeon shall be incompetent to testify concerning any communication made to him by his patient with reference to any physical or supposed

Headnotes by PITCHFORD, J.

physical disease, or any knowledge obtained by a personal examination of such patient, does not apply when the circumstances surrounding the communication, or knowledge obtained by personal examination, were such as to show that what was said or discovered on the occasion was not intended to be confidential, and especially when third persons were present and heard all that was said between the deceased and the physician, and the knowledge obtained by a personal examination was as patent to the third persons as it was to the physician.

[See 28 R. C. L. 546.]

Will — what is undue influence.

3. Undue influence, such as will invalidate a will, must be something which destroys the free agency of the

testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relations with them at the time of its execution. Mere general influence; not brought to bear on the testamentary act, is not undue influence; but, in order to constitute undue influence, it must be used directly to procure the will, and must amount to coercion, destroying the free agency of the testator. Mere suspicion that undue influence was brought to bear is not sufficient to justify the setting aside of the will.

[See 28 R. C. L. 137 et seq.]

ERROR to the District Court for Okmulgee County (Hughes, J.) to review a judgment reversing a judgment of the County Court admitting to probate the will of Frances Swartz, deceased. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. G. R. Horner and Dudley C. Monk, for plaintiffs in error:

The witness, Dr. Robinson, under the statute, was incompetent to testify as to the mental or physical condition of his patient from information obtained while attending her as a physician.

Chicago, R. I. & P. R. Co. v. Hughes, 64 Okla. 74, 166 Pac. 411; Auld v. Cathro, 32 L.R.A. (N.S.) 71, note; Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; Re Myer, 184 N. Y. 54, 76 N. E. 920, 6 Ann. Cas. 26; Davis v. Supreme Lodge, K. H. 165 N. Y. 159, 58 N. E. 891; Re Van Alstine, 26 Utah, 193, 72 Pac. 943; Re Flint, 100 Cal. 391, 34 Pac. 863; Re Nelson, 132 Cal. 182, 64 Pac. 294; Re Hunt, 122 Wis. 460, 100 N. W. 874.

A devise to one associated with testatrix in an immoral environment does not, because of the immorality of the association, give rise to an inference of undue influence exerted by devisee over testatrix.

Re Gorkow, 20 Wash. 563, 56 Pac. 385; Taylor v. Hilton, 23 Okla. 354, 100 Pac. 537, 18 Ann. Cas. 385; Bell v. Davis, 55 Okla. 121, 155 Pac. 1132; Letts v. Letts, — Okla. —, 176 Pac. 234; Re Cook, — Okla. —, 175 Pac. 507.

The mere presence of the beneficiaries under the will in the room where testatrix was instructing her

lawyer as to the disposition she wished to make of her property, he being at the time engaged in drafting said will, would not constitute undue influence.

Re Cook, *supra*.

Messrs. I. H. Cox and F. B. Ropkey for defendant in error.

Pitchford, J., delivered the opinion of the court:

This case comes on appeal from the district court of Okmulgee county in denying to probate the will of Frances Swartz. The record discloses that Frances Swartz resided in the city of Henryetta, Oklahoma. Some time prior to and at her death she was engaged in conducting a house of prostitution. For sometime preceding the execution of the instrument sought to be probated as her will, she had been under the care of Dr. Robinson, suffering from an attack of jaundice. Early Sunday morning, April 9, 1916, the doctor was called in and found that the disease had reached an acute stage, and informed her of her serious condition, and further impressed upon her the fact that there was no hope for her recovery.

Someone in the house telephoned

Mr. Axline, an attorney of Henryetta, and informed him that his services were wanted in the preparation of a will. He immediately responded, and the will was executed, devising to Marguerite Gleason and W. E. Peak, two of the inmates of the house, certain real estate, the same being the house occupied by the deceased, together with the furniture therein contained, of a total value of \$3,968.75, and real estate of the value of \$600 was devised to Wesley Jones, a brother of the testatrix, residing in Peoria, Illinois. The testatrix died on the following morning. Claims filed against the estate amount to \$3,200. When the will was offered for probate in the county court of Okmulgee county, the brother filed a contest, and the court, after hearing the evidence, admitted the will to probate. An appeal was taken by the contestant to the district court of Okmulgee county, and judgment there rendered in favor of the contestants, on the ground that the will was procured by undue influence exercised by the proponents over the testatrix. From the judgment of the district court the proponents appeal, and assign as error (1) that the court erred in permitting Dr. Robinson, the physician, to testify as a witness; (2) error in finding that the associations of the testatrix with the proponents in an immoral environment, and the presence of the proponents of the will in the room at the execution of the will, were sufficient to infer undue influence.

Section 5050, Rev. Laws 1910, provides: "The following persons shall be incompetent to testify:

... 6th. A physician or surgeon, concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient.

"
The application of this statute to the testimony of a physician in a will contest seems to have never

been considered by this court, nor do we deem it necessary to pass upon the question in this case, further than to say that we appreciate the objects the lawmakers must have had in view in enacting the statute. A patient should be encouraged to give the attending physician full and complete information as to his physical infirmities, in order that the physician may have a better knowledge of the physical condition of his patient, and thereby be placed in a better position to give a more intelligent treatment.

A patient is encouraged to speak freely to his physician, realizing that everything is said in strict confidence, and, the statute safeguarding him against the possibility of his feelings being shocked or his reputation ruined, he may be absolutely frank with his physician. A like privilege exists between attorney and client, and priest or clergyman, concerning any confession made to him in his professional character. These communications are made privileged by reason of the relationship of the parties, supposed to be made under absolute privacy, and made alone to the attorney, clergyman or priest, or physician. But we do not understand that the privilege obtains when all the circumstances show that the communications made or information obtained were made or obtained in the presence of third persons. In the instant case the matters testified to by the physician were not obtained by reason of his knowledge as a physician, but rather by a knowledge equally possessed by the laity. All the physician testified to was as to her condition that she was suffering with jaundice; the other parties in the room knew just as well as the physician that the testatrix was suffering with this disease. The average man or woman can as easily tell when one is suffering with jaundice as they can when the party is suffering from an ordinary cold. It is true, however, that the lay mind would

probably not know the far-reaching effects of jaundice, nor would it know the far-reaching effects of the ordinary cold.

Conceding, however, but not deciding, that if the physician and the deceased had been alone, and it appeared that what was said by the patient was intended to be confidential, or if the physician found it necessary to examine the person of the patient, then there would be some reason for claiming that the veil of secrecy should be thrown over these communications and discoveries. But when the circumstances surrounding the visit were

such as to show that what was said on the occasion was not intended to be in confidence, and especially when third persons were present and heard all that was said between the deceased and the physician, the statutory provision is inapplicable.

In 40 Cyc. title Witnesses, p. 2377, it is said: "There is no privilege as to a communication between attorney and client in the presence of a third person."

In *Baumann v. Steingester*, 213 N. Y. 328, 107 N. E. 578, Ann. Cas. 1916C, 1071, decided January 5, 1915, the facts were that one Maria Shadrack, with a companion, Mrs. Steinföld, went to the office of her attorney, and in the presence of Mrs. Steinföld gave directions for the drawing of her will. After her death a contest was instituted, and the attorney was called as a witness and asked concerning these directions. The court excluded the evidence as a confidential communication. This was held error by the court of appeals.

In *Scott v. Aultman Co.* 211 Ill. 612, 103 Am. St. Rep. 215. 71 N. E. 1112, it is said: "Statements made by clients in the presence of third parties, or of the opposite party and his solicitors, are not of that confidential nature which the client may insist shall not be disclosed by an attorney or solicitor."

In *Ruiz v. Dow*, 113 Cal. 490, 45

Pac. 867, there was at issue the question of a gift. The deceased donor had made certain statements to his attorney in the presence of the donee. It was held that under these circumstances the conversation between them—that is, the attorney and the decedent—was not confidential in the sense contemplated by the statute.

In *Mobile & M. R. Co. v. Yeates*, 67 Ala. 164, the rule is thus laid down: "Professional communications between attorney and client are regarded as confidential, and are protected on grounds of public policy; but the rule does not extend to communications openly made in the presence of third persons."

In *Elliott v. Elliott*, 3 Neb. Unof. 832, 92 N. W. 1006, there was admitted the conversation of an attorney with reference to drawing a contested will of a deceased client. This conversation took place in the presence of the witnesses. The court said, relative to its admission: "It is not probable that any part of the conversation was in the nature of a confidential communication. It appears to have taken place for the most part in the presence of the other two witnesses, and with no injunction of secrecy. In *Hills v. State*, 61 Neb. 595, 57 L.R.A. 155, 85 N. W. 836, it is said: "The mere fact that a communication is made to a person who is a lawyer, a doctor, or a priest does not, of itself, make such communication privileged. To have that effect, it must have been made in confidence of the relation, and under such circumstances as to imply that it should forever remain a secret in the breast of the confidential adviser."

To the same effect, see *Masons' Union L. Ins. Asso. v. Brockman*, 26 Ind. App. 182, 59 N. E. 401; *Hummel v. Kistner*, 182 Pa. 216, 37 Atl. 815.

In *Jones's Commentaries on the Law of Evidence in Civil Cases*, Horwitz's Revision, otherwise known as the Bluebook of Evidence, § 761, pp. 575, 576, vol. 4, the rule is laid down as follows: "As to

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communications.

the effect on the privilege of the patient or the physician, it needs no consideration to say that, if those third persons are necessarily present as assistants, there can be no question that the privilege is untouched. But when they are merely casually present, their very presence neutralizes the confidential character of the interviews, and the privilege should not attach."

There was no error in admitting the evidence of Dr. Robinson.

The second proposition contended for by the appellants is that a devise to one associated with testatrix in an immoral environment does not, because of the immorality of the association and the presence of the beneficiaries at the time the will is executed, give rise to an inference of undue influence exercised by the devisees over testatrix.

The trial court found that there was no direct and positive evidence that the will was made at the suggestion of either Marguerite Gleason or W. E. Peak, and that the only way the court could arrive at the proposition as to whether or not there was undue influence exercised, or whether the will was written at their suggestion, would have to be ascertained from the circumstances surrounding the making of the will. He found that the proponents of the will were present at the time of the writing of the will, and that at the time the decedent was in a very weak condition, both mentally and physically. The court did not find that the testatrix was not of disposing mind and memory at the time she made the will, but did find that at the time of the making of the will the testatrix was unduly influenced by the proponents. He found that such undue influence arose a great deal because of the illegal and licentious relationship existing among the inmates of the house; that at the time of her death her mind was in such condition as to be easily influenced by suggestion; and the court was of the opinion that under the particular circumstances of this case, taking everything into considera-

tion, the relationship of the parties, the character of the business in which they were engaged, the fact that both of the principal beneficiaries and proponents of the will were present at the bedside at the time the will was written, and the fact that one of them, the principal beneficiary under the will, to wit, Marguerite Gleason, had only been acquainted with the decedent a few months, the court was of the opinion that at the time of the execution of the will the testatrix was unfairly and unduly influenced in making it by the two principal beneficiaries, and therefore that the instrument presented for probate was not the will of Frances Swartz.

Conceding that the environments of the decedent and the proponents were immoral, that fact did not deprive Frances Swartz of the right to say in life what the disposition of her property should be after death. The property was her own; she had the right to sell it or give it away. The court did not find, neither did he base his judgment in refusing to probate the will upon the ground, that the testatrix was not of disposing mind, but upon the ground that she was influenced by the suggestions of the proponents. We have made a careful search of the record, and have been unable to find where either of the proponents ever at any time used the least influence on the testatrix to induce her to execute the will as she did; not even the remotest suggestion on their part is shown. Therefore, we are confronted with this proposition: Does the fact that the testatrix was the mistress of a house of ill fame deprive her of testamentary capacity in the event the beneficiaries of her will happen to be inmates of the house conducted by her as such? Does the lack of morality forfeit her right to devise her property as conferred by statute? And if her occupation does not deprive her of this right, is she limited to those who are respectable members of society? 'It is true that the testatrix and the proponents of the will had become

social outcasts, and had wandered far from the paths of rectitude, brought to this condition, in all probability, by the passions of some lecherous, unprincipled, lying man. Here we are reminded that a man may wander afar from the paths of virtue and right living; he may commit many offenses against the moral law; he may feed upon the husks of degradation; but when we see evidence of reformation on his part, everyone delights in giving him a word of encouragement. On the other hand, when a poor unfortunate woman, in almost every instance the victim of misplaced confidence in some man, makes an effort to reform, attempts to regain a respectable position in society, we find the back of almost every hand turned against her. They are shunned by people of respectability, they have no one to associate with except those who, like them, have departed from a life of virtue. Is it to be expected, then, when they come to their deathbeds and their spirit takes its flight to appear before the Infallible Bar where we hope that mercy will be shown them because of the fact that their sins are largely brought about by a confiding trust in some man, that the pillars of society will be present to administer to their last wants, or close their eyes in death? Must we say that because the proponents of this will were at the bedside of the testatrix at the time of her death, drawn together by their common social ban, compelled to administer, each to the other, that this is a circumstance from which, alone, we must draw a conclusion of undue influence exercised over the testatrix? The testatrix had cast her lot among these kind of people; they were of her world; her days were lived among them; she died among them. Under all the circumstances of the

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influence—
immoral
surroundings.

instant case, we are not prepared to say that the proponents would be the unnatural objects of the bounty of the testatrix, Frances Swartz.

We have not been cited to any authority directly in point upon this question, nor have we been able to find any; however, we have decisions of this court shedding some light upon the point.

In *Re Cook*, — Okla. —, 175 Pac. 507, the testator had been married. He and his wife had separated, his wife had gone to live with her people, and he lived at home with his mother. After his death, and when his will was offered for probate, his wife filed a contest, alleging undue influence on the part of his mother, who was the principal beneficiary under the will. There was no direct or positive evidence adduced disclosing any effort made by the mother to induce the testator to will the property to her. The trial court, however, deduced from the evidence that the testator lived with his mother, together with the fact of his being separated from his wife and all the circumstances surrounding the testator at the execution of the will, that undue influence could be inferred. Upon appeal to this court, Kane, J., delivering the opinion, said: "Undue influence, such as will invalidate a will, must be something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relations with them at the time of its execution. Mere general influence, not brought to bear on the testamentary act, is not undue influence; but, in order to constitute undue influence, it must be used directly to procure the will, and must amount to coercion destroying the free agency of the testator. Mere suspicion that undue influence was brought to bear is not sufficient to justify the setting aside of the will. *Re Keegan*, 139 Cal. 123, 72 Pac. 828; *McCulloch v.*

Campbell, 49 Ark. 367, 5 S. W. 590; *Westcott v. Sheppard*, 51 N. J. Eq. 315, 30 Atl. 428. It is true from the nature of the subject that proof of undue influence is, necessarily, largely or wholly circumstantial, and the contestant is not confined to the facts which he may be able to adduce, but is entitled to all the natural inferences which may be derived from established facts. But the will of a person found to be possessed of sound mind and memory ought not to be set aside on evidence tending to show only a possibility of undue influence. The express intentions of the testator should not be thwarted without clear reason therefor. The right to make a will includes the right to make it according to the testator's own desires, subject only to the statutory restrictions. Unequal or unnatural provisions, in themselves, raise no presumption of undue influence. They may be considered, with other evidence, in determining the question, Is this the testator's will? But they do not shift the burden of proof, and, in the absence of proof that undue influence has been exercised, they have no weight. If the will is expressive of the testator's wishes lawfully made, the opinions of other persons, however they may condemn its motive or disapprove its scheme, cannot, in any way, rightfully control his power to do with his own as he pleases, without impairing one of the incidents which give to every man's property its value."

• In *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681, it is said: "The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust."

In *Potter v. Jones*, 20 Or. 239, 12 L.R.A. 161, 25 Pac. 769, it was

said: "It may be harsh, and under some circumstances cruel, to disinherit one child and to distribute the estate among the others; but if the testator be of sound mind, and execute his will as prescribed by law, no court can interfere."

In *Re McDevitt*, 95 Cal. 17, 30 Pac. 101, it was said: "But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper."

In *Boughton v. Knight*, 6 Moak Eng. Rep. 349, Sir John Hannen said: "He may disinherit, either wholly or partially, his children, and leave his property to strangers, to gratify his spite, or charities, to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued."

In determining whether the testatrix at the time of the execution of the will was free from undue influence, her declarations as to her intended disposition of her property, made prior to the execution of the will, are very important. The court found: "There is no direct and positive testimony in this case upon the proposition that this will was made at the suggestion of either of the two beneficiaries who are proponents of the will. In other words, I say there is no direct testimony upon that proposition; and the only way that the court may arrive at the proposition as to whether or not there was such undue influence exercised, or whether this will was written at the suggestion of the two beneficiaries if it were necessary for the court to decide that point, the court would have to ascertain that from the cir-

cumstances surrounding the making of the will."

As we have heretofore stated, the evidence absolutely fails to show that either of the proponents did or said anything at any time to influence the testatrix.

Prior to the illness of the testatrix, she stated to Mrs. Flossie Parker, who is shown to be a disinterested witness, that she did not want her brother to have anything that she had; that he had never treated her right when she needed his help. This witness, Mrs. Parker, keeps a little store in the town, and was not a member of Mrs. Swartz's household.

In speaking to another witness she said: "I am going to make a will. No one don't know when they have got to die. One or two of my old girls that stood by me and were faithful to me while at the Francis

I have got to remember. Of course, I have got my brother, and poor little Shorty (meaning Shorty Phillips); I never could forget him."

From reading all of the evidence, it appears that she made the disposition of her property along lines frequently indicated by her a considerable time before her death.

Our conclusion is that from the entire record the contestant wholly fails to make any showing that would justify the court in denying the will to probate. The judgment of the trial court is therefore reversed, and the cause remanded, with directions to admit the will to probate.

Rainey, Ch. J., and Harrison, V. Ch. J., and Johnson and McNeill, JJ., concur.

Petition for rehearing denied September 14, 1920.

ANNOTATION.

Validity of will as affected by fact that testatrix and beneficiaries are inmates of house of prostitution.

An extensive search has disclosed no case, other than the reported case (RE SWARTZ, ante, 450), passing upon the question suggested in the title to this annotation. On principle, the conclusion reached by the court in the reported case is correct; this seems true whether the question is considered from the standpoint of capacity, or that of undue influence. In *Re Gorkow* (1899) 20 Wash. 563, 56 Pac. 385, where the testator was shown to be a man of violent and ungovernable passions and inordinately dissipated, and his acts evinced a total want of moral nature and natural affection, in short, as the court concludes, he was "a moral leper," it was said: "But the capacity required for a will is very well summed up and stated, as the deduction from a long line of recognized authorities, by Judge Redfield in the following language: 'The result of the best-considered cases upon the subject seems to put a quantum of understanding requisite to the valid execution of a will upon the basis of

knowing and comprehending the transaction; or in popular phrase, that the testator should, at the time of executing the will, know and understand what he is about.'" And although it appeared in this case that the testator had no respectable associates, that he mingled but little with the public except as business brought him in contact with anyone, that his evenings were frequently spent in the vilest resorts of the city in which he lived, but also it appeared that all the while he prospered in business, and that with tenacious obstinacy, until the period of his death, he kept his checks and balances on all his employees, and kept his money locked in a safe of which no one but himself knew the combination, the court says: "The will does not in itself afford any inferences of incapacity. He seems to have known what estate he had, and to have known what he wanted to do with it; and this fulfils the measure of testamentary capacity unless there

was undue influence deceiving him or overcoming his will."

See other opinions in the reported case.

It is well established in a large number of cases that an illicit relation is not sufficient per se to warrant a conclusion of undue influence, and that no presumption of undue influence arises merely from the fact that a man

who is of sound mind makes a will in favor of his mistress, or of one with whom his relations have been meretricious. The fact of an illicit relationship may, however, be considered in connection with evidence of undue influence, provided it existed at a time not too remote from the time when the will was made. 48 R. C. L. p. 148, § 102. W. A. E.

UTAH CONSOLIDATED MINING COMPANY et al.
v.
INDUSTRIAL COMMISSION OF UTAH.

Utah Supreme Court—December 15, 1920.

(— Utah, —, 194 Pac. 657.)

Limitation of actions — claim under Workmen's Compensation Act.

The limitation period for prosecuting a claim under the Workmen's Compensation Act, which itself fixes no limitation period, is controlled by the general statute applicable to actions for liability created by statute, and if such statute fixes a period of one year no claim can be prosecuted after the expiration of such time.

[See note on this question beginning on page 462.]

PETITION for a writ of certiorari to review an award by the Industrial Commission to the widow of deceased in a proceeding by her under the Workmen's Compensation Act to recover compensation for his death while in the employ of the mining company. *Award vacated and set aside.*

The facts are stated in the opinion of the court.

Messrs. Van Cott, Riter, & Farnsworth, for petitioners:

Actions for liability created by statute are barred by the Statutes of Limitation.

Preece v. Oregon Short Line R. Co. 48 Utah, 551, 161 Pac. 40; State v. Pfefferle, 33 Kan. 718, 7 Pac. 597; Durein v. Pontious, 34 Kan. 353, 8 Pac. 428; Richards v. Wyandotte County, 28 Kan. 326; State v. Baker County, 24 Or. 141, 33 Pac. 530; People ex rel. Dunn v. Van Ness, 76 Cal. 121, 18 Pac. 139; Graham County v. Van Slyck, 52 Kan. 622, 35 Pac. 299; Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40; Hawkins v. Iron Valley Furnace Co. 40 Ohio St. 507; Ohio & M. R. Co. v. Erwin, 45 Ill. App. 558; Seymour v. Pittsburg, C. & St. L. R. Co. 44 Ohio St. 12, 4 N. E. 236;

San Francisco v. Luning, 73 Cal. 610, 15 Pac. 311; People v. Hulbert, 71 Cal. 72, 12 Pac. 43; Los Angeles County v. Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329; Redwood County v. Winona & St. P. Land Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; Canyon County v. Ada County, 5 Idaho, 686, 51 Pac. 748; Davis v. Clark, 58 Kan. 454, 49 Pac. 665; Schroer v. Central Kentucky Asylum, 113 Ky. 288, 68 S. W. 150; Re Campbell, 96 App. Div. 561, 89 N. Y. Supp. 569; Davis v. Lewis, 16 Ohio. C. C. 138; State ex rel. Berge v. Patterson, 18 S. D. 251, 100 N. W. 162; Sonoma County v. Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12; Harby v. Board of Education, 2 Cal. App. 418, 83 Pac. 1081; Ada County v. Ellis, 5 Idaho, 333, 48 Pac. 1071; Cloud County v. Hostetler, 6 Kan. App. 286, 51 Pac. 62; Multnomah County v. Kelly, 37 Or. 1, 60 Pac. 202; McDonald v.

(— *Utah*, —, 194 Pac. 657.)

Thompson, 40 C. C. A. 685, 100 Fed. 1002, affirmed in 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297; Platt v. Wilmot, 118 Fed. 1019, affirmed in 193 U. S. 602, 48 L. ed. 809, 24 Sup. Ct. Rep. 542; Frame v. Ashley, 59 Kan. 477, 53 Pac. 474; Kuhl v. Chicago & N. W. R. Co. 101 Wis. 42, 77 N. W. 155; Briston v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944; Muir v. Bardstown, 120 Ky. 739, 87 S. W. 1096; Louisville & J. Ferry Co. v. Com. 108 Ky. 717, 57 S. W. 626; Custer County v. Story, 26 Mont. 517, 69 Pac. 56; State v. Bonness, 99 Minn. 392, 109 N. W. 703; Ramsden v. Knowles, 10 L.R.A.(N.S.) 897, 81 C. C. A. 105, 151 Fed. 721; State v. Chicago & N. W. R. Co. 132 Wis. 345, 112 N. W. 515; Illinois C. R. Co. v. Com. 128 Ky. 268, 108 S. W. 245; Pleadwell v. Missouri Glass Co. 151 Mo. App. 51, 131 S. W. 941; Hawk v. Saylor, 83 Kan. 775, 112 Pac. 602; Re Grade Crossing Comrs. 201 N. Y. 32, 94 N. E. 188; Nichols v. Chesapeake & O. R. Co. 115 C. C. A. 601, 195 Fed. 913; Due v. Bankhardt, 151 Ky. 624, 152 S. W. 786; Strout v. United Shoe Machinery Co. 208 Fed. 646; Hocking Valley R. Co. v. New York Coal Co. 132 C. C. A. 387, 217 Fed. 727; Zimmerman v. Western & S. F. Ins. Co. 121 Ark. 408, 181 S. W. 283, Ann. Cas. 1917D, 513; Central State Hospital v. Foley, 171 Ky. 616, 188 S. W. 752; Chicago & N. W. R. Co. v. Ziebarth, 157 C. C. A. 526, 245 Fed. 334; Brown v. Quincy, O. & K. C. R. Co. 198 Mo. App. 71, 199 S. W. 707; Ritcher v. Com. 180 Ky. 4, 201 S. W. 456; Wonnacott v. Kootenai County, 32 Idaho, 342, 182 Pac. 353; Davis v. Drury, 105 Kan. 69, 181 Pac. 559; Morganton v. Avery, 179 N. C. 551, 103 S. E. 138; Santa Cruz County v. McKnight, 20 Ariz. 103, 177 Pac. 256; Yuma County v. Hodges, 20 Ariz. 142, 177 Pac. 270; Hellwig v. Title Guaranty & S. Co. 39 Cal. App. 422, 179 Pac. 222; Chambers v. Gallagher, 177 Cal. 704, 171 Pac. 931; Roach v. Kelsey Wheel Co. 200 Mich. 299, 167 N. W. 33.

There is no support, either in the findings or in the evidence, for the award made on the theory that Fortunata Parone was wholly dependent on her deceased husband.

McDonald's Case, 229 Mass. 454, L.R.A.1918F, 493, 118 N. E. 949; Nelson's Case, 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694; Newman's Case,

222 Mass. 563, L.R.A.1916C, 1145, 111 N. E. 361; Finn v. Detroit Mt. C. & M. C. R. Co. 190 Mich. 112, L.R.A.1916C, 1142, 155 N. W. 721, 13 N. C. C. A. 187; Gorski's Case, 227 Mass. 456, 116 N. E. 811; Breaker's Case, 235 Mass. 460, 126 N. E. 769.

Messrs. Dan B. Shields, Attorney General, D. M. Draper, Assistant Attorney General, James H. Wolfe, O. C. Dalby, H. Van Dam, Jr., and Olson & Lewis, for defendant:

There is nothing in the Workmen's Compensation Act making the Statute of Limitations applicable to proceedings before the Industrial Commission, and, in the absence of such a provision, a proceeding to obtain compensation is not included within the ordinary terms of general statutes of limitations.

Baur v. Common Pleas Ct. 88 N. J. L. 128, 95 Atl. 627; Reist v. Heilbrenner, 11 Serg. & R. 131; Rosser v. Broadwater Mills Co. 54 Utah, 522, 182 Pac. 204.

Claimant was living with her husband at the time of his death, within the meaning of the statute.

Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, L.R.A.1916A, 366, 142 N. W. 271, Ann. Cas. 1915B, 877; Muncie Foundry & Mach. Co. v. Coffee, 66 Ind. App. 405, 117 N. E. 524.

Thurman, J., delivered the opinion of the court:

On July 15, 1917, one Gaetano Parone, while in the employ of the plaintiff mining company, was killed in an accident arising out of and in the course of his employment. The mining company was within the provisions of the Utah Industrial Act (Comp. Laws 1917, title 49, as amended by Laws 1919, chap. 63), and was insured by the Guardian Casualty & Guaranty Company. This company has since been succeeded by the Bankers' Trust Company, plaintiff herein.

The deceased, Parone, was an Italian. His dependents, if any he had, resided in Italy. No steps of any kind were taken to recover compensation for his death until October, 1918. At that time proceedings were commenced before the Industrial Commission (hereinafter called Commission), and vari-

ous steps taken from time to time until July 30, 1920, when the Commission made an award in the sum of \$4,500 to one Fortunata Parone, as widow of the deceased.

Plaintiffs in this action applied to the Commission for a rehearing, which application was denied. The case comes before us on a writ of review, and it is contended by plaintiffs in their application that the Commission exceeded its jurisdiction in making the award.

Various and numerous objections are urged by plaintiffs, and the same appear to have been seasonably made in the proceedings before the Commission.

The principal objection made by plaintiffs, and one which is controlling if their contention is correct, is that the action, if action it may be called, for compensation, was not commenced in time. At the very threshold of the proceeding before the Commission, plaintiffs herein interposed a plea of the Statute of Limitations.

It is conceded by both parties that the Utah Industrial Act itself fixes no limitation within which a proceeding for compensation may be commenced. The general statute, however, contains the following provision upon which plaintiffs rely (Utah Comp. Laws 1917, § 6468): "An action for liability created by the statute of a foreign state or by the statute of this state other than a penalty or forfeiture under the laws of this state shall be begun within one year."

There can be no denial of the fact that the Utah Industrial Act created a liability that had no existence prior to the enactment of the law. But it is contended by the Commission that a proceeding before it to recover compensation for an injury under the Industrial Act is not an "action" within the meaning of the statute above quoted.

It is practically conceded by both parties to the litigation that the question under review is one of first impression. It is unquestionably so,

so far as this jurisdiction is concerned. Nor has our attention been called to any decision from the court of a sister state or other jurisdiction that sheds light upon the question here presented. As bearing upon the meaning of the word "action," as used in the statute quoted, plaintiffs rely on Utah Comp. Laws 1917, § 6492, which is a part of the general Statute of Limitations. The section reads: "The word 'action,' as used in this chapter, is to be construed, whenever it is necessary to do so, as including a special proceeding of a civil nature."

It is contended by plaintiffs that a proceeding before the Commission for compensation under the Industrial Act is, at least, "a special proceeding of a civil nature," and therefore within the meaning of the Statute of Limitations. There is much force in this contention. The Utah Statute of Limitations is broad and comprehensive. It seems as if the legislature intended that, wherever a remedy was provided for a wrong or recovery on a liability, there should be a limitation of time within which the party injured could resort to the remedy. We can conceive of no reason why there should not be a limit of time within which a proceeding for compensation under the Industrial Act should be commenced, as well as in actions and proceedings outside of the act. Every possible reason that calls for a limitation of time in the one case applies with equal force to the other. For this reason we are inclined to the view that in passing the Industrial Act the legislature intended that the general Statute of Limitations should apply.

Limitation of actions—claim under Workmen's Compensation Act.

Counsel for the Commission cite the case of *Baur v. Common Pleas Ct.* 88 N. J. L. 128, 95 Atl. 627. This case lends no support to their contention. The New Jersey Work-

men's Compensation Act of 1911 (Pamph. Laws, 134) had no provision limiting the time within which proceedings to recover compensation should be commenced. In that respect the statute was similar to ours. The injury for which compensation was sought in that case occurred in November, 1911. The act was amended in 1913 (Pamph. Laws 302), providing, in effect, that proceedings should be commenced within one year from the date of the accident, unless the compensation was adjusted by agreement within that time. The party injured did not file his petition for compensation until April, 1914, more than a year after the Amendment of 1913 went into operation. The statute was interposed as a bar to the petitioner's claim, and the contention was made that the proceeding should have been commenced within one year from the time the amendment took effect. The court held that this contention should not prevail because the Law of 1911, in force when the accident occurred, did not limit the time within which the proceeding should be commenced, and that the Law of 1913, fixing a limitation, had no provision giving it retroactive effect. If that were all there is to this decision, there would be more force in the contention here made by defendant's counsel. The court in deciding the question, however, not only noted the fact that the New Jersey Compensation Act of 1911 had no provision limiting the time within which proceedings should be commenced, but also took into consideration the fact that there was no statute whatever in New Jersey covering the case. On page 131 of 88 N. J. L., the court says: "It will not be out of place, however, to call attention to the fact that the proceeding under the Act of 1911 is one unknown to the common law and clearly in derogation of it. *It can hardly be said to fall within the classification of any of the actions enumerated in the statute, and contem-*

plated by the legislature." (Italics ours.)

The court then proceeds to further elaborate the same idea to the effect that the Act of 1911 imposed a statutory duty or obligation not covered by any statute of limitations. Instead of lending support to the contention of defendant's counsel, in my opinion, it affords some support, at least in a negative way, to the contention of counsel on the other side. The reasonable inference is that, if there had been a statute of limitations in New Jersey covering a liability created by statute, the New Jersey court, in the case referred to, would have reached a different conclusion.

It certainly should not be a subject of controversy that the legislature, in enacting § 6468, subd. 1, enacted it to cover any statutory liability that might thereafter be created, where the act creating the liability did not provide a special limitation. Whether or not the enforcement of the liability so created should take the form of an action and be prosecuted in a regular judicial tribunal, or be denominated a special proceeding of a civil nature and be prosecuted before the same or some other tribunal created for the same purpose, is not a controlling feature of the case. In our opinion, it was the manifest intention of the legislature to limit the time within which a proceeding might be commenced to enforce a liability created by statute, without regard to the form of the proceeding or the character of the tribunal charged with its enforcement. Whether the proceeding be denominated an "action" or a "special proceeding of a civil nature," it is not necessary to determine in the instant case. It is certainly one or the other, and in either case it falls within the statute.

We are of the opinion that the right to recover compensation in this case is barred by the Statute of Limitations relied on by plaintiffs, and that the Commission ex-

ceeded its jurisdiction in making the award. As this disposes of the case for all purposes, it is not necessary to pass upon the other questions presented by the petition.

For the reasons stated, the award is vacated and set aside, and

the Commission directed to deny the petition for compensation.

Corfman, Ch. J., and Frick and Gideon, JJ., concur.

Weber, J., being disqualified did not participate herein.

ANNOTATION.

Applicability of general statute of limitations to action, or proceeding under workmen's compensation acts.

Many if not most, of the workmen's compensation acts, contain express provisions limiting the time for the filing of claims or the commencement of proceedings, and there is little authority on the question of the applicability of general statutes of limitations to compensation cases arising under these acts.

It will be observed that in the reported case (UTAH CONSOL. MIN. CO. v. INDUSTRIAL COMMISSION, ante, 458) the limitation period for prosecuting a claim under the Workmen's Compensation Act, which fixed no limitation period, was held to be controlled by a general statute, providing that an action for liability created by a statute of the state, other than a penalty or forfeiture under the laws of the state, should be begun within one year.

In *Baur v. Common Pleas Ct.* (1915) 88 N. J. L. 128, 95 Atl. 627 (cited in the reported case), the court in denying that an amendment to the Workmen's Compensation law, fixing a certain time within which proceedings for a claim on account of injury should be brought, had a retroactive effect, appeared to be of the opinion that the statutory limitation of six years was

inapplicable, stating that the proceeding under the Workmen's Compensation Act was one unknown to the common law; that it did not fall within any of the actions enumerated in the Statute of Limitations; that it was neither an action upon a contract, nor one of tort, but rather what the statute creating it made it—a proceeding to enforce a statutory duty or obligation arising out of the relation of the parties, the basis of which was a contract, express or implied.

And so, also, in *State ex rel. Anderson v. General Acci. F. & L. Assur. Corp.* (1916) 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615, denying that an amendment of the Workmen's Compensation Law, fixing a limitation of one year, was retrospective in operation, the court apparently assumed that the general Statute of Limitations had no force in an action under the Workmen's Compensation Act, as it stated, in considering the reasonableness of the change, that a change from no express limitations upon the time in which to present a claim for an accrued cause of action, to a limitation of seventy days, would be harsh.

J. T. W.

JOSEPH READER, Appt.,
v.
FRANK J. OTTIS et al., Respts.,
and
LEE T. JESTER et al.

Minnesota Supreme Court — December 10, 1920.

(— Minn. —, 180 N. W. 117.)

Joint debtors — liability of joint tort-feasors.

1. Where two or more tort-feasors by concurrent acts of negligence which, although disconnected, are yet in combination, inflict injury, all are liable.

[See note on this question beginning on page 465.]

Automobile — racing on highway — liability for injury.

2. Where two or more persons are unlawfully and negligently racing automobiles on a public highway, in concert, and thereby injure another, all are liable in damages for such injuries.

Evidence — sufficiency.

3. Testimony considered, and held sufficient to require the submission of the question of the respondents' negligence to the jury.

[See 13 R. C. L. 296.]

Automobile — duty to following car.

4. The duty to a person operating

a motor car on a highway, toward one following at a more rapid pace, is to yield room enough for the latter to pass, when it is needful and practicable, and when requested.

[See 2 R. C. L. 1194, 1195; 13 R. C. L. 277.]

— racing — injury to occupant of car.

5. Racing automobiles upon a public highway is such an act of negligence as to make the parties thereto responsible for injuries resulting to others therefrom, nor does it necessarily relieve them from such liability that the injured party happens to be in one of such racing cars.

Headnotes 2-5 by QUINN, J.

APPEAL by plaintiff from an order of the District Court for Ramsey County (Hanft, J.) denying a motion for new trial, as to defendants Ottis et al., of an action brought to recover damages for personal injuries to plaintiff's minor child, alleged to have been sustained through the negligent operation of automobiles. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Barton & Kinkead, for appellant:

The engaging in said race and driving at an excessive rate of speed in violation of statute should render the drivers of both cars and their said owners liable for the resulting injuries.

Burnham v. Butler, 31 N. Y. 480; Hanrahan v. Cochran, 12 App. Div. 91, 42 N. Y. Supp. 1031; De Carvalho v. Brunner, 223 N. Y. 284, 119 N. E. 563; Vosburgh v. Moak, 1 Cush. 453, 48 Am. Dec. 613; Brown v. Thayer, 212 Mass. 392, 99 N. E. 237; Potter v. Moran, 61 Mich. 60, 27 N. W. 854.

It was the duty of the driver of the

Packard car to go to and keep upon the right side of the road when approached by the Buick car, with a desire to pass.

Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275, 8 N. C. C. A. 1079; Benson v. Larson, 133 Minn. 346, 158 N. W. 426.

Defendant Ottis was liable for the conduct of his employee, La Valle.

Soderlund v. Chicago, M. & St. P. R. Co. 102 Minn. 240, 13 L.R.A. (N.S.) 1193, 113 N. W. 449; Merrill v. Coates, 101 Minn. 43, 111 N. W. 836; Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co. 106 Minn. 51, 18 L.R.A. (N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047;

Johnston v. Chicago, St. P. M. & O. R. Co. 130 Wis. 492, 110 N. W. 424; Bergman v. Hendrickson, 106 Wis. 436, 80 Am. St. Rep. 47, 82 N. W. 304.

Messrs. Briggs, Weyl, & Briggs and Guy Chase, for respondents:

It was the duty of the driver of the rear car to wait and not attempt to pass until he could do so safely, and not run so close to the front car, and the driver of the front car had a right to rely on the rear driver observing this rule.

Mark v. Fritsch, 195 N. Y. 282, 22 L.R.A.(N.S.) 632, 133 Am. St. Rep. 800, 88 N. E. 380; Young v. Cowden, 98 Tenn. 577, 40 S. W. 1088.

La Valle's failure to give the road was not the cause of the accident, for he had a right to expect that the Buick would be operated properly.

Young v. Cowden, *supra*.

Quinn, J., delivered the opinion of the court:

Action brought by Joseph Reader, as the father of Grace Reader, a minor, against the respective owners of two automobiles and the operators thereof, jointly, to recover for personal injuries sustained by such minor, through the alleged negligence of the operators of such cars. At the close of plaintiff's testimony the trial court granted a motion to dismiss the action as to the defendants Ottis and La Valle, upon the ground that the proofs failed to show any negligence on their part. From an order denying his motion for a new trial as to said defendants, the plaintiff appealed.

On May 8, 1919, the defendant Elger Jester, then sixteen years of age, in company with Jane Reiss, George Kneip, and Grace Reader, all about the same age, were returning to St. Paul in a Buick touring car owned by the defendant Lee T. Jester, over the White Bear road, which is paved to the width of 16 feet. When about 2 miles out from White Bear lake the defendant La Valle, driving a Packard car owned by the defendant Ottis in the line of his duty as the servant of the owner thereof, overtook the Buick.

Upon the trial plaintiff offered testimony to the effect that the Buick car had been going at the rate of about 18 or 20 miles an hour;

that when La Valle overtook it he sounded his horn; that Jester, driving the Buick, turned to the left, and the Packard went ahead, Jester remarking that "no car is ever going to get ahead of me;" that he then quickened his speed and passed the Packard at the rate of about 45 miles an hour; that they raced for some distance, when the Packard passed the Buick; that the Packard then kept the center of the pavement, as the Buick again attempted to pass, going first to the right, then to the left at the rate of from 50 to 60 miles, but could not get by. There was a curve of about 45 degrees in the pavement ahead; the left wheels of the Buick went off the edge of the pavement, and when the driver undertook to turn the curve the car went into the ditch, seriously injuring Miss Reader. While the cars were racing Kneip and both of the girls tried to persuade Jester to desist therefrom, but to no avail. The four young people had been out on a pleasure trip to White Bear lake.

Our statute provides, in effect, that no person shall drive a motor vehicle upon any public highway of this state at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb or injure the property of any person. It also provides that if the speed of any motor vehicle operated on any highway outside of an incorporated city, town, or village exceeds 25 miles an hour for a distance of one quarter of a mile, such rate of speed shall be *prima facie* evidence that the person operating the same is running at a rate of speed greater than is reasonable and proper. Gen. Stat. 1913, § 2635.

We are of the opinion, in view of the statute and the showing made, that it was for the jury to say whether the driving was such as to endanger the safety of others lawfully upon such highway, and whether the same was done in

**Evidence—
sufficiency.**

concert. If the jury should find in the affirmative on those issues, then it would be authorized to hold the respondents liable, provided, of course, the proofs were sufficient upon the other issues in the case. 1 Cooley, Torts, 3d ed. p. 249; De Carvalho v. Brunner, 223 N. Y. 284, 119 N. E. 563; Burnham v. Butler, 31 N. Y. 480; Brown v. Thayer, 212 Mass. 392, 99 N. E. 237; Potter v. Moran, 61 Mich. 60, 27 N. W. 854; Hanrahan v. Cochran, 12 App. Div. 91, 42 N. Y. Supp. 1031.

The question is, Was there evidence sufficient to fairly sustain a finding by the jury that the respondents were guilty of negligence which contributed to the injury? The law imposes upon all persons using a public highway the obligation to exercise ordinary care to avoid inflicting injury upon others. Our highways are not designed or maintained as places for racing automobiles, and those who use them for such purpose do so at their peril. Nor does the fact that the injured party was riding in one of the racing cars necessarily relieve the respondents from liability. The car in which she was riding had been going at a moderate rate of speed. When the Packard passed it the speed quickened and the racing began. The girl could not avoid the peril. She protested with the driver, as did the other occupants of the car, but to no avail. She could do no more. She had no con-

trol or right of control over the driver, nor was she engaged in a joint enterprise with the driver and the others occupying the automobile at the time. She was entitled to the same consideration from the driver of the Packard as though riding in a car not in the race. Clearly it is the duty of a person driving a car upon a highway to yield room to pass to one following at a more rapid pace, when it is needful and practicable, and when requested so to do. Gen. Stat. 1913, § 2634; Mark v. Fritsch, 195 N. Y. 282, 22 L.R.A. (N.S.) 632, 133 Am. St. Rep. 800, 88 N. E. 380.

The rule is well settled that, where two or more tort-feasors by concurrent acts of negligence, which, although disconnected, yet, in combination, inflict injury, all are liable. Brown v. Thayer, 212 Mass. 392, 99 N. E. 237; Feneff v. Boston & M. R. Co. 196 Mass. 575, 82 N. E. 705. See also line of decisions cited in note on page 158, vol. 20 R. C. L., where it is held that one who is riding in a vehicle or car, the driver of which is not his agent or servant, nor under his control, and who is injured by the negligence of a third person and of such driver, may recover of the third person for the injuries inflicted through such concurring negligence. The question of negligence on the part of the driver of the Packard car was, in our opinion, for the jury.

Reversed.

ANNOTATION.

Joint liability for injury to a third person or damage to his property due to concurring negligence of drivers of automobiles.

The rule that where two or more tort-feasors by concurrent acts of negligence, which, although disconnected, yet, in combination, inflict an injury, all are jointly liable, is applied in cases involving the joint liability of owners or operators of two or more automobiles for injuries to a third person or damage to his property.

16 A.L.R.—30.

United States. — Kilkenney v. Bockius (1911) 187 Fed. 382.

Illinois.—Sullivan v. William Ohl-haver Co. (1920) 290 Ill. 359, 126 N. E. 191.

Kentucky.—Matlack v. Sea (1911) 144 Ky. 749, 139 S. W. 930, 2 N. C. C. A. 305; Miller v. Weck (1920) 186 Ky. 552, 217 S. W. 905.

Massachusetts.—*Corey v. Havener* (1902) 182 Mass. 250, 65 N. E. 69, 13 Am. Neg. Rep. 108; *Brown v. Thayer* (1912) 212 Mass. 392, 99 N. E. 237.

Minnesota.—*READER v. OTTIS* (reported herewith) ante, 462.

Missouri. — *Mitchell v. Brown* (1916) — Mo. App. —, 190 S. W. 354.

Nebraska.—*Schweppe v. Uhl* (1914) 97 Neb. 328, 149 N. W. 789; *Thomas v. Rasmussen* (1921) — Neb. —, 184 N. W. 104.

Pennsylvania.—*Hitchins v. Wilson* (1917) 68 Pa. Super. Ct. 366.

Virginia.—*Carlton v. Boudar* (1916) 118 Va. 521, 4 A.L.R. 1480, 88 S. E. 174.

Washington.—*Anderson v. McLaren* (1921) — Wash. —, 194 Pac. 828.

It will be observed that in the reported case (*READER v. OTTIS*, ante, 462) it was decided that two persons who were unlawfully and negligently racing their respective automobiles on a public highway in concert were both liable to a person riding in one of the cars, who was injured by the overturning of the car in attempting to turn a corner.

And in *Thomas v. Rasmussen* (1921) — Neb. —, 184 N. W. 104, where the plaintiff was injured when the automobile in which she was riding tipped over, after it was struck by a car attempting to pass, and recovery was sought against the driver of the car which collided with the one in which the plaintiff was riding, and also against the driver of a car which was immediately ahead, on the theory that the cars were racing, it was held that, where a person is injured by the racing of two or more other parties on the public highway, all engaged in the race are liable although only one of the vehicles comes in contact with the injured person, or the vehicle in which he was riding. The evidence in the case, however, was held insufficient to prove that the defendants were racing at the time the plaintiff was injured, and it was held that a verdict should have been directed in favor of the defendant whose car did not strike the one in which the plaintiff was riding.

In *Brown v. Thayer* (Mass.) supra, in overruling exceptions to judgments

in separate actions in favor of a boy struck by one of two automobiles which were racing and approached without timely warning, against the respective owners of the cars, the court said: "The principle is settled by our decisions, that where two or more tortfeasors by concurrent acts of negligence, which, although disconnected, yet, in combination, inflict injury, the plaintiff may sue them jointly or severally, although he can have but one satisfaction in damages. . . . If each contributes to the wrong, as in the case at bar, the proximate cause is the wrongful act in which they concurrently participate, whether the result causes instantaneous death or injuries which the sufferer survives."

In *Anderson v. McLaren* (1921) — Wash. —, 194 Pac. 828, it was held that the defendants were jointly liable for the damage to plaintiff's automobile, which was struck by the car of one of the defendants, when attempting to pass the other defendant's truck, which started from the curb across the street, the evidence being held sufficient to show that the driver of the defendant's automobile had time to have stopped and avoided the collision if she had not lost control of the car, and also evidence showing that the driver of the other defendant's truck violated city ordinances requiring drivers to give timely warning of their intention to start, and requiring them to keep near the right curb.

But in *Brown v. Thayer* (Mass.) supra (an action for death of another boy in the same accident), it was held that a joint action could not be maintained under a statute providing that if one, by his negligence, caused the death of another, he should be liable in damages in a sum of not less than \$500, nor more than \$10,000, to be assessed with reference to the degree of his or its culpability, or of that of his or its agents or servants, to be recovered in an action of tort; since in an action such as that at bar, although the wrong remained joint, yet, because of the statute, the damages would have to be assessed severally,

with separate verdicts and judgments. It has been held that a taxicab company carrying a passenger, and the owner of an automobile, whose vehicles collide through the negligence of each, by reason of which the passenger in the taxicab is injured, are jointly and severally liable for the injury. *Carlton v. Boudar* (Va.) *supra*. In so holding the court said that the parties were properly joined as defendants, although there was no common duty, common design, or concert of action between them.

Negligence on the part of one of the operators of two automobiles claimed to have caused an injury will not, of course, render the operator of the other car liable if he exercise ordinary care. *Mathes v. Aggeler & M. Seed Co.* (1919) 179 Cal. 697, 178 Pac. 713.

But the parties may be sued jointly although the degree of care which each owed the person injured was different. *Carlton v. Boudar* (Va.) *supra*.

So, where respective operators of two automobiles which collided and injured a pedestrian were both guilty of negligence it is immaterial whether one was more or less negligent than the other, since they are liable jointly and severally. *Miller v. Weck* (1920) 186 Ky. 552, 217 S. W. 905.

The evidence in *Miller v. Weck* (Ky.) *supra*, was held to prove that a collision of automobiles resulting in an injury to the plaintiff was caused by the joint negligence of the drivers of the two automobiles, there being testimony that both cars approached a street crossing on different streets at a high rate of speed, and that, although they were within sight of each other for 50 yards before reaching the intersection, neither gave any signal or attempted to slacken speed, and that the cars collided, and one of them was deflected from its course and ran into the plaintiff.

And in *Hitchins v. Wilson* (1917) 68 Pa. Super. Ct. 366, the evidence was held sufficient to fix a joint liability on the drivers of the automobiles which collided at a right-angle intersection of streets, where there was evidence that the cars both approached the in-

tersection at a high rate of speed, and, although the other machine was in plain view for some distance before the crossing was reached, neither driver attempted to stop, and when but a few feet apart one turned sharply to the right and the other to the left, and by reason of such turn the plaintiff, who was crossing the street, was struck and injured. The court said: "The plaintiff concedes that to recover he must show a joint tort. He called each defendant to make out his case, and there was a reasonable dispute between them in attempting to fix the entire responsibility of the accident on the other. The testimony of each defendant standing alone would relieve him from the charge of negligence, but the testimony of the two clearly fixes the joint responsibility of their act in producing the result. When the cars were about to come together at right angles, the turn of one to the left and the other to the right was made on a street crossing then occupied by five pedestrians. If either one had exercised ordinary care and stopped before the collision was imminent, it would not have been necessary to have made the turn. It was the turning of the two cars at that point that produced the plaintiff's injuries. While there was no community of thought between the two defendants prior to making their respective turns, it was their community of action which produced the result, and this was made necessary in the mind of each to prevent a collision between the automobiles. Under the special facts it is immaterial which car arrived first at the crossing, as it is obvious that each, while in plain view of the other, without signal, attempted to cross in front of the other car. Each must have seen while at a safe distance from the crossing that to proceed on the line and at the speed he was then going a collision would be inevitable, even if the crossing had not been occupied by pedestrians. While each car escaped, it was at the expense of injuries to the persons on the crossing."

And in *Matlack v. Sea* (1911) 144 Ky. 749, 139 S. W. 930, 2 N. C. C. A.

305, where two automobiles collided at a street intersection and one of them skidded and killed the pedestrian, it was held that if both drivers were negligent and such negligence contributed to bringing about the collision, both would be liable, but that if only one of the drivers was negligent, the other could not be held liable.

And in *Corey v. Havener* (1902) 182 Mass. 250, 65 N. E. 69, 13 Am. Neg. Rep. 108, where two separate cases were brought against the defendants, and it appeared that they came up from behind the plaintiff mounted on their motorcycles with gasoline engines, and that one passed on either side of the plaintiff at a high rate of speed, frightened his horse, and injured him, it was held not necessary to show which one of the defendants caused the accident, the court stating that the verdict by the jury had established the fact that both of the defendants were wrongdoers, and that it made no difference that there was no concert between them, or that it was impossible to determine what portion of the injury was caused by each; that if each contributed to the injury that was enough to bind both.

And in *Mitchell v. Brown* (1916) — Mo. App. —, 190 N. W. 354, where an action was brought by a passenger who was injured in a collision between the automobile in which she was riding and another machine at an intersection of streets, it was held that an injured party may sue, singly or jointly, an operator whose negligence or wrongdoing contributes to cause the injury complained of; and that if the driver of the car which collided with the one in which the plaintiff was riding was guilty of negligence which was the proximate cause of the plaintiff's injury, it was immaterial whether the driver of the car in which she was a passenger was guilty of negligence contributing to the result,—there was held sufficient evidence in this case to warrant the jury's finding that the driver of the car which collided with the one in which the plaintiff was riding was negligent.

And in *Sullivan v. William Ohlhav-*

er Co. (1920) 291 Ill. 359, 126 N. E. 191, in which it was sought to recover for an injury sustained by being struck by an automobile which came into collision with another machine, the evidence, which was not set out, was held sufficient to establish the conclusion that the injury was the result of the combined negligence of the operators of the two automobiles which collided, and also sufficient to warrant a finding that, notwithstanding the negligence of one of the operators in turning his car without warning, the accident would not have happened if the operator of the other had not been running at an unreasonable rate of speed. The court stated that the fact that the injury would not have happened but for the negligence of the driver of the machine in turning without warning was not sufficient to exonerate the driver of the other machine, but that, if the plaintiff was injured by the combined negligence of both of these parties, he could maintain an action against either.

And in *Schweppe v. Uhl* (1914) 97 Neb. 328, 149 N. W. 789, where there was evidence that the plaintiff was driving a team of horses along the highway, and that at a narrow place in the road near the approach to a bridge the defendants, driving their several automobiles in a procession at a rapid rate, crossed close to the plaintiff's team, making unusual noises, as a result of which the plaintiff's team was frightened and ran away and injured him, it was held that the evidence was sufficient to render the defendants jointly liable. The court said: "It is very clear that the defendants not only carelessly, but recklessly, passed the plaintiff when he was in a place of danger, at a high and reckless rate of speed. According to the plaintiff, instead of stopping the noise, they made more as they drove by. The evidence shows that plaintiff's horses were not easily frightened. It is clear that, even with the noise the cars were making, no one of them, passing as they did, would have caused the runaway; but, rushing by as they did, one after another, in rapid succession, proved to be too great a

strain for even this reliable team. The horses 'looked up and got kind of scared' as the first car whizzed by. They became more and more frightened as each succeeding car passed, until the strain became more than they could bear, and when the seventh car attempted to pass their fright reached a point where plaintiff was unable to longer control them. This result was, therefore, not caused by the single act of any one of the defendants, but by the combined acts of all. Their actions show a disregard for the rights, and even the life, of the plaintiff, for which the jury held they should answer, and they should consider themselves very fortunate that the jury dealt with them as leniently as the verdict shows. The contention that no concurrent negligence on the part of the defendant is shown is without merit. If the cars were running at the rate of speed testified to by plaintiff and the witness Gruenther, and they were traveling about 25 yards apart; as shown by the evidence, less than half a minute's time would elapse between the passing of the first and the seventh car, and not more than three or four seconds between each car and the one following. The driver of each car, as he approached, could see the dangerous situation of plaintiff. None of them tried to lessen his danger, but all proceeded in the same manner and with the same unusual noises. This is not a case where several different cars were each running independently of the other and without any concert of action or agreement as to the manner of their running. It was one single procession, made up of the several cars as units of that procession. It was running as a procession by agreement, the speed of each car being regulated by the speed of the leader. If ever a case of concurrent negligence could be made out, it seems to us that it has been done here. The law in such a case is plain. As said by Judge Cooley in the third edition of his work on torts (1 Cooley, Torts, 3d ed. p. 247): 'The weight of authority will, we think, support the more general proposition that, where the negligences

of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action.'"

It has been held that a count alleging that the defendants did not use due and proper care and skill, and so carelessly ran and operated their automobiles that the machines collided and came together, in consequence whereof the plaintiff was injured, stated a good cause of action against the defendants as joint tort-feasors. *Kilkenney v. Bockius* (1911) 187 Fed. 382. But at the hearing in this case it appeared that the defendants severally owned and severally operated the automobiles which had collided, and it was held that the declaration should be amended, as it did not state the case that the plaintiff intended to present to the jury. The court stated that the amendment was clearly permissible, since, if a collision occurred in consequence of the negligence of both drivers, and injury resulted, this was a joint tort for which the defendants were jointly and severally liable. It further stated that it was difficult to imagine a more typical case of a joint tort, than the case of two drivers who, by their simultaneous negligence, come into collision with a force that is the result of the momentum of each or both, and which resultant is so transmitted to a passenger as to throw him out of one of the vehicles to his injury, and said that for a court to analyze an event of this kind into two causes of action so distinct and independent that the two defendants could not be joined in a single action would be to ignore physical law as well as common law.

The declaration in *Hellan v. Supply Laundry Co.* (1917) 94 Wash. 683, 163 Pac. 9, was held to state a cause of action for concurrent negligence, where it was alleged that an auto delivery truck of the defendant, driven by one of its servants at an unlawful and dangerous rate of speed in violation of an ordinance, at the intersection of two streets, made a sharp, unlawful turn in violation of the ordi-

nance, intercepting the car of another driver of an automobile so that the latter was compelled to turn suddenly to avoid a collision with the truck, and thereby struck the plaintiff, and that the negligence of the defendant Supply Laundry Company accentuated the negligence of the driver of the other automobile, and directly contributed to and caused the injury to the plaintiff. The defendant in this case contended that the negligence of the operator of the other automobile, who at time of trial had died and had been dropped as a party to the suit, was the proximate cause, and that there was no concurrent negligence on the defendant's part, but it was held that, upon the facts pleaded and stated, it was a question for the jury whether the negligence of the deceased driver or that of the defendant was the proximate cause, or whether the negligence of both was the proximate and concurrent cause.

In *Adams v. Parish* (1920) 189 Ky. 628, 225 S. W. 467, in which a recovery was sought against the owner of a Ford automobile which knocked the plaintiff down, so that his body was immediately run over by a large car, it was held that if the Ford car negligently knocked the plaintiff prostrate

on the street, and as a result thereof, and before he could arise, he was run over by a large car, the defendant could not escape responsibility for the injury even though the driver of the other car was also negligent. In this case a joint action was brought against the owners of the two automobiles, but was dismissed as to one who was a nonresident, who could not be served with process.

It will be observed that there was a difference between the situation involved in this last case and those involved in the other cases cited in the annotation, which would have had a material bearing on the question whether a joint action could have been maintained against tort-feasors, assuming that both could have been served with process, since there was a completed wrong by one tort-feasor which would have supported an action for damages before the negligence of the other intervened, whereas in the other cases no damage was sustained and no actionable wrong was committed until both defendants had done the acts upon which the tort was predicated. Upon the general question of joint liability of tort-feasors, each of whom alone causes some damage, see annotation in 9 A.L.R. 939, *J. T. W.*

JESSE GIERSCHE, Admr., etc., of Charles M. Giersch, Deceased,
v.
ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt.

Kansas Supreme Court — March 9, 1918.

(— Kan. —, 171 Pac. 591.)

Limitation of actions — Federal Employers' Liability Act.

1. Under the Federal Employers' Liability Act (Act Cong. April 22, 1908, chap. 149, 35 Stat. at L. 65), § 6, the cause of action accrues within two years from the date of the death of the deceased, and a personal representative appointed more than two years from such date cannot maintain an action.

[See note on this question beginning on page 482.]

Evidence — sufficiency.

2. The evidence examined, and found to support the findings of the jury.

Headnotes by WEST, J.

Appeal — error.

3. The record examined, and held to disclose no substantial error as to the merits of the case.

(— Kan. —, 171 Pac. 591.)

Limitation of actions — amendment of action — change of parties.

4. The widow brought her action under the state statute, and recovered a judgment which was reversed. When reached the second time for trial, leave was given to amend by interlineation, by increasing the amount of recovery prayed for, and by the allegation of the widow's appointment as administratrix, and by striking out the former allega-

tion that no administration had been had nor any personal representative appointed. The plaintiff's intestate was killed more than two years before this time, while engaged in interstate commerce. Held, that the Statute of Limitations had run, and that the plaintiff, as administratrix, cannot recover.

[See 8 R. C. L. 804; 18 R. C. L. 859, 860.]

(Johnston, Ch. J., and Mason, J., dissent.)

APPEAL by defendant from a judgment of the District Court for Lyon County in favor of plaintiff in an action brought to recover damages for the death of her husband alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. William R. Smith, Owen J. Wood, and Alfred A. Scott, for appellant:

No recovery can be had under the Federal Employers' Liability Act for the wrongful death, unless the action is brought within two years of the death of the employee.

New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. ed. 1057, 37 Sup. Ct. Rep. 556, Ann. Cas. 1918B, 662, 14 N. C. C. A. 957; Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938; Powers v. Badger Lumber Co. 75 Kan. 687, 90 Pac. 254; Siegrist v. Atchison, T. & S. F. R. Co. 91 Kan. 260, 137 Pac. 975; St. Louis & S. F. R. Co. v. Loughmiller, 193 Fed. 689; Hall v. Louisville & N. R. Co. 157 Fed. 464; Union P. R. Co. v. Sweet, 78 Kan. 243, 96 Pac. 657; Box v. Chicago, R. I. & P. R. Co. 107 Iowa, 660, 78 N. W. 694; Giersch v. Atchison, T. & S. F. R. Co. 98 Kan. 452, 158 Pac. 54; Hamilton v. Hannibal & St. J. R. Co. 39 Kan. 56, 18 Pac. 57; Rodman v. Missouri P. R. Co. 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; Kinney v. New York C. & H. R. R. Co. 166 N. Y. Supp. 868.

There was no proof of negligence on the part of the defendant, but the evidence disclosed that the death of Giersch was caused solely by his own negligent act in going between moving cars, without just reason or excuse.

Ivey v. Union P. R. Co. 99 Kan. 613, 162 Pac. 288; Atchison, T. & S. F. R. Co. v. Rudolph, 78 Kan. 695, 99 Pac. 224; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529.

The principal findings of the jury are contrary to the undisputed evidence.

Union P. R. Co. v. Sternbergh, 54 Kan. 410, 38 Pac. 486; Kansas P. R. Co. v. Peavey, 34 Kan. 472, 8 Pac. 780, 15 Am. Neg. Cas. 26; Atchison, T. & S. F. R. Co. v. Brown, 33 Kan. 757, 7 Pac. 571; Atchison, T. & S. F. R. Co. v. Long, 46 Kan. 260, 26 Pac. 682; St. Louis & S. F. R. Co. v. Clark, 48 Kan. 329, 29 Pac. 315; Atchison, T. & S. F. R. Co. v. Davis, 64 Kan. 127, 67 Pac. 441; Atchison, T. & S. F. R. Co. v. Holland, 58 Kan. 317, 49 Pac. 71; Anders v. Atchison, T. & S. F. R. Co. 91 Kan. 378, 137 Pac. 966; King v. Western U. Tele. Co. 81 Kan. 223, 105 Pac. 449; Dewey v. Barnhouse, 75 Kan. 214, 88 Pac. 877.

Messrs. R. M. Hamer, H. E. Ganse, and W. S. Kretsinger, for appellee:

The action was not barred.

Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223, U. S. 1-53, 56 L. ed. 327-347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 354, 60 L. ed. 326, 36 Sup. Ct. Rep. 126, 11 N. C. C. A. 165; Central Vermont R. Co. v. White, 238 U. S. 508, 59 L. ed. 1435, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Kansas City & Western R. Co. v. McAdow, 240 U. S. 51, 60 L. ed. 520, 36 Sup. Ct. Rep. 252, 11 N. C. C. A. 857; Brinkmeier v. Missouri P. R. Co. 224 U. S. 269, 56 L. ed. 759, 32 Sup. Ct. Rep. 412; Smith v. Atlantic Coast Line R. Co. 127 C. C. A. 311, 210 Fed. 762; Patillo v.

Allen-West Commission Co. 65 C. C. A. 508, 131 Fed. 680; DeValle DaCosta v. Southern P. Co. 100 C. C. A. 313, 176 Fed. 843; Jorgensen v. Grand Rapids & I. R. Co. 189 Mich. 537, 155 N. W. 535; Vandalia R. Co. v. Stringer, 182 Ind. 676, 106 N. E. 865, 107 N. E. 673; South Carolina R. Co. v. Nix, 68 Ga. 572, 8 Am. Neg. Cas. 118; Lassiter v. Norfolk & C. R. Co. 136 N. C. 89, 48 S. E. 642, 1 Ann. Cas. 456; Cunningham v. Patterson, 89 Kan. 684, 48 L.R.A.(N.S.) 506, 132 Pac. 198; Robinson v. Chicago, R. I. & P. R. Co. 90 Kan. 426, 133 Pac. 537; American R. Co. v. Coronas, L.R.A.1916E, 1095, 144 C. C. A. 599, 230 Fed. 545, 12 N. C. C. A. 49; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Harlan v. Loomis, 92 Kan. 398, 140 Pac. 845; Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 61 L. ed. 476, 37 Sup. Ct. Rep. 188, 17 N. C. C. A. 349.

West, J., delivered the opinion of the court:

When this case was first here, we held that the action could not be maintained by the widow. 98 Kan. 452, 158 Pac. 54. Thereafter the plaintiff was appointed administratrix, and as such was substituted as plaintiff. Leave was granted to amend the petition by interlineation. The jury returned a verdict against the defendant for causing the death of the plaintiff's intestate. The defendant appeals and contends that the action is barred, also that the judgment ought to be reversed, urging in its brief that the evidence did not support the charge of negligence and that the principal findings are contrary to the evidence.

As to the merits, the claim of the plaintiff is that the deceased, a switchman, went in behind a slowly moving flat car, which had been separated from a number of others and switched upon a certain track, to adjust the knuckle so that it would couple properly, and that the train, which had stopped, started up without warning and ran against him, crushing him against the drawbar of the flat car.

It is insisted that there is no evidence that the train had come to a

stop. This record does not bear out such a contention.

Mr. Wilhite testified, among other things: "At the time Mr. Giersch was adjusting or working on that knuckle, the main train had stopped. . . . The main train did not remain standing during all the time he was working on this knuckle."

On cross-examination: "The cars behind him had stopped. I seen them. There was nothing between me and that train to prevent me from seeing these cars. I should judge the cars following had stopped stock-still. They did not remain stopped very long. I don't know how long. I saw him in there a space of ten or fifteen seconds before he was hit. The cars had stopped possibly two or three seconds before that."

On redirect examination: "I said that after he had walked along there behind that car, and was working with the knuckle, the train stopped,—came to a dead stop,—and then when it started it moved gradually down."

Mr. Sterner testified: "He was following the flat car and working the knuckle with his hands. The train had stopped, well, I will say momentarily, as though the engineer has set the air and released it."

On cross-examination: "I couldn't see the engine that was pushing this string of cars on account of some way-cars, that were on the way-car track between me and the engine. I could not tell as to whether the engine stopped or not. I did notice the slacking or stopping of the cars up at the east end of this string of cars."

Mr. Anderson for the defendant testified: "Unless a man was paying very particular attention, he could be fooled by this rebound. He might have thought they had stopped, when they hadn't."

On cross-examination: "It fooled me, too, and I don't say now whether it stopped or not."

Again: "After that car was uncoupled from the train that train

was either so slacked up that I could not tell whether it entirely stopped or not, or it did actually stop; one or the other."

From the counter abstract:

Mr. Wilhite: Q. If I understand you correctly, you say, after he had walked along there behind this car, and was working with the knuckle, the train stopped—came to a dead stop?

A. Yes, sir.

Mr. Sterner: Q. I will ask you if you did not state in your former testimony, if you did not unqualifiedly say, that the train had stopped, for the purpose of refreshing your memory?

A. Well, I believe it had come to a stop—a complete stop.

While there was evidence to the contrary, and also evidence tending to show that the stop was merely the action of the train in taking up slack, the statements of witnesses already quoted seem to have im-

pressed the jury as correct, and they

Evidence—
sufficiency.

are sufficient to sustain the verdict and findings as to the question of stopping.

The jury found that the switch engine handling the cars stopped after Mr. Giersch cut off a flat car, and before the stop signal was given by the foreman. They found that the other switchman and the foreman did not signal the engineer to stop immediately after the deceased had stepped between the cars; that the switchman shouted, but not immediately—too late to avoid injury. The allegation was that the foreman in charge and other employees knew, or should have known, that the deceased was adjusting the knuckle of the flat car, and was not in a position where he could observe the danger, and that the foreman carelessly and negligently caused the train to again come forward without warning to the deceased. The jury found that the negligence consisted in starting the train and pushing it forward without warning after the flat car was cut off, and that the foreman and another em-

ployee were the ones immediately negligent. They also reduced the damages from \$10,000 to \$7,916.66, on account of the negligence of the deceased. The foreman himself testified that he had control over the way the men did their work; that he knew the position of the deceased; that he was looking at him all the time, and could not be mistaken.

The switchman, whom the jury found to have been negligent, testified that he turned the pin puller over to Mr. Giersch, or the lever, and stopped so that he could give the signal to the foreman.

"The only signal I intended to give was that when that track was shoved far enough they would stop; that is what I was doing at that time. In this case we were shoving the cars. When you kick in you give them a kick off and let them go."

He further testified that as the gap opened up Mr. Giersch stepped around the end of the car.

"I suppose I was in sight of the foreman. The foreman was keeping in line with me. He was behind me. He was looking towards me. It was not necessary for me to turn around to face him to give the sign. The engine stopped once on my stop signal. It did not start again before Mr. Giersch was hurt."

"When a man is in there adjusting a knuckle, it is not his duty to give any signal. He cannot give any signal. I am not positive whether the train stopped or not."

The theory of the defense seems to be that Giersch went in between moving cars, knowing full well the danger of so doing, and that it was his own negligence, and not the negligence of those over him, which caused the injury. The plaintiff's theory is that he went where it was his duty to go, at a time when it was safe, having a right to rely on the supposition that the train would remain stopped, or sufficient warning would be given before starting again, and that by reason of the starting and failure of warning he was crushed.

Out of the usual evidential conflict the jury reached their conclusions, and the record fails to show

that they were unwarranted in so doing. We find nothing in the record of which the defendant can complain as to the merits of the action.

Appeal—error. The death occurred on December 28, 1913, the widow began her action on February 20, 1915, and obtained a judgment which was reversed June 10, 1916, and on July 19th, thereafter, the court permitted an amendment to the petition and the substitution of the plaintiff as administratrix for herself as widow. Her appointment as administratrix was on July 10, 1916. The amount prayed for was increased from \$10,000 to \$20,000, but subsequently changed to its original amount. Section 6 of the Federal Employers' Liability Act, 35 Stat. at L. 65, chap. 149 (Comp. Stat. § 8662, 8 Fed. Stat. Anno. 2d ed. p. 1369), provides that: "No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

It also provides that in case of the death of an employee the carrier shall be liable to his or her personal representative for the benefit of the survivor, widow, or husband and children of such employee.

In the former opinion it was held that the testimony brought the case under the Federal act exclusively, although it was not alleged in the original petition that the parties were engaged in interstate commerce. It is contended that the change by amendment and substitution was a change "from law to law," which cannot be more than two years after the death of the employee. Plaintiff insists that under the Federal statute the action does not accrue until the appointment of an administrator.

In *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642, it was held that under the Lord Campbell Act, Civil Code, § 419 (Gen. Stat. 1915, § 7323), that the

limitation as to the time in which the action must be brought is a condition upon the right to sue, and is not affected by the general provisions of § 22 of the Civil Code (Gen. Stat. 1915, § 6912). This was followed in *Swisher v. Atchison, T. & S. F. R. Co.* 76 Kan. 97, 90 Pac. 812, and in *Harwood v. Chicago, R. I. & P. R. Co.* — Kan. —, 171 Pac. 354.

It has frequently been decided that an amendment may be made after the statute has run, if it go only to the form and not to the substance of the action. A change from the common-law to statutory liability is deemed a departure. *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938. In *Powers v. Badger Lumber Co.* 75 Kan. 687, 90 Pac. 254, it was held that a petition which fails to state a cause of action cannot, by amendment which asserts a cause of action barred by the Statute of Limitations, thereby be made good. A petition alleging the death in another state, but failing to add that such state authorized a recovery under the facts, was held amendable after the statute had run, in *Cunningham v. Patterson*, 89 Kan. 684, 48 L.R.A. (N.S.) 506, 132 Pac. 198. The closing words of the opinion are: "The amended petition did not state a new cause of action. It merely amplified and corrected the statement of facts constituting the only cause of action the plaintiff had or professed to have." 89 Kan. page 690.

In *Robinson v. Chicago, R. I. & P. R. Co.* 90 Kan. 426, 133 Pac. 537, a similar ruling was made. In *Harlan v. Loomis*, 92 Kan. 398, 140 Pac. 845, an amendment to correct a mistake of the pleader, merely substituting one party plaintiff for another, was held not to change the cause of action, and to be proper, although made after the statute had run.

An action under the state statute must be brought within two years from the time of the death. It is urged, however, that under the Federal act the statute does not begin to run until the appointment of an

administrator. This depends on when the cause of action accrues under that act. The case of *American R. Co. v. Coronas*, L.R.A.1916E, 1095, 144 C. C. A. 599, 230 Fed. 545, 12 N. C. C. A. 49, is relied on, and it was there held that, in view of the fact that an action can be maintained only by the personal representative for the benefit of the beneficiaries, it must be deemed to accrue, not from the date of the employee's death, but from the date of the appointment of the administrator; no one being able to sue before that time. The opinion was by the United States circuit court of appeals for the first circuit. It was suggested that the action is not for the occurrence out of which the death arose, but for the pecuniary damage to the beneficiaries by the death, "so that in no event could the cause of action arise until after the death, or be said to exist so that the statute could run until after that time." L.R.A.1916E, page 1096. After going over the authorities, it was said: "In view of the well-recognized rule heretofore pointed out as to when a right of action accrues—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled." L.R.A.1916E, page 1100.

In *Hall v. Louisville & N. R. Co.* (C. C.) 157 Fed. 464, a widow of an employee of an interstate railroad company sued under the Florida statute, and it was held that an amendment of her declaration

changing the capacity in which she sued to that of administratrix made a new cause of action based on the Federal statute, and was in effect the bringing of a new cause, which for the purpose of limitation was begun when the amendment was filed, and did not date back to the time of the beginning of the original action. In *Smith v. Atlantic Coast Line R. Co.* 127 C. C. A. 311, 210 Fed. 761, it was held by the fourth circuit court of appeals that a plaintiff who sued for personal injury could, after the expiration of two years, amend so as to bring the case within the Federal Employers' Liability Act; that such amendment did not introduce a new cause of action, but only affected the defenses which might be made. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, is to the effect that, while under the Federal act the beneficiaries of one killed cannot maintain an action except as personal representatives where the plaintiff is the sole beneficiary and takes out letters after the beginning of the action, an amendment may be allowed which alleges that the plaintiff sues as administrator.

"An amendment to the effect that plaintiff sues as personal representative on the same cause of action under the Federal statute, instead of as sole beneficiary of the deceased under the state statute, is not equivalent to the commencement of a new action, and is not subject to the Statute of Limitations." (Syl.)

In this case the widow sued in the circuit court to recover for the death of her husband, diverse citizenship being pleaded. She alleged that there was no administration and that none was necessary; that the deceased was a citizen of Texas, but was killed in Kansas. "Where the said F. S. Wulf was killed, a right of action is provided by statute, for injuries resulting in death." 226 U. S. page 572. She claimed \$40,000 damages. The case was begun January 23, 1909; the death was alleged to have occurred November

27, 1908. On January 6, 1911, plaintiff amended by averring that two days previously she had been appointed temporary administratrix, and had made application to be appointed temporary administratrix, and that she sued in her individual capacity and as administratrix. "That by virtue of both the laws of the state of Kansas, where the said Fred S. Wulf was killed, and the acts of Congress of the United States of America, a right of action is provided for injuries resulting in death in the manner and form and in the occupation that deceased was engaged in at the time of his death." 226 U. S. page 573. The defendant in its answer excepted to that portion of the pleadings seeking to make her a party as administratrix, "because the amendment making her a party in that capacity was made more than two years from the time the alleged cause of action accrued, and for that the cause of action, if any, was barred by the limitation of two years." 226 U. S. page 574.

In the opinion it was said: "It seems to us, however, that aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. . . . It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. . . . Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done. It is true that under the Federal statute the plaintiff could not, al-

though sole beneficiary, maintain the action except as personal representative. . . . Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by § 6 of the Employers' Liability Act. The change was in form rather than in substance. . . . It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit." 226 U. S. pages 575, 576.

One significant point in this case is that the original petition pleaded that the deceased was in the performance of his duties upon a train bound from Parsons, Kansas, to Osage, Oklahoma. Hence it was well said in closing the opinion that the Federal statute did not need to be pleaded. In the case now before us the widow is not the sole beneficiary. In *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, it was held that when the plaintiff's petition states a cause of action under the state statute, and from the evidence it appears that the case is controlled by the Federal statute, and the defendant has duly excepted, the state court is bound to take notice of the objection and dismiss if the plaintiff is not entitled to recover under the Federal statute. The action was brought by the widow and parents apparently under the Texas statute. The company contended that the deceased was engaged in interstate commerce, and that it was liable, if at all, only to the personal representative. This was denied by the state court. It was said in the opinion:

"And if the Federal statute was applicable, the right of recovery, if any, was in the personal representative of the deceased, and no one else could maintain the action." 229 U. S. page 158.

"In our opinion the evidence does not admit of any other view than

that the case made by it was within the Federal statute. . . . It comes then to this: The plaintiffs' petition, as ruled by the state court, stated a case under the state statute. The defendant by its special exceptions called attention to the Federal statute, and suggested that the state statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. . . . In short, the case pleaded was not proved and the case proved was not pleaded. In that situation, the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in overruling it." 229 U. S. page 161.

In *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265, the administratrix sued for the benefit of the widow and next of kin. The company raised the point, and the plaintiff in her reply alleged that the deceased was engaged in interstate commerce at the time of his death. This was demurred to as a departure from the petition. The state court held that this reply was proper, and the Supreme Court deemed this ruling binding as a matter of practice. In discussing the point raised, the court said: "The Employers' Liability Act is substantially like Lord Campbell's Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the states in which it was to operate." 238 U. S. page 515.

In *Seaboard Air Line R. Co. v. Renn*, 241 N. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 C. C. A. 1,

the original complaint alleged that the defendant was engaged in operating its road in North Carolina and other states, and it was held that an amendment that the parties were both engaged in interstate commerce at the time of the injury did not amount to the statement of a new cause of action, but merely amplified or extended that already stated and related back to the beginning of the action. This was an action by the employee himself for personal injuries. In *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532, 61 L. ed. 476, 37 Sup. Ct. Rep. 188, 17 N. C. C. A. 349, the action was brought for the death of a car inspector, the plaintiff alleging that the defendant operated a line of railway wholly within the state of South Carolina. The case went to the supreme court of that state, and after reversal, and when called for the second trial, the defendant asked leave to amend its answer by pleading gross and wilful contributory negligence. Up to this time no claim had been made by the defendant and no facts had been pleaded or shown indicating that the Federal act applied in any way. When the plaintiff rested her case on the second trial, the defendant for the first time offered to prove that the deceased was engaged in interstate commerce. This was rejected as coming too late. No application was made for leave to amend the answer. It was held that the refusal of the state court to permit the point to be raised at this time was not a denial of a Federal right. In the opinion, in response to the argument that under the recent decisions of the Federal Supreme Court it is not necessary to claim the benefits of the Federal act in a pleading in a state court in order to obtain a review of a decision denying or refusing to consider such claim, it was said that while it is true that the reports show in the *Seale Case*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, and the *Slavin Case*, 236 U. S. 454, 59 L. ed. 671, 35

Sup. Ct. Rep. 306, that the Federal act was not specially referred to in the pleadings, yet they were in such form that the trial court could have admitted testimony making it necessary to apply the Federal act in deciding each case.

"This, of course, was equivalent to holding that the pleadings in the trial court were in a form to justify the introduction of testimony in support of the Federal claim, under the system of practice and pleading prevailing in the courts of the two states in which the cases were decided. This brings these decisions clearly within the principle of the conclusion we are announcing in this case." 242 U. S. page 536.

It does not appear whether the action was by the widow or by a personal representative, and no point or mention is made touching the capacity to sue. In *New York C. R. Co. v. Winfield*, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680, it was held that the obligations of interstate carriers to make compensation for personal injuries to their employees while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal statute, and that no room exists for state regulation even in respect to injuries occurring without fault, for which the Federal act provides no remedy. In *Missouri P. R. Co. v. Taber*, 244 U. S. 200, 61 L. ed. 1082, 37 Sup. Ct. Rep. 522, an action by a guardian was brought under the state statute, and the Federal act was not pleaded or relied upon or otherwise called to the trial court's attention. The point was raised first in the state supreme court, which declined to pass on it because not presented to the trial court, and this was held to present no Federal question. In *New York C. & H. R. R. Co. v. Tonsellito*, 244 U. S. 360, 61 L. ed. 1194, 37 Sup. Ct. Rep. 620, 14 N. C. C. A. 1072, it is held that the Federal act is exclusive as to cases which it covers and no other can be added by state law. The

father sued to recover for expenses incurred for medical attention to his son and for loss of services on account of personal injuries. The New Jersey courts held that it was a common-law case which had not been taken away by the Federal act. The supreme court followed the *Winfield Case*, holding that the act is not only comprehensive but also exclusive, and that it cannot be abridged by common or statutory law of a state. In *Partee v. St. Louis, & S. F. R. Co.* 204 Fed. 970, 51 L.R.A. (N.S.) 721, 123 C. C. A. 292, 204 Fed. 970, it was held by the eighth circuit court of appeals that an action for a wrongful death under the Oklahoma statute, which provides that "the action must be commenced within two years," must be begun within two years from the wrongful act or death. After referring to the contentions in favor of the other view, Sanborn, J., said: "A statute which in itself creates a new liability gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a Statute of Limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the actions and the right of action no longer exist, and the defendant is exempt from liability." 51 L.R.A. (N.S.) at page 725.

Numerous decisions, including the *Rodman Case*, were cited in support of this view. A note to this decision (51 L.R.A. (N.S.) 721) collates numerous other authorities. This decision was rendered in 1913. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265, decided in

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1915, contains this: "But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability. (Citing authorities.) In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue." 238 U. S. page 511.

In *Hamilton v. Hannibal & St. J. R. Co.* 39 Kan. 56, 18 Pac. 57, the Missouri statute was under consideration, and it was held that the widow could not maintain an action begun more than six months after the death; the statute providing that recovery could be had by the husband or wife for six months after the death, and if they fail to sue within that time then by the minor child or children.

"The provision designating when and by whom the suit may be brought is more than a mere limitation—it is a condition imposed by the legislature, which qualifies the right of recovery and upon which its exercise depends." 39 Kan. page 62.

In *Berry v. Kansas City, Ft. S. & M. R. Co.* 52 Kan. 759, 39 Am. St. Rep. 371, 34 Pac. 805, it was held (Syl. 3) that an action could be brought by the widow after the enactment of § 7324 of the General Statutes of 1915 (Code Civ. Proc. § 420), "if commenced within two years after the death complained of." In the *Rodman* decision, 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642, appears the following: "As a part of the right of action itself, as a condition imposed upon and in limitation of the exercise of the right granted, it is provided that the action upon which recovery is had must be commenced within two

years from the time the right of action arose. No excuse pleaded for delay in the commencement of the action for more than two years will avail, for the reason that no such excuse can, in law, be held sufficient. . . . But the limitation in time of the commencement of the action here brought under this statute is imposed as a condition upon the exercise of the right itself, is special and absolute in its nature, and is unaffected by the general provisions of § 23." 65 Kan. page 654.

From the briefs on file in the state library, it appears that Mrs. Rodman was appointed administratrix more than two years after the death.

"The general and reasonable rule is that the statute runs from the time of the death, and not from that of the injury; and many of the statutes based on Lord Campbell's Act and purporting to confer a new cause of action contain an express provision to this effect." 8 R. C. L. p. 803, § 82.

"The better rule seems to be that the Statute of Limitations begins to run against the statutory right of action for death by wrongful act only from the time that such death occurs, although that event may take place long after the time of the infliction of the injury causing such death." 13 Cyc. 339.

Now, as before, the question is not so much one of pleading as one of party. In the former opinion in response to the suggestion that the defendant could not avail itself of the defense of the interstate question without pleading, it was said: "It would be more accurate, however, to say that the real question is whether or not, in view of the condition of the pleadings, the defendant had a right, by competent evidence, to show that whatever liability might exist, the widow could not maintain the action." 98 Kan. 455, 158 Pac. 55.

The result was thus stated: "The conclusion is reached, therefore, that under the record as it appears here the plaintiff was not entitled to

recover because not the proper party under the only statute applicable to the case." 98 Kan. 461.

When the point was first brought to the attention of the widow, she might have been appointed administratrix and amended; but this she did not do until more than two years after the date of the death. Thus the two years' time in which a personal representative might sue was allowed to elapse. The fact that the widow had within the statutory time attempted to recover under the state law could not affect the right which the Federal statute gives to the administratrix only. The one cannot be tacked upon the other, nor can the limitation be thereby extended.

The Federal statute is not retroactive. *Winfree v. Northern P. R. Co.* 44 L.R.A. (N.S.) 841, 97 C. C. A. 392, 173 Fed. 65, ninth circuit court of appeals. It is intended to supersede all other bases of actions wherever it applies. It has repeatedly been said to be similar to the Lord Campbell Act, and in fixing the limitation at two years it is difficult to conceive that it was intended that all this time and more might elapse before an administrator must be appointed, and that he would then have two years longer in which to sue, which would be the case if the time ran from his appointment, and not from the death of the decedent. While, of course, this is a question finally for the Federal Supreme Court, we hold that, in view of the authorities now

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obtainable, the action must be brought within two years from the time of the death, and therefore that the administratrix in this case cannot prevail.

The judgment is, therefore, reversed, with directions to enter judgment for the defendant.

Burch, Porter, Marshall, and Dawson, JJ., concurring.

Mason, J., dissenting:

The decision in *St. Louis, S. F. & T. R. Co. v. Smith*, 243 U. S. 630, 61 L. ed. 938, 37 Sup. Ct. Rep. 477, affirming a Texas decision reported in — *Tex. Civ. App.* —, 171 S. W. 512, seems to me to establish the right of the plaintiff to maintain her action as one under the act of Congress, for the facts of that case appear essentially similar to those here presented. In the reply brief of the defendant it is said: "We are willing to concede that if there had been an express allegation in the original petition that Charles Giersch, at the time of his death, was engaged in interstate commerce, and the railway company was so engaged at that time, with the allegation as to the application of the state Employers' Liability Act omitted, then the amendment by substituting the administratrix and increasing the prayer for damages could be made, even after two years from the date of the death. This principle has been settled by the case of *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, and also the case of *Seaboard Air Line R. Co. v. Renn*, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1. In the *Renn* Case there was an allegation 'that the defendant (railway) was engaged in operating its railroad in that and other states.' It was held that the amendment after the statute had run 'merely amplified or expanded' the statement of the original cause of action."

The petition in the present case alleged that the defendant owned and operated a "system of railroads," and a "freight terminal junction in connection with its said railroad system in and near the city of Emporia," in the yards of which terminal the plaintiff's husband was killed. Facts of which judicial notice is taken need not be pleaded. 31 Cyc. 47. The courts of Kansas know judicially that the "system of railroads" owned and

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operated by the defendant company extends into other states. *Patterson v. Missouri P. R. Co.* 77 Kan. 236, 239, 15 L.R.A. (N.S.) 733, 94 Pac. 138. The allegations of the original petition point to an interstate operation much more definitely than those in the *Renn Case*. The insertion of other averments suggesting a reliance on the local statute should not affect the matter, because a mistaken belief on the part of the plaintiff or her attorneys that the state law could apply in an action for an injury received in the course of interstate commerce ought not to defeat her recovery. To render the petition nonamendable, it must have utterly failed to state a case under the Federal law—mere defects and surplusage could not have that effect.

Moreover, I think the judgment should be affirmed upon another theory. When the case was here before, a reversal was ordered (as I interpret the opinion) because it was believed that controlling Federal decisions gave the defendant the right to prove that the plaintiff's husband was killed while engaged in an operation of interstate commerce without pleading it. 98 Kan. 452, 158 Pac. 54. It now seems obvious that, if the first judgment had been sustained and a review of the ruling had been sought in the Federal Supreme Court, it would have been there affirmed both because the decision of the state court of last resort on such a matter is regarded as final "when it is clear . . . that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of Federal right," and because the "essential justice of" such "decision, which is the fundamental thing," would have commended it to the favor of that tribunal. *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532, 534, 535, 61 L. ed. 476-478, 37 Sup. Ct. Rep. 188, 17 N. C. C. A. 349. I am not
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suggesting a re-examination of the former decision, but I think the situation stated has a bearing upon the present case as warranting a somewhat strict application of rules of procedure that may militate against the defendant's contentions—a course the more justifiable because of the essentially technical character of its defense. If the defendant in its answer had specifically pleaded the interstate character of the transaction in which the plaintiff's husband met his death, the defect of the petition in omitting that allegation would under our practice have been cured. *Irwin v. Paulett*, 1 Kan. 418; *Campbell v. Coonradt*, 22 Kan. 704; *Sill v. Sill*, 31 Kan. 248, 1 Pac. 556. When the defendant without pleading anything with reference thereto, offered documentary evidence the only possible purpose of which was to show that the car in connection with which the injury occurred was in the course of an interstate trip, I think it should be regarded as having asserted the fact to all intents and purposes as fully and definitely as though it had pleaded it, so that from the time of such assertion (which was within two years from the death) the allegation with regard to interstate commerce was in the case, and might thereafter be formally incorporated in the petition, regardless of the Statute of Limitation. The view of the court results in what appears to me to be the somewhat anomalous situation that a claim for damages which has twice been judicially determined to be otherwise valid is lost to the plaintiff because she omitted to plead a fact which was well known to the defendant, while the defendant succeeds in defeating the claim by proving the same fact without having pleaded it.

Johnston, Ch. J., joins in the dissent.

Petition for rehearing denied.

ANNOTATION.

Limitation of action: when cause of action for death accrues under Federal Employers' Liability Act.

For a note on amending complaint, after limitation period has expired, so as to come within Federal Employers' Liability Act as changing the cause of action, see annotation to *Hogarty v. Philadelphia & R. R. Co.* 8 A.L.R. 1405.

The Federal Employers' Liability Act provides that in case of the death of an employee the employer shall be liable to the deceased's personal representative, and further provides that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

It is generally held that where a cause of action arises after death, it is considered as accruing, for the purpose of limitations, only from the time when there is someone in existence capable of suing, and, if no one but the administrator can sue, that the statute does not begin to run until administration is granted. It has accordingly been held, contrary to the decision in the reported case (*GIERSCH v. ATCHISON, T. & S. F. R. Co.* ante, 470), that the two-year limitation within which an action based on the statute under consideration must be brought runs, in the case of the death of an employee, from the time of the appointment of a personal representative who alone could bring the action, and not from the time of the death of the employee. *American R. Co. v. Coronas* (1916) L.R.A.1916E, 1095, 144 C. C. A. 599, 230 Fed. 545, 12 N. C. C. A. 49; *Bird v. Ft. Worth & R. G. R. Co.* (1918) — Tex. —, 207 S. W. 518; *Williams v. Western & A. R. Co.* (1920) — Ga. App. —, 102 S. E. 186. The court in *American R. Co. v. Coronas* (Fed.) supra, said: "It is to be noted that the statute does not require that the action shall be brought within two years from the death, but within two years from the time the cause of action accrued. It is also to be noted that the action is not for the occurrence out of which the death arose,

but for the pecuniary damage to the beneficiaries, due to the death; so that in no event could the cause of action arise until after the death, or be said to exist so that the statute could run until after that time. We may, therefore, assume that the statute, so far as this cause of action is concerned, did not begin to run until after death had ensued. It is a general rule of law that where a cause of action arises, as in this case, after death, it is considered as accruing, for the purpose of the running of the statute, only from the time when there is someone in existence capable of suing, and, if no one but the administrator can sue, that the statute does not begin to run until administration is granted. This principle was announced at an early day. The leading English case on the subject is *Murray v. East India Co.* (1821) 5 Barn. & Ald. 204, 106 Eng. Reprint, 1167, 24 Revised Rep. 325, which has been very generally followed in this country. . . . In view of the well-recognized rule heretofore pointed out as to when a right of action accrues,—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue so that the limitation attached, until the administrator was appointed."

It will be noted, however, that in the reported case (*GIERSCH v. ATCHISON, T. & S. F. R. Co.*) it was held that under the Federal act the cause of action accrued within two years from the date of the death of the de-

ceased, and that a personal representative appointed more than two years from such date could not maintain an action.

In *Gillette v. Delaware, L. & W. R. Co.* (1917) 91 N. J. L. 220, 102 Atl. 673, where an infant was injured, the case was distinguished from one in which the appointment of a personal representative was necessary, it being held that the infant who was injured might have sued the day after he was hurt, and that under the Federal Employers' Liability Act suit must be brought within two years from the time when the cause of action accrued, and that infancy did not suspend the operation of the act. The court said: "As in the case of our Death Act [Comp. Stat. 1910, p. 1907], the Federal act in creating rights of action at the same time limits their exercise to the period prescribed. It is more than a mere statute of limitation; it is a condition of the bringing of the action that it be begun within two years from the day the cause of action accrued. Hence the inquiry is:—when could the plaintiff have caused a summons to issue, based thereon? When did such cause of action accrue? In the case of fatal injury and suit by a representative, it has been held that the cause of action did not accrue until the representative was appointed. *American R. Co. v. Coronas* (1914) L.R.A. 1916E, 1095, 144 C. C. A. 599, 230 Fed. 545; 12 N. C. C. A. 49. But the case of an infant is very different. He may bring his suit at once, notwithstanding his minority. It is true that the suit must be prosecuted by guardian or next friend (Practice Act of 1903, § 18); but it is not necessary that a next friend be appointed before suit begins; on the contrary, process may be sued out before the next friend is appointed. 2 Archbold, Pr. 6th ed. 940. 'This,' said our supreme court in 1810, 'is the common practice.' *Groff v. Groff*, 3 N. J. L. 656. Consequently there was nothing to prevent the plaintiff's taking out a summons the day after he was injured. His cause of action had accrued, for he was in a position to assert it in a court of law."

And in *Alvarado v. Southern P. Co.* (1917) — Tex. Civ. App. —, 193 S. W. 1108, it was held that, as the Federal act contained no exceptions to the provision that no action should be maintained under the act unless commenced within two years from the date the cause of action accrued, an action on behalf of an injured employee must be brought within such two years, notwithstanding the fact that the injury in question rendered the employee insane.

And in *Bement v. Grand Rapids & I. R. Co.* (1916) 194 Mich. 64, L.R.A. 1917E, 322, 160 N. W. 424, an action for injuries, it was held that the two-year limitation, being contained in the statute which created a new liability, was a limitation upon the right and not on the remedy, and that if the action was not brought within the period designated by the statute, it was lost, and that the defendant was not estopped from asserting the benefit of the statute by reason of concealment or fraud.

In *Lindsay v. Chicago, R. I. & P. R. Co.* (1916) 56 Okla. 234, 155 Pac. 1173, in which it did not appear that death occurred more than two years from the date of the action, it was held, under the statute here considered, that where the action is for death the cause of action accrues at the time of death, and not from the time of the accident. The court there said: "The action must be brought 'within two years from the day the cause of action accrued.' We are of the opinion that, where the action is for death, as in the instant case, a correct interpretation of the time the cause of action accrued is that the action accrued at the time of the death. 'Must the action be brought within two years from the date of his injury, or within two years from the date of his death? A little consideration of this question will show that the suit can be brought within two years after the death, and that the date of the injury is immaterial in this respect. While the injured person was alive he could have no administrator, nor could his parents, wife, children, or next of kin, depend-

ent upon him, bring an action because of his injuries. . . . It necessarily follows that the statute begins to run from the date of the death of the injured person. . . . "The better rule seems to be that the Statutes of Limitation begin to run against the statu-

tory right of action for death by wrongful act only from the time that such death occurred." 13 Cyc. 339, C, 2. "The general and reasonable rule is that the statute runs from the time of death, and not from that of the injury." 8 R. C. L. § 82, p. 803." J. T. W.

COMMONWEALTH OF KENTUCKY, Appt.,

v.

JOHN H. ALLEN.

Kentucky Court of Appeals—May 24, 1921.

(191 Ky. 624, 231 S. W. 41.)

Witness — wife against husband — performance of abortion.

1. A woman may testify against her husband in a prosecution against him for causing her to miscarry by the use of instruments upon her person.

[See note on this question beginning on page 490.]

Indictment — sufficiency — failure to follow statute.

2. An indictment is not insufficient to put accused in jeopardy because it does not follow the language of the

statute, if it omits no allegation of fact or circumstance necessary to constitute the offense named in the statute.

[See 14 R. C. L. 185.]

APPEAL by the Commonwealth from a judgment of the Circuit Court for Logan County acquitting defendant upon trial of an indictment for abortion. *Error.*

The facts are stated in the opinion of the court.

Messrs. Charles I. Dawson, Attorney General, Thomas B. McGregor, Assistant Attorney General, James R. Mallory, and Coleman Taylor for the Commonwealth.

Messrs. S. R. Crewdson, E. J. Felts, and Selden Y. Trimble, for appellee:

It was never the intention of the legislature to allow the wife to testify against the husband upon a trial for abortion.

Com. v. Sapp, 90 Ky. 586, 29 Am. St. Rep. 405, 14 S. W. 834; Elswick v. Com. 13 Bush (Ky.) 155; Hostetter v. Green, 159 Ky. 611, L.R.A.1915C, 870, 167 S. W. 919; Howard v. Com. 118 Ky. 14, 80 S. W. 211, 81 S. W. 704; Murphy v. Murphy, 23 Ky. L. Rep. 1460; Fightmaster v. Fightmaster, 22 Ky. L. Rep. 1512, 60 S. W. 918; Com. v. Wilson, 190 Ky. 813, 229 S. W. 60; Miller v. Com. 154 Ky. 201, 157 S. W. 373; Com. v. Winfrey, 169 Ky. 650, 184 S. W. 1121.

Settle, J., delivered the opinion of the court:

The grand jury of Logan county found and returned in the circuit court of that county an indictment against the appellee, John H. Allen, accusing him of the crime of abortion. Omitting the merely formal parts of the indictment, its description of the acts constituting the crime charged is as follows: "The said Allen . . . did unlawfully, wilfully, and feloniously use a metal instrument, a spoon or sound, a more particular description of which is to the grand jury unknown, upon the body and person of his wife, Sallie Mildred Allen, who was at the time pregnant, during the period of gestation, which was well known to him, by forcing, thrusting, and inserting the said instrument

into the body, private parts, and womb of the said Mrs. Allen, with the intent thereby to procure the miscarriage of said woman, all of which was over her protest, against her will, and not necessary to preserve her life, and, as a result of said acts so done with the intent and in the manner aforesaid, the miscarriage of the said Mrs. Allen was procured, the death of two unborn children was caused, and the said Mrs. Allen did miscarry. . . . "

The trial of appellee under the indictment resulted in his acquittal by the verdict of the jury, complaining of which, the ruling of the trial court in excluding certain evidence offered in its behalf, and of its refusal to grant it a new trial, the commonwealth has appealed.

The crime of abortion is defined and made a felony by Kentucky Statutes, § 1219a, subsecs. 1-4; the penalty prescribed by subsec. 1 being applicable where the conviction of the accused results from his committing, with the intent to procure a miscarriage, when not necessary to preserve the woman's life, the acts by which, as defined by the section, it may be effected, but without actually causing it. The penalty prescribed by subsec. 2 applies where the conviction of the accused occurs by reason of his committing, with the intent to procure a miscarriage, when not necessary to preserve the woman's life, the acts described in subsec. 1, and the miscarriage actually results from such acts; and, in addition, causes the death of the unborn child, whether before or after quickening time. If, however, the woman upon whom the acts described in subsec. 1 are committed with the intent to procure the miscarriage, when not necessary to preserve her life, should by reason thereof die, subsec. 3 of the statute provides that the person offending, if convicted, "shall be punished as now prescribed by law for the offense of murder or manslaughter, as the facts may justify." By subsec. 4 it is provided that the consent of the woman to the means employed to procure the abortion shall

be no defense; that she shall be a competent witness in any prosecution under the statute, and for that purpose shall not be considered an accomplice.

It is apparent from the language of subsecs. 1, 2, and 3 of the statute, supra, that the offense denounced by each is a felony, and manifest from that of the indictment in the instant case that the acts alleged therein to have been committed by the appellee constitute the offense as defined in subsecs. 1 and 2, for which, if found guilty by the jury, he would have been amenable to the punishment, by way of confinement in the penitentiary, prescribed by subsec. 3.

Without raising the question in the court below, or seriously arguing it here, counsel for the commonwealth contends that the indictment is not sufficient to sustain a conviction; hence the appellee was not placed in jeopardy by his trial thereunder, for which reason the judgment appealed from should be reversed, and the case remanded, with direction to the court below to set it aside and refer the case to the grand jury for the return of another and sufficient indictment against appellee. Without consuming time in discussing this contention, it is deemed only necessary to say that the indictment in form and substance sufficiently complies with the provisions of Criminal Code, § 122, subsecs. 1, 2, and § 124, subsecs. 1 to 4, inclusive, in that it is direct and certain as regards (1) the party charged; (2) the offense charged; (3) the county in which it was committed; (4) "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the right of the case." While the indictment does not attempt to follow the language of the statute, it omits no allegation of fact or circumstance

Indictment—
sufficiency—
failure to
follow statute.

necessary to constitute the offense therein named. Therefore it is clear that the appellee was placed in jeopardy by his trial thereunder in the court below, and that this court is powerless to reverse the judgment of that court based upon the verdict of the jury acquitting him of the crime charged. So our authority is confined to a review of such of the rulings of the circuit court on the trial as are assigned as error on the appeal, and to declaring the law regarding the same.

The remaining important question presented for decision by the appeal, and respecting which counsel for the appellant are most insistent, is: Was the wife of the appellee, the party injured by his alleged acts constituting the crime charged in the indictment, a competent witness for the commonwealth on his trial under the indictment? It appears from the record that the only evidence introduced on the trial of appellee in the court below was in behalf of the commonwealth; and, while it was sufficient to prove that appellee's wife suffered a miscarriage as charged in the indictment, resulting in the premature birth of two children (twins) without life, and that such miscarriage was caused by some sort of force or violence employed upon the person of Mrs. Allen, with the exception of one witness who testified as to a statement of appellee that his wife was pregnant, and, in substance, that he intended to cause her to have a miscarriage, there was little, if anything, in the evidence tending to connect him with the procurement of the abortion, which doubtless led the jury to entertain such doubt of his guilt as to cause the verdict of acquittal returned by them. It was to supply this lack of evidence, therefore, that the wife of appellee, who better than all others knew the facts regarding his guilt or innocence, was offered as a witness by the commonwealth. She was, however, excluded upon appellee's objection as a witness, and her offered

testimony rejected by the trial court, to which ruling counsel for the commonwealth at the time took an exception, and thereupon entered of record an avowal that the witness Mrs. Allen, "if permitted to testify, would state that her husband [appellee], over her protest and against her will, forcibly inserted a metal instrument into her private parts, person, and body for the purpose of causing a miscarriage of her unborn child [or children], and the result of same was a miscarriage."

The antiquity of the common-law rule that neither the husband nor wife shall testify for nor against the other is so great as to render even the century of its origin well-nigh undiscoverable. It was mainly founded upon two reasons: (1) The danger of causing dissension and of disturbing the peace of families; (2) the natural repugnance in all fair-minded persons to compelling the husband or wife to be the means of the other's condemnation. It may therefore be said that the rule in question was bottomed upon a humane public policy intended to protect the sanctity of the home and happiness of the family. But the rule, like practically all others, had its salutary exceptions, one of which is that the wife may testify against the husband in a criminal or penal prosecution for an offense or attempted offense against her person.

In *Com. v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834, we had occasion to pass directly on this question. *Sapp* was indicted for attempting to poison his wife, and upon his trial the wife was offered by the commonwealth as a witness against him; its counsel avowing that she would state that she saw the husband sprinkle a substance upon a piece of watermelon intended for her, which substance was shown by other testimony on the trial to be arsenic, a deadly poison. The trial court refused to permit her to testify, holding that she could not be a witness for any purpose. But on the appeal of the case we held that her rejection as a witness

was error. The opinion, following a review of the common-law and numerous judicial decisions on the subject, declares that § 606, Civil Code of Practice, is "but declaratory of the common law," and that, notwithstanding its emphatic provisions to the effect that neither a husband nor his wife shall testify for or against each other, this rule "is subject necessarily to some exceptions, one of which is where the husband commits or attempts to commit a crime against the person of the wife."

Although in the case *supra* the wife had been divorced from the husband before she was offered as a witness, this fact the court held of no consequence, saying in the opinion: "The policy upon which the rule that the husband and wife cannot testify for or against each other is based is so far overcome as to create the exception by that superior policy which dictates the punishment of crime, and which, without the exception to the rule, would very likely go unpunished. It is of necessity. If it be said that our statute forbids the introduction of the husband or wife as a witness against the other, we reply, and so did the common law; and yet the exception named existed, and so it should, in our opinion, under our statute. The necessity of the case requires such a construction, and, as already said, the statute forbidding husband or wife to testify against each other is but declaratory of the common law. As the divorced wife would have been a competent witness if she had still been the wife of the accused at the time of the trial as to the alleged attempted felony upon her, it follows a fortiori that being divorced did not disqualify her."

In Wharton, Criminal Law, vol. 1, § 762, it is said: "Where, however, violence has been committed on the person of the wife by the husband, she is competent to prove such violence."

See Roscoe, Crim. Ev. 150; Stein

v. Bowman, 13 Pet. 221, 10 L. ed. 129.

In the very recent case of *Com. v. Wilson*, 190 Ky. 813, 229 S. W. 60, the right of the wife to testify against the husband in such a state of case as is here presented is recognized. In approving in that case the decision holding the wife a competent witness against the husband reached in *Com. v. Sapp*, *supra*, we said of the exception, both to the common-law and Code provisions, upon which her right to testify was therein rested: "But the exception was created and is allowed from the necessities of the case, in order to subserve the larger policy of the state, that the guilty should be punished, which would in many cases be defeated if the mouth of the wife was closed and she was not permitted to testify to the facts constituting the offense against her person."

In *Com. v. Wilson*, *supra*, we held that the wife was a competent witness against the husband under an indictment accusing him of obtaining by false pretenses upon her check, fraudulently made out by his procurement for an unauthorized amount, money belonging to the wife. The question decided, therefore, was whether the wife was a competent witness against the husband where the offense charged was one affecting her property, instead of her person, as in the *Sapp* Case. But the opinion, in responding to the insistence of counsel for the commonwealth that the superior policy of the state constituting the exception to the rule of the common-law and Code provisions under which the competency of the wife's testimony was declared in the *Sapp* Case made the wife a competent witness where, as in the *Wilson* Case, the crime of the husband caused the loss to her of her property, while admitting the force of this contention and the support given it by the weight of authority in other states, held the decision of the question unnecessary, as the competency of *Wilson's* wife as a witness against him was

put beyond doubt by the amendment to § 606, Civil Code, made by act of the Legislature of February 23, 1898, providing: "And except that when the husband or wife is acting as agent for his or her consort, either of them may testify as to any matter connected with such an agency."

So, while it is true, as claimed by counsel for appellee, that the court did not have before it in *Com. v. Wilson* the precise question passed on in *Com. v. Sapp*, its approval of the conclusion regarding the wife's competency as a witness against the husband expressed in the opinion of the latter case, and of the reasons supporting the conclusion, persuasively indicate it to be the intention of the court to be understood as adhering to the rule as to the wife's right to testify against the husband where, as in the *Sapp* Case and the instant case, the crime of the latter was committed or attempted to be committed on the person of the wife.

In *Barclay v. Com.* 116 Ky. 275, 76 S. W. 4, we reaffirmed the rule of necessity with respect to the right of the wife to testify against the husband announced in *Com. v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834. Barclay was indicted for unlawfully and feloniously hiring and procuring a man unknown to the grand jury, and without authority to solemnize a marriage, to conduct and solemnize, under pretense of having such authority, a marriage between him (Barclay) and Adeline Chandler. On the trial of Barclay under the indictment Adeline Chandler, over his objection, was permitted by the court to testify against him as to the mock marriage, which, according to her testimony, she supposed had been legally solemnized by one having authority to act in performing such a rite. After the pretended marriage Barclay took her to Tennessee and there lived with her a week as his wife, she believing all the while that they had been legally married.

Section 2110, Kentucky Statutes, makes it a felony, punishable by con-

finement in the penitentiary not exceeding three years, for any person, not authorized to solemnize a marriage, to do so under pretense of having such authority. Barclay, as an accessory to the false marriage and before the fact, was liable under § 1128, Kentucky Statutes, to the same punishment as the person by whom the illegal marriage was pretended to be solemnized. Section 2097, Kentucky Statutes, declares a marriage void when not solemnized or contracted in the presence of an authorized person or society. It is, however, provided by § 2102 that "no marriage solemnized before any person professing to have authority therefor shall be invalid for the want of such authority, if it is consummated with the belief of the parties, or either of them, that he had authority and that they have been lawfully married."

On the appeal of the case it was insisted for the appellant, Barclay, that, as the marriage had been consummated with the belief on the part of Adeline Chandler that she and appellant had been lawfully married, it was by the terms of the statute not invalid for want of authority in the person solemnizing it, for which reason she could not testify against him. But in overruling this contention we, in the opinion, said:

"We cannot concur in this conclusion. The case falls within one of the well-settled exceptions to the rule that a wife cannot testify against her husband. In 1 Greenleaf on Evidence, § 343, it is said: "To this general rule excluding the husband and wife as witnesses there are some exceptions, which are allowed from the necessity of the case, partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But the necessity which calls for this exception for the wife's security is described to mean, 'not a general necessity, as where no other witnesses can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed,

without remedy, to personal injury.' Thus a woman is a competent witness against a man indicted for forcible abduction and marriage, if the force were continuing upon her until the marriage, of which fact she is also a competent witness, and this by the weight of the authorities, notwithstanding her subsequent assent and voluntary cohabitation, for otherwise the offender would take advantage of his wrong."

"Other authorities might be cited, but the principle is so well settled that we deem it unnecessary. If the rule were otherwise, it would be in the power of the defendant by consummating the marriage, and thus adding another wrong to the crime he had already committed in procuring the mock marriage, to protect himself from punishment for the crime."

Under the ruling in *Com. v. Sapp* and *Barclay v. Com.* supra, it may be said to be a well-settled rule of law in this jurisdiction that the wife is a competent witness against the husband in a prosecution of the latter for a criminal offense alleged to have been committed upon or against the person of the former.

In the majority of the states the courts recognize the right of the wife to testify against the husband in a criminal prosecution against the latter for an offense involving actual or threatened injury to her person; and in many of them the doctrine that the wife may testify against him in any criminal prosecution charging him with injury to her property is also given recognition. *Williamson v. Morton*, 2 Md. Ch. 94; *Miller v. State*, 78 Neb. 645, 111 N. W. 637; *Murray v. State*, 48 Tex. Crim. Rep. 141, 122 Am. St. Rep. 737, 86 S. W. 1024; *People v. Northrup*, 50 Barb. 147; *Com. v. Spink*, 137 Pa. 255, 20 Atl. 680; *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229; *Davis v. Com.* 99 Va. 838, 38 S. E. 191; *Com. v. Kreuger*, 17 Pa. Co. Ct. 181.

A well-considered case, among the many of other jurisdictions on the question under consideration, is

that of *State v. Dyer*, 59 Me. 303. An indictment against the husband and another charged them with using an instrument upon the wife by forcing and inserting it into her womb for the purpose of procuring a miscarriage. The question for decision was whether the wife was a competent witness against the husband. It was held that she could testify: (1) Because the charge was gross personal violence on the person of the wife; (2) that the wife acted under the coercion of the husband; (3) that the intent was to procure the miscarriage of the woman. These facts were sufficient, as held by the court, to bring the case within the exception to the rule of the common law excluding husband and wife as witnesses for or against each other. In discussing the reasons for the exception the court, in part, said: "The object and purpose of the exception measures the extent of it. In a given case the inquiry must be: What is the nature of the offense charged, and is it one implying personal violence to the wife? If so, she may be a witness, not only to obtain security for herself, but also when he is charged, by indictment, with an assault upon her. . . . The rule of exclusion, it is well known, is based upon the unity in view of the law of husband and wife, and 'the idea that her testimony would tend to destroy domestic peace, and introduce discord, animosity, and confusion.' The exceptions which necessity soon forced upon the courts are based primarily on the idea that the protection of the person of the wife from actual violence and assault or cruel treatment by the husband is of more practical importance than the legal assumption of unity, or the theoretical fears of domestic discord."

We fully indorse the reasons advanced by the supreme court of Maine in the case, supra, in support of the right of the wife to testify against the husband when it is sought in a criminal or penal pros-

ecution to bring him to account for an injury wantonly inflicted or threatened to her person; for we believe them in full accord with a salutary public policy, the enforcement of which will have beneficent effect in protecting the sanctity of the home and happiness of the family. Indeed, any other view of the matter would be contrary to reason and repugnant to the demands of justice.

We do not find that the authorities relied on by counsel for appellee militate against the view we entertain of the law. None of the cases cited in their brief is precisely analogous to the case at bar, in point of fact or as regards the conclusion reached. That of *Com. v. Winfrey*, 169 Ky. 650, 184 S. W. 1121, strongly relied on, though apparently similar in some of its features of fact, did not require a decision of the question of the wife's right to testify. The only questions decided in the case on the appeal was as to the right of the commonwealth's attorney, denied by the trial court, to dismiss by motion an indictment under § 243, Criminal Code, over the defendant's objection, and whether a writ of prohibition would lie to control the action of that court upon such motion. It was held by us that the writ of prohibition did not lie, but, as the commonwealth had taken an appeal from the order of the trial court overruling the motion of its attorney to dismiss the indictment, its action thereon was reviewable on the appeal; and, further, that such action of the trial court in overruling the motion of the common-

wealth's attorney to dismiss the indictment was error; hence for that reason, and no other, the judgment was reversed.

While comment is made in the opinion upon the claim of counsel that the marriage of the defendant to the prosecutrix after his indictment for procuring an abortion upon her had rendered her incompetent to testify against him, it can hardly be claimed that the court by what was said admitted the disqualification of the wife as a witness by her marriage to the defendant. Fairly construed, the language used means that, if it were true such disqualification of the witness resulted from the marriage, as claimed, that fact could not be urged by the defendant as a ground for defeating the right of the commonwealth to renew the prosecution against him under another indictment, if the parties should thereafter be divorced. We think it manifest that the court did not intend, by the language referred to, to make the opinion conflict with those of *Com. v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834, and *Barclay v. Com.* 116 Ky. 275, 76 S. W. 4. At most, what was said in *Com. v. Winfrey* was unnecessary to the decision of the question upon which the judgment appealed from was reversed; and, this being true, it is to be regarded obiter dictum.

It follows from the conclusions we have expressed that the ruling of the Circuit Court excluding the testimony of the wife of the appellee as a witness in the instant case was error. Hence it is so declared, and this opinion certified to that court as the law of the case.

ANNOTATION.

Abortion as an offense against other spouse within exception to rule relating to competency of one as witness against other.

Generally, as to sexual offense by one spouse with or against third person as a crime against other spouse within statute relating to competency of husband or wife as witness against

other, see annotation following *State v. Wilcox*, 4 A.L.R. 1066.

The general common-law rule was to the effect that one spouse was incompetent to testify against the other,

but to this an exception, said to arise from necessity, was made in case of offenses by one spouse against the other, at least, where there was personal violence. This exception has, in varying phraseology (e. g., "all cases in which an injury has been done by either against the person or property of the other," "a crime committed by one against the other," "cases of criminal violence upon one by the other," etc.), been incorporated in the statutes of most jurisdictions.

The question under consideration in this annotation, as stated in the title, is whether or not the exception applies in cases of abortion.

The general rule in this respect is that the wife is competent to testify against the husband for abortion committed on her by him. Thus in the reported case (*COM. v. ALLEN*, ante, 484) where the general statute merely provided that neither a husband nor his wife shall testify for or against each other, it was held that since the statute was but declaratory of the common law, the common-law exception should be read into it, so that the wife was competent to testify against her husband, especially in view of the provisions of the Abortion Statute, to the effect that the woman upon whom the acts described have been committed shall be a competent witness in any prosecution thereunder. This was an application of the said to be well-settled rule of law in Kentucky, that the wife is a competent witness against the husband in a prosecution of the latter for a criminal offense alleged to have been committed upon or against the person of the former. And in *State v. Dyer* (1871) 59 Me. 303, set out, discussed, and quoted in *COM. v. ALLEN*, it was expressly held that a wife was a competent witness against her husband on a prosecution for abortion committed on her by him and another; the theory being that the commission of the acts complained of constituted gross personal violence within the meaning of the exception to the common-law rule. And again in *Munyon v. State* (1899) 62 N. J. L. 1, 42 Atl. 577, it was said that a wife upon whom an abortion was alleged

to have been committed by her husband and another was a competent witness against the husband, since the charge showed an act of direct violence to the person of the witness, which clearly brought the case within the exception to the general common-law rule. And in *Navarro v. State* (1887) 24 Tex. App. 378, 6 S. W. 542, where it was charged that a husband procured an abortion by an unlawful assault on his wife, the prosecuting witness, with the design of producing that effect, it was held that "under the statute [provisions not reported], she was clearly a competent witness."

And in Pennsylvania it has been held, upon the theory that an abortion "is clearly a case of bodily injury or violence" so as to present an exception to the general rule, that a wife who became such by marrying the accused subsequent to the commission of the abortion, but prior to the prosecution, was a competent witness against the husband. *Com. v. Kreuger* (1895) 17 Pa. Co. Ct. 181.

But in Texas, under a statute providing that husband and wife shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other, it has been held (*Miller v. State* (1897) 37 Tex. Crim. Rep. 575, 40 S. W. 313) that a wife is not a competent witness against her husband for an abortion committed on her by the administration of drugs prior to their marriage, it being said that the acts, even conceding that they were acts of personal violence, were not directed against the wife, since she was not a wife at the time of their commission; and moreover that, since the acts consisted merely in the administration of drugs, there was no "personal violence," so as to bring the case within the exception to the common-law rule. The court, among other things, said: "The conviction was had mainly, if not entirely, upon her evidence. We presume the ruling of the judge authorizing her to testify was based upon one or two propositions: First, that the matters to which she was called to testify about transpired before the intermarriage between prose-

cutrix and defendant; and, second, that her testimony was authorized, because the abortion was personal violence by the husband against her. At common law neither the husband nor the wife were admissible as witnesses in a case, civil or criminal, in which the other was a party. See 1 Greenl. Ev. § 334, and authorities cited in note 2. Our statute on the subject has modified the rule. See Code Crim. Proc. 1895, arts. 774, 775. We quote the last article, to wit: "The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other." This statute has been construed with such strictness as that a wife, though introduced for the husband, cannot be cross-examined, except as to matters brought out and directly involved in the examination in chief. . . . We are not aware, however, that it has been construed with reference to transactions occurring prior to the marriage. At common law the principle of exclusion applies in its fullest extent, wherever the interest of either of the spouses is directly concerned. . . . We have been referred to the case of *State v. Evans* (1897) 138 Mo. 116, 60 Am. St. Rep. 549, 39 S. W. 462, which is much in point. That was a case where Evans was indicted for rape on a girl then under fourteen years of age (which is the age of consent in Missouri). Subsequent to the alleged rape, he married the prosecutrix, and she was introduced as a witness against him over his objections. In that state there is a statute similar to our own, allowing the wife to testify in favor of the husband, but not against him. The facts in that case show said rape to have been committed with the consent of the prosecutrix. It was urged, however, that this was a criminal injury to the wife, and came within the exception allowed at common law. The court, on this point, said: "This contention ignores the

limitation of the exception itself. *Ex vi termini* a wife is only admitted to testify concerning criminal injuries to herself as a wife, not to a woman who was not at the time of the injury the wife of the defendant. We agree with counsel that both the rule and its exceptions are founded in public policy, but the legislature of this state has announced the public policy of this state. . . . The court clearly erred in admitting the wife as a witness over and against the defendant's objections and exceptions." If we follow the rule laid down in this case, it would apply directly; that is, *Allene Turnage* was not the wife of the appellant at the time the transaction occurred about which she was called to testify. She was his wife at the time she was placed upon the stand. If it be conceded that the acts constituting the abortion stated in the record were acts of personal violence, they were not at the time directed against his wife. They subsequently married, and the statute, by its terms, excludes the wife from testifying against her husband, except as to acts of personal violence against her. However, the acts constituting and causing the alleged abortion in this case were the administration of certain drugs, no force being used in the administration thereof, and apparently with her consent. Even in case of the administration of poison with malicious intent to take life, it has been held in this state that this did not constitute an assault, but was controlled by our statute on the subject with reference to administering poisons to another with intent to kill and injure such person. . . . All of the cases that we are aware of in this state, where it has been held that the wife was a competent witness against the husband, were cases of personal violence by the husband against her."

In *Com. v. Kreuger* (1895) 17 Pa. Co. Ct. 181, it was held that the fact that the wife consented to the act or acts complained of did not at all affect the question of her competency. G. J. C.

C. P. GILES et al., Resp'ts.,
v.
CITY OF OLYMPIA, Appt.

Washington Supreme Court (Dept. No. 1) — April 15, 1921.

(— Wash. —, 197 Pac. 631.)

Highway — binding effect of condition in dedication.

1. A municipality in accepting a dedication of land for a street with power to make the necessary cuts and fills without liability to abutting property may agree to a condition that the abutting property of the dedicators will not be assessed for the cost of improvements, and cannot insist that the condition is void but the dedication must stand.

[See note on this question beginning on page 499.]

—failure to remonstrate against improvement district — right to contest assessments.

2. Persons who have dedicated a right of way for a street on condition that it be improved without assessing their property do not, by failure to remonstrate when an improvement district is formed for the improvement of the street, lose their right to contest an assessment laid upon their property to meet the cost of the improvement.

[See note in 9 A.L.R. 634.]

— failure to record plat — effect.

3. Failure of the city to record a plat dedicating to it a right of way for a street does not prevent the property owners from enforcing the conditions of the dedication when steps for the improvement of the street are taken.

Municipal corporation — power to contract to exempt property from assessment.

4. A city having charter authority

to acquire rights of way for streets has authority to contract with the property owners that, if they will dedicate the right of way, their property shall not be assessed for the improvements.

[See 25 R. C. L. 128.]

Highway — contract to relieve abutting property from assessment.

5. The mere existence of a trail by prescription does not deprive the municipality of the right to contract with the abutting property owner that in consideration of the dedication of sufficient additional land to make a highway, together with the right to make the necessary cuts and fills without compensation to him for incidental injuries, it will not assess his lands for the cost of the improvements.

APPEAL by defendant from a judgment of the Superior Court for Thurston County (Wright, J.) in favor of plaintiffs in a suit to contest assessments against their property for a street improvement. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William W. Manier and George R. Bigelow, for appellant:

The respondents, not having presented their objection to the city council at the time of the hearing on the initiatory resolution, are estopped from thereafter doing so.

Re 20th Ave. Northeast, 95 Wash. 5, 163 Pac. 12; Kuehl v. Edmonds, 85 Wash. 307, 148 Pac. 19; Great Northern R. Co. v. Leavenworth, 81 Wash. 511, 142 Pac. 1155, Ann. Cas. 1916D,

239; Re North Yakima, 87 Wash. 279, 151 Pac. 795.

Where a roadway is already had by prescription, there is no consideration for an agreement to purchase a right of way, even though a greater width of roadway is given than existed by prescription.

Olympia v. Lemon, 93 Wash. 508, 161 Pac. 363.

The dedication claimed cannot be enforced.

Perth Amboy Trust Co. v. Perth Amboy, 75 N. J. L. 291, 68 Atl. 84; Pittsburgh, C. C. & St. L. R. Co. v. Oglesby, 165 Ind. 542, 76 N. E. 165; Page & J. Taxn. by Assessment, p. 721; 4 McQuillin, Mun. Corp. ¶ 1545, p. 3218; 1 Elliott, Roads & Streets, 3d ed. p. 183, ¶ 163; State ex rel. Grinsfelder v. Spokane Street R. Co. 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719; Richards v. Cincinnati, 31 Ohio St. 512; Leggett v. Detroit, 137 Mich. 251, 100 N. W. 566; Pittsburgh, C. C. & St. L. R. Co. v. Oglesby, 165 Ind. 542, 76 N. E. 165.

Messrs. Troy & Sturdevant for respondents.

Holcomb, J., delivered the opinion of the court:

The owners of five lots or tracts included in the local improvement district known as local improvement district No. 263 of the city of Olympia appealed to the superior court from the final resolution of the city council of Olympia, which included their properties within the local improvement district and levied special assessments against the same. The improvement was initiated by the city council by resolution for the purpose of "grading, graveling, draining, constructing necessary culverts, sewers, bridges, and such other work as may be necessary in connection therewith," Farragut avenue, and Farragut avenue extended, from Jackson street north to its intersection with West Bay avenue, and West Bay avenue north to the plant of the Buchanan Lumber Company. The roadway runs along the water front on the west shore of the bay. At the time fixed in the initiatory resolution of the council, calling for protests against the proposed improvement, none of these respondents appeared before the council or in any manner objected to the making of the improvement. There was no attack made upon the legality of the proceedings in and by the city council until the work had been completed, and the assessment roll prepared and submitted to the city council for confirmation. Respondents then appeared before the city

council and filed objections upon the principal ground, as stated, that: "The said premises comprising such West Bay avenue abut upon and run across said property. This property was granted to the city of Olympia upon the express consideration and condition that the said abutting property aforesaid was to be released, exempt, and free from any costs and assessments by way of grading, graveling, etc.; the said premises, consisting of the said street, were conveyed about 1891 or 1892, and the sole consideration therefor being the exemption of the aforesaid property of the plaintiffs from future costs and expenses by way of grading, graveling, etc., and the said premises having been expressly released by a written contract."

Upon the hearing, upon appeal to the superior court, findings, conclusions, and decree were entered by the court, sustaining the objections of respondents, and decreeing that the assessments against respondents be canceled.

The city appeals, and urges that the decree of the superior court should be reversed upon the following grounds:

(1) The respondents, not having presented their objections to the city council at the time of the hearing on the initiatory resolution, are estopped from thereafter doing so.

(2) Where a right of way is already had by prescription, there is no consideration for an agreement to purchase a right of way, even though a greater width of roadway is given than existed by prescription.

(3) The dedication claimed in this case cannot be enforced for the reasons: (a) That the dedication or plat was not recorded; (b) that the city council had no statutory authority to enter into or accept any such condition; (c) that the decision of the lower court exceeds the terms of the reservation; and (d) a deed or other dedication of land to the public for use as a roadway containing a condition is void as to the

condition; the grant stands, but the condition falls.

Respecting appellant's first contention, it is necessary to consider the situation in which respondents' rights were involved.

Prior to 1892, a trail or roadway of some description was traveled along the water front, about 20 feet above the water which was narrow, irregular, unimproved, and only in a passable condition. In 1892, the city council of Olympia, by negotiation with respondents and their predecessors, obtained a definite right of way for a street, to be called West Bay avenue, across the lands owned by respondents and their predecessors, of a sufficient width and course, caused it to be surveyed by the city engineer, and procured from them a deed describing the tracts of land to be included in the street, and in pursuance thereof a dedication was duly executed and acknowledged by the landowners. This instrument, which was attached to the plat, contained a recital: "The landowners have consented to a survey of the premises by the city engineer of the city of Olympia." And also contained a waiver as follows: "And we do hereby waive all claims for damages by reason of excavation or embankment resulting from the improvement of said West Bay avenue."

Then follows a condition attached to the dedication, as follows: "Provided, and this dedication is expressly conditioned, that the city of Olympia shall undertake, and from time to time improve, said avenue by grading and graveling the same, and the expense thereof shall be paid from the general tax of the city, and no part thereof shall be assessed against the property abutting any land hereby dedicated."

Attached to the instrument was the city surveyor's certificate that he had surveyed the land, and that the courses and distances indicated on the plat and in the dedication are correct to the best of his knowledge and ability. There was also a

certificate attached to the dedication that it was sufficient, signed by the city attorney, and a certificate of the city clerk, as follows: "This dedicatory plat of West Bay avenue was approved by the city council of the city of Olympia on the 16th day of February, 1893."

This instrument was never filed and recorded in the office of the county auditor.

The street was, however, opened and somewhat improved at about that time, by grading and building bridges, all of the value of more than \$400. It has been continuously used as a public street ever since.

These respondents made no objection to the improvement of the street as proposed, under local improvement district No. 263, and it may be assumed that they were entirely willing that such improvement be made. Since they were not remonstrants against the establishment of the local improvement district, and the making of the improvement proposed, it was not incumbent upon them to appear before the city council and make any objections, or assert any of their rights, until it was found that their premises were to be specially assessed for the improvement. This was not made known, and they could not object until the assessment roll was filed and notice of hearing thereon was given, when they appeared, set up their contract, and demanded compliance with its provisions. That

was the proper time. In fact they or their predecessors had contracted with the city that the improvements should from time to time be made, and they were probably estopped to contest the making of the proposed improvements. This, however, does not conclude them as to their rights to object to the special assessments made for the improvement. *Re Shilshole Ave.* 85 Wash. 522, 148 Pac. 781.

The next contention of appellant, that where a right of way is al-

Highway—
failure to
remonstrate
against im-
provement
district—right to
contest assess-
ments.

ready had by prescription there is no consideration for an agreement to purchase a right of way, even though a greater width of roadway is given than existed by prescription, is sought to be sustained by our decision in *Olympia v. Lemon*, 93 Wash. 508, 161 Pac. 363.

That was, in its inception, a condemnation case to acquire the right of way involved, and was converted into a suit to quiet title, wherein it was determined that the roadway had been long established by prescription, and that the city had no need to condemn the land, and its title was quieted. It is not in point in this case. In this case the appellant is not attempting to acquire a right of way, for they proceeded upon the assumption that they already had and owned the right of way, and the respondents acquiesced therein. Owning the right of way, the city had a right to improve it. When it proceeds to improve it under the local improvement district law, assessing the special benefits to the abutting property, it is met with the contract made by itself previously to the effect that, as to these properties, it must, when improving the same by grading and graveling, pay the expense thereof from the general fund of the city, and no part thereof to be assessed against the property of these respondents.

The city contests that claim of respondents upon the grounds: First, that the dedication or plat was not recorded; second, that the city council had no statutory authority to enter into such a contract; and, third, that the deed or other dedication of land to the public for a roadway, containing a condition, is void as to the condition, the grant standing, but the condition falling.

As to these contentions it is immaterial that the dedication or plat was not recorded. That was the

—failure to
record plat—
effect.

neglect of the city itself. The dedication was approved and accepted by the city council

after its execution, and the city council has always assumed that it owned the land dedicated and granted, and made no attempt to acquire the same by eminent domain proceedings or purchase. The city council certainly had statutory authority to enter into a contract containing the conditions relied upon by respondents. Laws 1889-90, p. 183, § 117; Laws 1889-90, p. 189, § 125.

At the time of the acquisition of these properties for street purposes, the present Eminent Domain Statute by which property could be acquired for street purposes by cities of the third class, and paid for out of the abutting property, was not in effect. The only statutes that were then in effect were the old general Eminent Domain Statute (1 Hill's Code, § 673) and the charter of the city. When this contract was made the city was compelled to either purchase the premises for street purposes, or to condemn the land in the manner and form then prescribed generally for all eminent domain appropriations, and pay the consideration out of the general fund. Instead of proceeding by eminent domain appropriation, the city, being able to agree with the landowners, acquired the necessary right of way to comprise and define the street desired by the city, and a part of the consideration therefor was that the grading and graveling of the street should be without charge to the property abutting upon the portion of the street thus acquired. The city certainly had power under its charter to acquire the necessary right of way for streets and highways by the purchase thereof, and to make all necessary contracts in regard thereto, such as the agreement here involved.

Municipal
corporation—
power to con-
tract to exempt
property from
assessment.

The contention that a road existed across the premises of respondents by prescription, and that, therefore, there was no considera-

tion for the grant by respondents to the city, cannot be sustained. Such road as did exist was a mere trail, or a very narrow road,

Highway—
contract to
relieve abutting
property from
assessment.

and the city had no right to cut into the sidehills, where such existed on the premises of these grantors, which right it acquired from respondents, together with a waiver of all damages for excavating and embanking which would result from the improvement of the street upon the premises of respondents. It obtained also a well-defined highway, definitely located and of a specific width, which it did not have theretofore.

The contention that a deed or other dedication of land to the public for use as a roadway, containing a condition, is void as to the condition, the grant standing, but the condition falling, is much more serious.

There is a division of authorities upon this question. McQuillin on Municipal Corporations, vol. 4, § 1545, to the effect that "a condition in a dedication of land for streets that the abutting lots shall be free from assessments for improvements of the streets is void," and Elliott on Roads & Streets, 3d ed. vol. 1, § 163, to the effect that "a condition in a deed of land sold a city for a street providing that, as part of the consideration, the grantor and the remaining portions of the lot should not be charged with any costs connected with the extension or maintenance of the street, is void"—are cited to sustain appellant's position. The above authorities cited cases from Indiana, Michigan, Missouri, and Louisiana. A case from our own court (*State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719), is also cited. The last case was one where, in platting an addition to the city and dedicating the streets therein to the public, the dedicator attempted to reserve the right to operate street railway lines upon the

16 A.L.R.—32.

streets, and this court held that such a condition was void, merely making the brief statement that, if any condition is annexed to such dedication, the condition falls, and the grant stands—citing the authorities above cited. Although we are still in accord with the case above cited from this court, there is a great distinction between such a case and this. No dedication is good, under all the authorities, which attempts to take from the public authorities their full power and control over streets. That is the principle upon which that case is based, and is a principle universally observed.

The text from Elliott, Roads & Streets, and McQuillin, Municipal Corporations, are based principally upon decisions from Michigan, Ohio, Missouri, and Louisiana, the leading case being from Ohio. *Richards v. Cincinnati*, 31 Ohio St. 506. It appears that generally municipalities in those states were required to provide for the payment of the cost of improvements of streets by assessment against abutting property, and such condition in a dedication was held to impair the power of the city to spread all the cost of improvement over all the property abutting.

As a general rule the dedicator may impose reasonable conditions and restrictions in making a dedication of his property. The dedicator may impose a condition that the expense of turning the land dedicated into a street shall be borne by the public, and not by the abutting property. 18 C. J. 71.

The grantee generally gets what the grantor conveys, and the grantee must generally accept the dedication, as the legal phrase is, "secundum formam doni," or according to the form of the gift or grant.

In this case the dedication was somewhat more than a mere general dedication to the public. It was an express dedication or grant to the public of the city of Olympia after previous negotiations and agreements, and limiting the ex-

press dedication upon certain conditions, to wit, that the improvement of the street by grading and graveling should be paid from the general fund of the city, and no part thereof assessed against the abutting property of the dedicators. The provision that such improvement costs should be paid from the general tax of the city is doubtless void, for it impairs the power of the city to provide as it has for the creation of a local improvement district and spreading the cost upon the property abutting, even though the respondents' property must be accepted.

The trial court found (and there was ample evidence to support the finding) that in 1892 the city of Olympia contracted and agreed with the owners of the premises involved herein, by contract running with the land, that in consideration of the granting by the owners of the premises of such right of way for such avenue the city would not assess the abutting property for the expense of grading and graveling the street thereon; that a portion of such right of way was taken at that time, and an additional and considerable portion of the right of way was taken by the city by special proceedings in local assessment district No. 263.

A case which we consider exactly applicable to the instant case is *Perth Amboy Trust Co. v. Perth Amboy*, 75 N. J. L. 291, 68 Atl. 84. In that case certain parties as owners in fee had dedicated to the public use, as a street of the city of Perth Amboy, a strip of land afterwards called Sheridan street. The deed contained the condition subsequent: "That said street shall be graded and worked so as to form a convenient approach to said bridge and connect therewith as soon as it shall be completed for public use, including the erection of a proper crossing or bridge over said Raritan North Shore Railroad; the owners of property bordering upon said street to be free from municipal assessments therefor, or for other

street improvements, unless the same shall be solicited by a majority in interest of the said owners."

The city council accepted the dedication, adopted the street, and expressly provided that the acceptance and adoption were subject to all things stated in the instrument of dedication. The city opened the street, worked and graded it pursuant to the scheme recited in the dedication, and levied the cost of the work as an assessment upon the lands in direct violation of the terms of the deed of dedication. The court (Garrison, J.) said:

"The excuse of the city for levying the assessment in question in the face of the condition of dedication which it had accepted is that it had no power to accede to the condition upon which the land for Sheridan street was given by its owners to the public. The claim of the city is that the dedication should stand, but that the condition upon which it was made should be ignored. We cannot take this view of the legal situation. The condition, so far as it affected Sheridan street, being limited to a single expenditure for a specific purpose, was in effect the price the city was willing to pay for the land. If the city had power to buy the land at such sum, it had power to agree to expend such sum upon the land as the condition of its perpetual dedication to public uses. After the expenditure of the sum thus required, the public have no more standing to exact payment from the abutting owners than the owners have to exact damages from the public for taking the land. *Dill. Mun. Corp.* 3d ed. § 632, and cases cited in the notes.

"The presence in the deed of dedication of conditions not involved in the present controversy does not militate against the views that have been expressed, and need not, in our judgment, be further considered in the present proceeding."

The assessment was set aside.

So, in this case, the city obtained from the respondents the ground

necessary for a street of the courses, distances, and width it desired, and the waiver of all damages for excavating and embanking along the abutting property, and agreed that it would not assess the property for grading and graveling the street. While the city council was acting in a governmental capacity, it is true, nevertheless, it was acting within its powers, and cannot be said to have acted ultra vires. We have decided many times that municipalities should be held to the same standards of right and wrong that the law imposes upon individuals. *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999; *Coliseum Invest. Co. v. King County*, 72 Wash. 687, 131 Pac. 245; *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820; *Mallory v. Olympia*, 83 Wash. 499, 145 Pac. 627.

—binding effect
of condition in
dedication.

Appellant also insists that the

court went beyond the limit in granting the relief to respondents, because, "though the contract exempts the property of respondents from costs of grading and graveling assessed against their property, that the present improvement consists in grading, graveling, draining, constructing any necessary culverts, sewers, bridges, and doing such other work as may be necessary in connection therewith." The grading and graveling are the principal item of the improvement. While constructing that improvement, it is, of course, necessary to construct drains, culverts, sewers, and bridges, but they are all incidental to the principal improvement.

We think the judgment of the trial court is right, and it is affirmed.

Parker, Ch. J., and Bridges, Mackintosh, and Fullerton, JJ. concur.

ANNOTATION.

Validity and effect of condition of dedication that remaining property shall not be subject to assessments for improvements.

Generally, as to validity and effect of agreement that claim may be applied upon or set off against taxes, see annotation following *Enterprise v. Rawls*, 11 A.L.R. 1175.

Rule permitting condition for exemption.

Although, as is stated in the reported case (*GILES v. OLYMPIA*, ante, 493), and as is subsequently shown, there is a conflict of authority as to the validity of a condition in a deed, or other dedication of land for public purposes, that the remaining property of the dedicator shall not be subject to assessments for improvements, there is considerable authority to the effect that the general rule that the dedicator may impose reasonable conditions and restrictions should be held applicable to conditions exempting the remaining property from assessments for the improvements for

which the land was dedicated, and that such a condition or limitation is valid and enforceable. The following cases support this conclusion: *Gess v. Common School Dist.* (1893) 15 Ky. L. Rep. 30; *Omaha v. Megeath* (1895) 46 Neb. 502, 64 N. W. 1091; *Browne v. Palmer* (1902) 66 Neb. 287, 92 N. W. 315; *Perth Amboy Trust Co. v. Perth Amboy* (1907) 75 N. J. L. 291, 68 Atl. 84, set out and quoted in the reported case (*GILES v. OLYMPIA*, ante, 493); *Washington Water Power Co. v. Spokane* (1916) 89 Wash. 149, 154 Pac. 329; *GILES v. OLYMPIA* (reported herewith). And see *Richardson v. Seattle* (1917) 97 Wash. 371, 166 Pac. 639, 168 Pac. 513, and *Re Patterson* (1917) 98 Wash. 334, 167 Pac. 924.

And that a deed of land for a boulevard may provide that the consideration shall be exemption of the ad-

joining lands of the grantor from assessment for the cost of the original improvement,—at least, where the values are equal,—see *Vrooman v. Toledo* (1914) 5 Ohio App. 222, on subsequent appeal in (1915) 5 Ohio App. 230, as set out *infra*.

In both *Omaha v. Megeath* (1895) 46 Neb. 502, 64 N. W. 109f, and *Browne v. Palmer* (1902) 66 Neb. 287, 92 N. W. 315, *supra*, it was held that the owners of land, who donated a part thereof for parks and streets on condition that the grantee city should lay out, improve, and keep in repair the same at its own expense, could prevent the city from levying assessment against the remaining land for any such improvements.

In *Washington Water Power Co. v. Spokane* (1916) 89 Wash. 149, 154 Pac. 329, *supra*, the agreement which was upheld was that the city, in consideration of the grant of lands for a street, would refund any grade tax paid by the grantor for "opening, grading, or improving any part" of the street, except sidewalks.

And in *Dallas v. Atkins* (1917) — Tex. Civ. App. —, 197 S. W. 593, affirmed in (1920) 110 Tex. 627, 223 S. W. 170, an agreement between a city and certain landowners on a street which the city sought to widen, whereby they were to give such of their lands as the city desired in consideration of not being assessed for benefits to pay for other lands so desired, was held to protect the grantors from assessments for such benefits, they, in view of the agreement, having offered no evidence of the value of the lands conveyed by them.

And in *St. Louis ex rel. Lancaster v. Armstrong* (1874) 56 Mo. 298, where municipal city authorities agreed, in consideration of a dedication of land for a sewer right of way, that he would not be called upon to make payment of assessments for three years, it was held that the agreement was valid and binding, and that assessments could not be collected until the expiration of the three-year period. And see *St. Louis v. Meier* (1880) 8 Mo. App. 578, which involved land dedicated for a public street. But

compare *Vrana v. St. Louis* (1901) 164 Mo. 146, 64 S. W. 180, and other Missouri cases, set out *infra*.

And in Georgia it has been held that where the condition of dedication is merely that there shall be no expense to the dedicator for the improving of the land dedicated therefor, the rule is that, where a city accepts a dedication on consideration that it shall make certain improvements without expense to the dedicator, it cannot thereafter legally make an assessment against the remaining property for the cost of making the improvement for which the land was dedicated. *Atlanta v. Akers* (1916) 145 Ga. 680, 89 S. E. 764, following and relying upon the principles laid down in *Jenkins County v. Dickey* (1912) 139 Ga. 91, 76 S. E. 856.

In several jurisdictions there are statutes expressly permitting conditions of the kind under consideration herein.

Thus, in Minnesota, under a statute providing that the board of park commissioners may contract in the name of a city for the purchase of lands, and may provide for payment at such time and in such manner as it deems best, and that, in case of the purchase of lands for parks or parkways, the commissioners may agree with the vendor upon a purchase price "which may, in addition to the purchase price thereof, include exemption from an assessment for benefits upon any remaining contiguous or adjacent lands owned by such vendor or vendors, the amount of which exemption shall be specifically agreed upon in the contract," etc., it has been held that the park commissioners of a city may contract for a conveyance of land to the city for park purposes, in consideration of the exemption of other contiguous lands of the owner from assessments for park purposes in a specified amount, and that such assessments are not limited to a single assessment, but include all assessments, present or future, for park purposes, as well as an assessment which had already been made against the contiguous property, but which had not been entered upon the tax

books for collection at the time of the execution of the contract. State ex rel. Minneapolis v. Fourth Judicial Dist. Ct. (1901) 83 Minn. 170, 86 N. W. 15.

And, in Massachusetts, an agreement entered into pursuant to Stat. 1884, chap. 226, which empowered local authorities to locate and construct public streets, etc., and authorized them, whenever they should take or purchase any land therefor, to make an agreement in writing with the owner that the city or town should assume any betterments assessed upon the remainder of his land, or any portion thereof, if he should in turn release, upon such terms as might be agreed upon with them, all claims for damages, whereby landowners agreed to release the damages caused by taking their lands for a street, and to pay to the city one third of the cost of construction, "being credited, however, with the betterments assessed on lands of those abutters who do not sign this proposal," and to save the city harmless from nonsigners "upon being subrogated to and credited with the betterments assessed" to such nonsigners, and the city agreeing that such contributions shall be in lieu of any betterments upon land of the subscribers—has been held valid; at least, in the absence of a showing of fraud or allegation that the agreement was unfair or unjust, either as affecting the city, or as causing non-agreeing owners to be assessed sums which, in the proper administration of the law, they would not be called upon to pay. In other words, the court assumed that all parties acted honestly and fairly, and that the agreement was not unreasonably favorable to the landowners whose assessments were assumed by the city. Towne v. Newton (1897) 169 Mass. 240, 47 N. E. 1029. And this statute has been held to authorize a city to contract with an owner of land taken for a boulevard, to make a cash contribution to the landowner sufficient to pay whatever sewer assessments may be laid upon his land. Bell v. Newton (1908) 183 Mass. 481, 67 N. E. 599. But under this statute a city which

has no power to act in an executive capacity through its common council cannot make an agreement of settlement of a pending petition for damages, there having been no agreement at the time of the taking of the lands. Green v. Everett (1901) 179 Mass. 147, 60 N. E. 490. It has also been held that the fact that land was taken for a park, under an agreement by a city to assume assessments for the betterment, does not prevent the assessment of betterments for a way subsequently laid out over the park previously taken. Leahy v. Street Comrs. (1911) 209 Mass. 316, 95 N. E. 834; Phillips v. Boston (1911) 209 Mass. 329, 95 N. E. 836. Mass. Stat. 1884, chap. 226 (Rev. Laws, chap. 50, § 11), was superseded by Stat. 1902, chap. 503, which, it has been said, affords the only method whereby a city can contract away betterments assessable on the laying out of a street. Whitcomb v. Boston (1906) 192 Mass. 211, 78 N. E. 407.

And in Michigan it has been held that a conveyance of land to a city for a boulevard, by a deed expressly referring to Boulevard Act, No. 374, Local Acts 1879 (subsequently repealed by Act No. 388, Local Acts 1889), and the acceptance of the deed by the city, raised an implied contract, at least, not to levy special assessments for improvements upon the grantor's abutting property, so that he can restrain an attempt by the city to do so. Scovel v. Detroit (1909) 159 Mich. 95, 123 N. W. 569.

In Kansas v. Morse (1891) 105 Mo. 510, 16 S. W. 893, where a city charter provided that when one or more owners of property to be taken shall relinquish the same without claims for damages, on condition of exemptions from payment of benefits, it has been held that the mayor of the city may sign the relinquishment after the passage of an ordinance authorizing him to accept it, although the charter provision is that the mayor may be authorized to compromise, and report his proceedings to the common council for confirmation.

Construing and applying a provision of the Greater New York Char-

ter that where the owner of lands, an entire block in extent, conveys the same to the city without compensation, and the city accepts the same, the lands fronting on the portion of the street so conveyed, and extending to the center of the block, shall not be chargeable with any portion of the expense of the residue of the same, except the due and fair proportions of the awards made for buildings, it was held in *Westminster Heights Co. v. Delany* (1905) 107 App. Div. 577, 95 N. Y. Supp. 247, affirmed without opinion in (1906) 185 N. Y. 539, 77 N. E. 1198, that a voluntary conveyance could be made after the application of the city to open a street, and before the appointment of commissioners, and thereby secure the exemptions provided by the charter. And specifically, that the conveyance must be made prior to the appointment of the commissioners, see *Re Boulevard* (1918) 185 App. Div. 315, 173 N. Y. Supp. 28. And an agreement conforming to the terms of the provisions under consideration between the city and the landowner may be made concurrently with the deeds. *Re Hebbard Ave.* (1914) 150 N. Y. Supp. 462. But the statute does not work an exemption as to owners who did not derive their title from the person who conveyed the land for the street to the city, and which land, as a matter of fact, does not front on that portion of the street which was deeded to the city. *Re Lafayette Ave.* (1905) 103 App. Div. 496, 93 N. Y. Supp. 84. With respect to the provisions relating to "buildings," it has been held that the owners of remaining lands are not liable to assessment for damages to buildings not taken, but merely injured by a change in grade, which damages were awarded for such prospective injury. *Re Tibbett Ave.* (1914) 162 App. Div. 398, 147 N. Y. Supp. 333. But, to the contrary, see *Re Lawrence Street* (1912) 136 N. Y. Supp. 845, where the owners of remaining lands were held liable for an assessment of damages caused by a change in grade of a street. And it has been held that the provision of the charter does not en-

title the dedicator to have his lands entirely excluded from the proceedings for the opening of the street, since his abutting land is still subject to "the due and fair proportion of the awards made for buildings." *Re Avenue L* (1905) 107 App. Div. 581, 95 N. Y. Supp. 245. And except where circumstances are exceptional, the "block-by-block" method of assessment may be followed, although the objecting owners may have their burdens somewhat increased over those who are entitled to the exemptions provided by the statute. *Re Spuyten Duyvil Road* (1914) 87 Misc. 635, 150 N. Y. Supp. 405. And the "block-by-block" rule, which means assessing the property in the block in which buildings are taken, does not authorize the assessment of an owner on one street, who has ceded property, for buildings taken on another block on a street running at right angles to the first street, merely because of the fact that the buildings on both streets had been taken in a proceeding to provide a continuous route for a trunk sewer; but a whole street may be assessed under the rule permitting the distributing of the assessments throughout a whole street, which is based on the theory that a uniform regulation inures to the benefit of all owners. *Re Fowler Street* (1915) 153 N. Y. Supp. 585.

Rule denying right to qualify dedication.

A number of courts have refused to apply the general rule that reasonable and consistent conditions and limitations may be annexed to dedications, to cases where the condition is that remaining property shall not be subject to assessment for improvements, and, upon the theory that public policy does not permit the granting of immunity from public burdens, have held that conditions of the character under consideration in this annotation are void.

Thus, in *Richards v. Cincinnati* (1877) 31 Ohio St. 506, in holding that a condition in a deed dedicating lands for public streets that the lots abutting thereon shall be exempt from

charges for improvements was against public policy and void, the court said: "In our opinion, these dedications to public use took effect, but the conditions named were inoperative and void. The dedicators undoubtedly intended to make the grant to the public absolute and perpetual, but sought to secure to themselves, their heirs and assigns, quoad other property, an immunity from public burdens, from which it is against the policy of our law that anyone should be exempted. The public necessity that streets and highways should be improved and kept in repair is equal to the necessity for their establishment; and private property cannot be exempted from liability to share in the burden of the improvement and repair of highways, any more than it can be exempted from liability to be appropriated for the establishment of a highway, where public necessity demands it. And it is no answer for these parties to say that, when the public accepted the dedications, it assented to the conditions. The public had power to accept the grant, but no power to assent to the conditions proposed. While, therefore, the lands dedicated have become a part of the public street, the proposed exemption of other lands from the public burden of maintaining it are inoperative and void." And in *Leggett v. Detroit* (1904) 137 Mich. 247, 100 N. W. 566, where a landowner conveyed land to a city for a public street by a deed conditioned that his remaining lands should "forever be excluded from any and all assessment districts" thereafter made to defray the expenses of opening the same, it was held that the condition was void. The court said: "In the opening of streets a city acts as an agency of government. . . . In performing the functions of such agency, it has no private or municipal interest, and it has no power except such as is prescribed. It is given no authority to say that a given parcel of land shall never be taken as a highway, nor has it authority to agree that some or all lands which would be benefited by the establishment of a high-

way shall have immunity from contribution. The statute requires it to establish an assessment district, which must include all lands benefited. It cannot do less. If it can agree to omit one parcel, it may omit many. It cannot determine in advance the amount of benefits chargeable to one or more such parcels, for the law says that is for a jury. In this case it was necessary to take land through several blocks, paying adequate compensation. If such taking involved the removal of buildings, or the disturbing of large business interests, the damages would be correspondingly large, while the benefits thereto might be small. In such case such damages would necessarily be chargeable upon other lands in the assessment district, of which complainant's lands, consisting of many valuable lots, might form an important part. If they are exempt by reason of this alleged contract, the burden must of necessity fall with undue weight upon the remaining lands within the district. It would only be necessary to make enough such contracts to exempt the entire assessment district, thereby depriving the council of any power to condemn land, for want of a source from which to compensate the owners of the land to be condemned. Properly and lawfully distributing the burden is as much a part of the duty of the city as the exercise of the power of taking the property. It is not clear that it could exercise the power at all if it can be said to have deprived itself of the power to make a statutory assessment district by absolving a considerable portion of the property actually benefited from liability to contribute. It may be that by deeding land this entire addition has been paid its full and just share of the cost of opening the street, but we cannot know this. Neither can the common council know it until the benefits have been determined in the method provided by law. The effect of action by the common council cannot be to deprive future councils of power in the premises. . . . Another suggestion in this connection is this: We have

learned that the legislature may exercise the power of eminent domain, although it shall have previously delegated it. If so, will it be claimed that this action of the council has deprived it of power in the premises to impose the burden upon the property benefited. . . . We are of the opinion that a contract such as is sought to be inferred from this condition is not within the authority conferred upon the city." And in *Vrana v. St. Louis* (1901) 164 Mo. 146, 64 S. W. 180, in holding that in the absence of legislative permission a municipal corporation cannot, by accepting a dedication of lands for streets which contains a condition that the remaining lands are not to be assessed for widening or extending such streets, grant an exemption from taxation, the court said: "One of the prime governmental duties imposed upon the city of St. Louis is to provide reasonable highways for the public of said city, and as compensation for private property taken for public use is required to be made out of public funds only so far as the public generally is found benefited, and the remainder is required to be provided by local assessments against private property especially benefited, the city would put it out of its power to perform its obligation if it were allowed to exempt private property from such assessments. If it could exempt one man's property, it might a dozen, and thus it might find itself unable to find property sufficient, and not exempted, out of which to pay for necessary improvements, or be driven to taxing a part of the property owners far in excess of any fair benefit to their property—a practice not to be countenanced. . . . So that, even if the city had made an express agreement with Thomas Allen to exempt the lots in said addition from future assessments for necessary public purposes, it would have been a void undertaking on its part, of which he was bound to have notice." This decision was followed in *Miners' Bank v. Clark* (1913) 252 Mo. 20, 158 S. W. 597 (holding that a city of the third class, by accepting a deed providing for exemption from

assessments, cannot contract away its right to levy special assessments for street improvements, and thereby create an exemption from such assessments), and *Rackliffe v. Duncan* (1908) 130 Mo. App. 695, 108 S. W. 1110 (holding that, in the absence of express charter provision, a municipal corporation has no power to grant exemption from assessments by accepting a deed conveying lands for public streets). And see *Birmingham v. Graham* (1918) 202 Ala. 202, 79 So. 574, where the court seemingly approved of the holding in *Richards v. Cincinnati* (1877) 31 Ohio St. 506; *Walker v. Richmond* (1916) 173 Ky. 26, 189 S. W. 1122, Ann. Cas. 1918E, 1084, set out *infra*, wherein the court held that the public burdens of taxation must be equally imposed upon all; and *Re Fifty-fifth Street* (1900) 9 Pa. Dist. R. 453, affirmed in (1901) 16 Pa. Super. Ct. 133.

And in a number of instances dedications conditioned that the remaining property shall never be assessed for improvements on the lands dedicated have been declared *ultra vires* and void because of the unlimited exemption. Thus, in *Vrooman v. Toledo* (1914) 5 Ohio App. 222, on subsequent appeal in (1915) 5 Ohio App. 230, it was held that, in so far as a deed of land for boulevard purposes undertakes to exempt the adjoining property from assessments for the future maintenance of the boulevard, the conditions are void as against public policy, but that provisions against assessments for the original construction are not invalid. The latter was upon the theory that the land conveyed to the city was equal in value to the cost of making the improvement contemplated. And in *Pittsburgh, C. C. & St. L. R. Co. v. Oglesby* (1905) 165 Ind. 542, 76 N. E. 165, in holding that a grant of land for a street, on condition that the remaining lands of the grantor shall be forever free and exempt from expenses connected with the laying out and maintenance of the street, was *ultra vires* and void as to the exemption, the court said: "Appellees maintain that the grant by the railroad

company to the city of ground for use as a street was valid, but that the provision in the deed that the grantor and the remaining portions of the lot should not then or thereafter be charged with any expense connected with the extension or maintenance of that portion of such street was void. It has long been an established principle that private property may be appropriated for a highway when public necessity, convenience, or utility requires it. It is quite as essential that such highway be improved and kept in repair as that it be established in the first instance. It has been, and is, the theory of our law that the opening and improvement of a public highway will benefit the abutting and adjacent property, and that such property should be primarily and proportionately liable for the costs and damages occasioned thereby, to the extent of such resulting benefits. This was the law in the year 1882, when the deed in question was executed, and it has continued to be the law to the present time. Conceding that the city of Rushville might purchase the title or an easement in land for use as a street, and obligate itself to pay a fair and reasonable compensation therefor, it does not follow that as a part of the consideration it could make a covenant or accept a condition that would annul a provision of its charter, and bind the discretionary judgment of future councils and governing bodies of the municipality. If, in consideration of the grant of such right, the city might lawfully release one man and his property from future liability for street improvements abutting such property, by the same right it might release all property within its jurisdiction, and thus make street improvements impossible, or subject an entirely different fund to the payment of the costs of such improvements, from that provided by law. This provision of the contract was not only contrary to public policy, but in contravention of positive law. So far as the contract attempted to release appellant's property from liability for future improvements upon the abutting street, it was ultra vires

and void." And it has been held that an agreement that, in consideration of a grant of a right of way, the adjoining property shall be forever exempt from future assessments for improvements, is ultra vires and void so that it cannot be ratified by use under the contract, or by benefits received thereby. *Neal v. Decatur* (1914) 142 Ga. 205, 82 S. E. 546. This was upon the theory laid down in *Horkan v. Moultrie* (1911) 136 Ga. 561, 71 S. E. 785, which involved a grant of a right of way for a sewer in consideration of furnishing water for closets, namely, that there was no limitation fixed as to the time the exemption from charges should continue, in which connection the court said: "There has been, before various courts, the question of the legal power of a municipal corporation to make a contract or to grant a license extending over a period beyond the official term of the body granting the privilege or the license. The decisions on the question are not uniform. All legislative bodies are limited in their legal capacity in such a manner as not to deprive succeeding bodies of the right to deal with matters involving the same questions, as they may arise from time to time in the future, and as the then-present exigencies may require. The weight of authority sustains the doctrine that a municipal corporation may make a valid contract to continue for a reasonable time beyond the official term of the officers entering into the contract for the municipality. 3 *Abbott, Mun. Corp.* § 904. We have found no case, however, that would tend to support a contract made by a city council in behalf of the municipality, to furnish water indefinitely to one of its citizens, in consideration of his permitting it to lay a sewer through his land. Succeeding councils would necessarily have the power, we think, to change the water rates from time to time, as circumstances might require or justify, in order to obtain sufficient revenue to maintain its waterworks system, on the one hand, and, on the other, in order to serve all its patrons at reasonable rates and

on equal terms. To allow one council to legally bind the city by a contract of the kind here in question might so tie the hands of its successors as to result in great injury to the municipality and to the public." And see *Leggett v. Detroit* (1904) 137 Mich. 247, 100 N. W. 566, wherein, as shown supra, the condition was that the remaining property should be "forever" exempt from assessments, but in which the court does not seem to have attached any especial importance to the fact that the exemption was a perpetual one.

And it has been expressly held that the absence of statute or constitutional provision authorizing the exemption of dedicators of land for public improvements from assessments prevents a municipal corporation from validly agreeing to such an exemption. Thus, in *Walker v. Richmond* (1916) 173 Ky. 26, 189 S. W. 1122, Ann. Cas. 1918E, 1084, where a municipal corporation, in consideration of a grant of land for street purposes, contracted never to require the grantor to build or maintain sidewalks and perpetually to maintain a pavement at its own expense, it was held that the contract was ultra vires and void, but that, since the contract had been fully performed upon the part of the grantor, the city could not retain the benefits of the transaction, while repudiating the exemption part of the contract, and that the grantor could have the land restored to him. And in *Mt. Sterling v. Judy* (1920) 186 Ky. 689, 217 S. W. 911, the court again held a contract for tax exemption ultra vires and void, but limited the rule laid down in the *Walker* Case as to restoration of the dedicated property to the dedicator, by holding that it applied only where the property could be restored, and that, where it could not be restored, the grantor or dedicator was without remedy. In the latter connection, the court said: "The remaining question is: What relief, if any, is a party entitled to, who has conveyed or sold to a municipal corporation for its use and benefit, real or personal property under a void and unenforceable contract, as this

was, when it is not within the power of the municipal corporation to restore the property or pay the consideration under which it was received? As one effective remedy affording ample relief, counsel press the argument that when, as here, the property received by the municipality cannot be restored, the aggrieved party is entitled to have compensation in money, and it is upon this theory that the counterclaim prayed that Mrs. Judy should have judgment against the city of Mt. Sterling for the reasonable value of the property conveyed by her remote vendor, to wit, \$50,000. If this was a controversy between a private corporation and Mrs. Judy, we have no doubt that the private corporation, if it had received property under an ultra vires contract and was so situated that it could not restore the property, would be required to compensate her in money for its value. . . . But this principle, however just and equitable it may be, cannot be invoked against a municipal corporation. If it could be, there would be no reason in holding that a municipal corporation, unless it can restore the property, cannot be held liable upon a contract that it had not authority to make, although it may have received the benefits contemplated by the contract. It must be obvious that if a municipal corporation that had received property, labor, services, or material under a void contract, and one that could not be enforced by the party furnishing the property, services, labor, or material, could nevertheless be required to compensate the party for their value in a suit in damages for a breach of the contract, the municipality would be, in effect, required to perform the contract. It is further obvious that the announcement of a rule under which such a recovery might be had would be the merest evasion of the long-settled principle that municipalities are not liable on void contracts except to the extent that there may be a restoration of the property received by the municipality under the contract. As a further result from the adoption of such a rule,

municipalities, in all cases in which they had received property, labor, services, or material under and by virtue of contracts that were void and unenforceable, would be compelled to fully compensate in damages the party who had furnished the property, labor, services, or material. So that in place of bringing suit on the contract, he need only bring suit for damages for the breach."

So, in *J. & A. McKechnie Brewing Co. v. Canandaigua* (1897) 15 App. Div. 139, 44 N. Y. Supp. 317, affirmed without opinion in (1900) 162 N. Y. 631, 57 N. E. 1113, it was said that, in the absence of statutory authorization, an agreement by village trustees that in consideration of a grant of a right of way, the grantors should not be assessed for certain benefits was illegal, and that assessments made against others were absolutely void, where the commissioners, pursuant to the agreement, had intentionally omitted the grantor's remaining property in making such assessments.

A landowner cannot avoid a deed to a city of lands for a public street, where he has been assessed for laying the same out, etc., in violation of a void condition for reversion of title in case of assessment against remaining property, where, subsequent to the execution of the deed, he dedicated a plat showing the street, and sold lots with reference thereto, since such acts established the right of the public to the streets. *Leggett v. Detroit* (1904) 137 Mich. 247, 100 N. W. 566.

In *McCoy v. Carran* (1918) 179 Ky. 590, 201 S. W. 463, it was held that the fact that abutting owners have never been assessed for repairs, together with the fact that the dedication was made under a mistaken belief that the abutting property would never be required to bear any of the expense of a subsequent improvement, does not prevent an assessment for a new improvement, the obligation originally imposed on the city having been to repair the then-existing street.
G. J. C.

TRANSCONTINENTAL OIL COMPANY, Appt.,

v.

LOUIS L. EMMERSON, Secretary of State.

Illinois Supreme Court — June 22, 1921.

(298 Ill. 394, 131 N. E. 645.)

Tax — property located in state — oil and gas lease.

1. Rights held under oil and gas leases which convey an estate in the land of indefinite duration are corporeal property within the meaning of a statute declaring that, in ascertaining for purposes of taxation the amount of the capital of a foreign corporation represented by property located in the state, the sum of the total tangible property located within the state shall be divided by the total tangible property wherever situated, and defining tangible property as meaning corporeal property.

[See note on this question beginning on page 513.]

Definition — corporeal property.

2. Corporeal property is the right to possess, use, occupy, and enjoy corporeal things and take the profits thereof.

[See 22 R. C. L. 37, 38.]

— easement.

3. An easement is the right of the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property in the owner.

[See 9 R. C. L. 735.]

Mines — conveyance of right to operate for oil and gas as sale of land.

4. An instrument granting for the purpose of operating for oil and gas a certain tract of land, to continue for

an indefinite duration of time, conveys a freehold interest in the land to which it applies, and is, in effect, a sale of a part of the land.

[See 18 R. C. L. 1211.]

APPEAL by complainant from a decree of the Circuit Court for Sangamon County (Smith, J.) dismissing a bill filed to enjoin defendant from paying over certain funds to the State Treasurer, from interfering with its authority to do business, or from imposing any penalty for failure promptly to pay its franchise tax. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Scott, Bancroft, Martin, & Stephens, Brown, Hay, & Creighton, John E. MacLeish, George W. Swain, and Logan Hay, for appellant:

The purpose of the legislature in defining "tangible property" was merely to discriminate between property having a fixed situs and property which could be easily shifted to avoid taxation.

Bruner v. Hicks, 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *People ex rel. Carrell v. Bell*, 237 Ill. 332, 19 L.R.A. (N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511; *Ohio Oil Co. v. Daughetee*, 240 Ill. 361, 36 L.R.A. (N.S.) 1108, 88 N. E. 818; *Illinois Kaolin Co. v. Goodman*, 252 Ill. 99, 96 N. E. 867; *Guffey v. Smith*, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; *Barnsdall v. Bradford Gas Co.* 225 Pa. 338, 26 L.R.A. (N.S.) 614, 74 Atl. 207; *People ex rel. Healy v. Shedd*, 241 Ill. 155, 89 N. E. 332; *Tiffany, Real Prop.* § 375; *Wash. Real Prop.* p. 51.

If oil leaseholds are to be excluded in determining the total tangible property of the corporation wherever situated, then the corporation franchise tax, when applied to foreign corporations, must be held to be unconstitutional as a burden on interstate commerce, and a deprivation of property without due process of law.

Union Tank Line Co. v. Wright, 249 U. S. 275, 63 L. ed. 602, 39 Sup. Ct. Rep. 276; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 62 L. ed. 624, 38 Sup. Ct. Rep. 292; *Wallace v. Hines*, 253 U. S. 66, 64 L. ed. 782, 40 Sup. Ct. Rep. 435.

Messrs. Edward J. Brundage, Attorney General, and Clarence N. Boord and James W. Gullett, Assistant Attorneys General, for appellee:

Oil leaseholds are not tangible

property within the meaning of § 106 of the Corporation Act of 1919, under the definition of "tangible property" as given in § 137 of that act.

Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25; *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490; *Priddy v. Thompson*, 123 C. C. A. 277, 204 Fed. 955; *Shaffer v. Marks*, 241 Fed. 139; *Brunson v. Carter Oil Co.* 259 Fed. 656; *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 110 Pac. 902; *State v. Welch*, 16 Okla. Crim. Rep. 485, 184 Pac. 787; *Rich v. Doneghey*, — Okla. —, 3 A.L.R. 352, 177 Pac. 86; *Thornton, Oil & Gas*, 3d ed. § 52; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Gillespie v. Fulton Oil & Gas Co.* 236 Ill. 206, 86 N. E. 219; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Bruner v. Hicks*, 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; 32 Cyc. 659; *Nellis v. Munson*, 108 N. Y. 458, 15 N. E. 739.

The exclusion of oil leaseholds in determining the total tangible property of the corporation, wherever situated, does not render the corporation franchise tax unconstitutional as a burden on interstate commerce, or as a deprivation of property without due process of law.

American Can Co. v. Emmerson, 288 Ill. 289, 123 N. E. 581; *Hump Hairpin Mfg. Co. v. Emmerson*, 293 Ill. 387, 127 N. E. 746; *Kansas City, M. & B. R. R. Co. v. Stiles*, 242 U. S. 111, 61 L. ed. 176, 37 Sup. Ct. Rep. 58; *Northwestern Mut. L. Ins. Co. v. Wisconsin*, 247 U. S. 132, 62 L. ed. 1025, 38 Sup. Ct. Rep. 444.

Dunn, J., delivered the opinion of the court:

The Transcontinental Oil Company, a Delaware corporation authorized to do business in the state of Illinois, filed its report for the

year 1919 as required by the general Corporation Act (Laws of 1919, p. 316), and the secretary of state assessed a franchise tax of 5 cents on each \$100 of the proportion of its authorized capital stock represented by business transacted and property located in this state upon the basis of his finding that .01241 of complainant's authorized capital of \$200,000,000, being \$2,482,000, was employed in its business within this state. The secretary of state also notified the corporation that, inasmuch as in filing its application to be admitted to do business within the state of Illinois in the year 1919, in accordance with paragraph (e) of § 81 of the general Corporation Act, it had estimated the total amount of its authorized capital to be employed by it in business within the state of Illinois at \$183,000 and had paid its initial franchise fee on that basis, there was due to the state an additional fee for the preceding year of \$1,149.50, based upon the difference between the estimated sum of \$183,000 and \$2,482,000, the amount of authorized capital found by the secretary of state to be employed by the appellant within the state. The secretary of state further notified the company that, unless both amounts were paid on or before July 31, 1920, there would be assessed a penalty of 5 per cent for each month until they should be paid. The corporation insisted that the franchise tax should be only \$117.10, based upon its claim that the proportion of its authorized capital employed in its business within the state of Illinois was only .001171, or \$234,200, and that the deficit in the amount of its initial franchise fee paid in 1919 was only \$25.60, being .001171 of the difference between \$183,000 and \$234,200. The company being unable to induce the secretary of state to accept the smaller amounts which it insisted were all that it owed, in order to avoid the penalties imposed by the act if the tax assessed should not be paid by July 31, 1920, it deposited with the secretary of state

the sum of \$2,390.50, being the total tax assessed, accompanying the deposit with a written protest specifying the grounds for its objection to the tax. Afterward, on September 27, 1920, the company filed a bill in the circuit court of Sangamon county against the secretary of state praying for an injunction against his turning over to the treasurer or otherwise disposing of the funds deposited by the company without first deducting therefrom \$2,247.80, and from forfeiting, annulling, canceling, declaring void, or otherwise interfering with the authority and license of the appellant to do business in the state of Illinois, or declaring it without authority to do business in Illinois, or from imposing any penalty provided in the general Corporation Act for failure promptly to pay its franchise tax. A temporary injunction was issued. The bill was afterward amended, and the demurrer to it was sustained. The complainant electing to stand by its bill, the court dismissed the bill for want of equity, the injunction was dissolved, and the complainant appealed.

The wide divergence in these estimates of the proportion of the company's capital employed in its business in the state of Illinois arose out of a difference of opinion as to what constitutes the tangible property of the corporation. Section 106 of the general Corporation Act provides that "in ascertaining the amount of the authorized capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total tangible property of such corporation located within this state shall be divided by the sum of the total business of the corporation, and the total tangible property of the corporation wherever situated."

Section 137 provides that "the term 'tangible property' as used in this Act, shall mean corporeal property, such as real estate, machinery, tools, implements, goods, wares, and

merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidence of an interest in property or evidences of debt."

It appears from the report filed by the appellant with the secretary of state that the total value of all the property of the appellant, wherever located, amounted to \$196,706,-277.38; that of this amount \$175,-649,289.81 represented the value of oil leaseholds and oil properties owned by the appellant and located outside the state of Illinois; that appellant's total business transacted at or from places in Illinois during the year 1919 was \$228,690.01, and its total business everywhere transacted was \$3,107,107.63; that the total property of the appellant within the state of Illinois has a value of \$5,500; and that the authorized capital stock of the appellant consisted of 2,000,000 shares without nominal or par value.

The only question upon which the parties disagreed, as stated by the appellant and accepted by the appellee, is whether or not the value of the oil leaseholds of the appellant should have been included in determining the total tangible property of the corporation wherever situated. The secretary of state excluded such oil leaseholds, and the appellant insists that they should have been included as a part of its tangible property.

The appellant's oil and gas leaseholds covered properties owned and operated by it in many different states and in foreign countries, and were held under instruments the form of which is attached to the bill as exhibit D. They provided that "the lessor, for and in consideration of — dollars, cash in hand paid, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the lessee to be paid and kept and performed, ha— granted, demised, leased, and let, and by these presents do— grant, demise, lease, and let unto the said lessee, for the sole and only pur-

pose of mining and operating for oil and gas, and of laying of pipe lines, and of building tanks, powers stations, and structures thereon to produce, save, and take care of said products, all a certain tract of land situate in the county of —, state of —, described as follows, to wit, . . . and containing — acres, more or less."

It is agreed that "this lease shall remain in force for a term of . . . years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee."

The lessee covenants and agrees:

"(1) To deliver to the credit of the lessor, free of cost, in the pipe line, to which — may connect — wells, the equal one-eighth part of all oil produced and saved from the leased premises.

"(2) To pay the lessor — dollars each year, in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for — stoves and — inside lights in the principal dwelling house on said land during the same time by making — own connections with the well at — own risk and expense.

"(3) To pay lessor for gas produced from any oil well and used off the premises at the rate of — dollars per year for the time during which such gas shall be used, said payments to be made each three months in advance.

"If no well be commenced on said land before the — day of —, 191—, this lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor or to the lessor's credit, in the — bank at —, or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of — dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for — months from said date. In like

manner, and upon like payments or tenders, the commencement of a well may be further deferred for like period of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privilege granted to the date when the first rental is payable as aforesaid, but also lessee's option of extending that period as aforesaid, and any and all other rights conferred. Should the first well drilled on the above-described land be a dry hole, then and in that event, if a second well is not commenced on said land within twelve months thereafter, this lease shall terminate as to both parties, unless the lessee, on or before the expiration of said twelve months shall resume the payment of rentals in the same manner as hereinabove provided."

The appellee contends that an instrument of this character does not convey tangible or corporeal property, but creates only an incorporeal right. Definitions are cited from dictionaries from which it appears that "tangible" means capable of being touched, and "corporeal" of a material or physical nature, and these definitions are of no particular assistance in arriving at the conclusion of the matter.

"Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it." *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

"Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the Constitution; yet the term is often used to indicate the res or subject of the property,

rather than the property itself." *Rigney v. Chicago*, 102 Ill. 64.

That case made clear the distinction between an injury to the subject of property, the thing in which property exists, and a direct physical obstruction or injury to the right of user and enjoyment of the thing which is the actual property.

"Property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying, and disposing of a thing,' which, of course, includes the use of a thing." *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.* 115 Ill. 375, 56 Am. St. Rep. 173, 4 N. E. 246.

"Sometimes the term is applied to the thing itself, as to a horse or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations of invisible rights, 'the evidence of things not seen.' Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment and disposal of that object." *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861.

According to these definitions of property, there is no such thing as tangible property or corporeal property. The right to use, enjoy, control, and dispose of anything is not capable of being touched, and is not of a material or physical nature. It is a mere idea; a mental conception; a legal consequence of certain circumstances. *Bouvier's Law Dictionary* defines corporeal property as: "That which consists of such subjects as are palpable. In the common law the term to signify the same thing is property in possession. It differs from incorporeal property, which consists of choses in action and easements, as a right of way and the like."

"The objects of dominion or property," says Blackstone, "are things, as contradistinguished from persons, and things are, by the law of England, distributed into two kinds; things real and things per-

sonal. Things real are such as are permanent, fixed, and immovable, which cannot be carried out of their place, as lands and tenements; things personal are goods, money, and all other movables, which may attend the owner's person wherever he thinks proper to go." 2 Bl. Com. 16.

The objects of property mentioned are all corporeal, and corporeal property refers to and is property in corporeal things. The right to possess, use, occupy, and enjoy corporeal things and take the profits thereof is what the law regards as corporeal property.

There is also property which is not corporeal and does not directly concern corporeal things. Such are a patent right, the exclusive right to make, use, and vend an article which is the result of a new and useful invention; a copyright, the exclusive right to multiply copies of an author's publication; a trademark or tradename; a franchise to be a corporation. None of these rights have any direct connection with corporeal things. The sole value of the first three is to prevent others than the proprietor from taking the benefit of his skill and work without his consent, and of the last to enable him to secure the advantage of corporation management in the conduct of his business.

There are also rights to be exercised in connection with corporeal things, but without any ownership, possession, control, or power of disposition of the thing in connection with which the power may be exercised, and without any profit therein, such as a right to pass over another's land; to have an unobstructed passage of light and air over another's land; to have the soil in its natural state supported by another's land; to have a building restriction on another's land observed. These are easements which consist in the right of the owner of one parcel of land, by reason of such ownership, to use the land of another for

a special purpose not inconsistent with the general property in the owner, and are always distinct from the occupation and enjoyment of the land itself. *Wessels v. Colebank*, 174 Ill. 618, 51 N. E. 639. A distinguishing feature of an easement is the absence of all right to participate in the profits of the soil charged with it. *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718.

The appellee has cited a number of Federal decisions holding that a lease to mine for oil and gas is a mere incorporeal right to be exercised in the land of another, and that an instrument substantially in the form of the appellant's leases grants only an option to explore for oil and gas, not amounting to an estate in the land. These cases are: *Federal Oil Co. v. Western Oil Co.* (C. C.) 112 Fed. 373, 22 Mor. Min. Rep. 25; *Priddy v. Thompson*, 123 C. C. A. 277, 204 Fed. 955; *Kemmerer v. Midland Oil & Drilling Co.* 144 C. C. A. 154, 229 Fed. 872; *Shaffer v. Marks* (D. C.) 241 Fed. 139; *Brunson v. Carter Oil Co.* (D. C.) 259 Fed. 656. They are based upon the fugacious nature of oil and gas, which renders them not susceptible of ownership distinct from the soil, and therefore incapable of conveyance by a deed of the oil and gas underlying a specified tract, together with the use of so much of the surface as may be necessary to recover the oil and gas. So, it is held by the supreme court of Oklahoma that such a lease conveys to the grantee no estate in the land or title to the oil and gas, but only a right to prospect, which is held to be an incorporeal hereditament. *Kolachny v. Galbraith*, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902; *Rich v. Doneghey*, — Okla. — 3 A.L.R. 352, 177 Pac. 86; *State v. Welch*, 16 Okla. Crim. Rep. 485, 184 Pac. 787. *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490, is to the same effect. On the other hand, in *Barnsdall v. Bradford Gas Co.* 225 Pa. 338, 26 L.R.A.(N.S.) 614, 74 Atl. 207, the supreme court of Penn-

(298 Ill. 394, 131 N. E. 645.)

sylvania held, following numerous previous decisions of that court, that language substantially the same as that of the exhibit attached to the appellant's bill shows the instrument to be a lease conveying an interest in land—a corporeal, and not an incorporeal, hereditament. The same view has been taken by the supreme courts of other jurisdictions. *Wilson v. Youst* (Wilson v. Hughes) 43 W. Va. 826, 39 L.R.A. 292, 28 S. E. 781; *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 34 L.R.A. 62, 44 N. E. 1093; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292, 69 S. W. 169; *Wolfe County v. Beckett*, 127 Ky. 252, 17 L.R.A. (N.S.) 688, 105 S. W. 447; *Murray v. Allred*, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, 19 Mor. Min. Rep. 169.

We have held, in accordance with the decisions in the cases last cited and in accordance with what we regard as the better reason as well as the weight of authority, that an instrument of the character of that in question here, which is a form of oil and gas lease in common use in this state, conveys a freehold interest in the real estate to which it applies, and is, in effect, a sale of a part of the land. Oil

Mines—conveyance of right to operate for oil and gas as sale of land.

and gas in the earth cannot be the subject of an ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land, and his

grant of them to another is a grant only of such oil and gas as the grantee may find, and no title to it vests in the grantee until it is actually found. The conveyance, however, of the right to enter upon the land for the purpose of prospecting and operating for oil and gas, laying pipe lines, and building powers, stations, and structures to produce, save, and care for the products, is a conveyance of an interest in the land itself, which, if of indefinite duration, is a freehold estate in the land. *Bruner v. Hicks*, 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *People ex rel. Carrell v. Bell*, 237 Ill. 332, 19 L.R.A. (N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511; *Ohio Oil Co. v. Daughetee*, 240 Ill. 361, 36 L.R.A. (N.S.) 1108, 88 N. E. 818; *Daughetee v. Ohio Oil Co.* 263 Ill. 518, 105 N. E. 308.

The instruments in question conveyed to the appellant an estate in the land mentioned in them which is corporeal property, and the statute requires the value of such property to be included in the total amount of the tangible property of the corporation. Since it appeared that this requirement was not observed, the demurrer to the bill should have been overruled.

The decree will be reversed, and the cause will be remanded, with directions to overrule the demurrer.

Tax—property located in state—oil and gas lease.

ANNOTATION.

Oil and gas rights or privileges as independent subject of taxation, or as tangible property for purposes of taxation.

- I. Scope, 513.
- II. Where the fee in oil and gas is severed from the fee on the surface, 514.
- III. Licenses to drill and operate, 516.

I. Scope.

This annotation is confined strictly to the subject indicated in the title, 16 A.L.R.—33.

- IV. Effect of particular statutory or constitutional provisions, 518.
- V. Inclusion of oil and gas rights in fixing taxable value of capital stock, 520.

and does not cover such matters as taxation of oil and gas as a part of the land within which they are found,

or occupational or license taxes upon the business of producing oil or gas. While the decision in many of the cases considered herein depends upon the view taken by the court as to various underlying questions, such as the severability of the fee in oil and gas in situ from the fee of the surface, the character of oil and gas rights as realty or personalty, and as tangible property or incorporeal hereditaments, and the character of the instrument by which the particular right or privilege was granted or reserved,—as being a mere license or executory contract, creating at most only a chattel real, or a conveyance of the oil and gas in situ, operating to dis sever the fee therein from the fee in the soil,—these questions are, of course, beyond the scope of this annotation, and are not considered herein except so far as they have affected the decision in taxation cases.

II. Where the fee in oil and gas is severed from the fee on the surface.

It will be apparent that the diverse views taken by the courts in different jurisdictions upon the underlying matters already referred to, as well as the differences in the provisions of the tax laws of the various states render it difficult to lay down any general rules upon the subject under annotation. But bearing in mind the facts that the question may be affected by the difference in statute, and that the same instrument, which in one jurisdiction is held to sever the fee, may in another be held to operate merely as a license, it may be said to be generally held that where the fee in the oil and gas is actually severed from the fee in the surface, it is subject to separate taxation.

Illinois.—*People ex rel. Carrell v. Bell* (1908) 237 Ill. 332, 19 L.R.A. (N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511.

Kansas.—*Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co.* (1910) 83 Kan. 136, 109 Pac. 1002.

Kentucky.—*Wolfe County v. Beckett* (1907) 127 Ky. 252, 17 L.R.A. (N.S.) 688, 105 S. W. 447.

Ohio.—*Jones v. Wood* (1895) 6 Ohio C. D. 538, 9 Ohio C. C. 560.

Pennsylvania.—*St. Mary's Gas Co. v. Elk County* (1899) 191 Pa. 458, 48 Atl. 321, 20 Mor. Min. Rep. 76; *Ridgeway Light & Heat Co. v. Elk County* (1899) 191 Pa. 465, 43 Atl. 323; *Rockwell v. Warren County* (1910) 228 Pa. 430, 139 Am. St. Rep. 1006, 77 Atl. 665, affirming (1909) 39 Pa. Super. Ct. 468; *Moore's Appeal* (1895) 4 Pa. Dist. R. 703.

Texas.—*Texas Co. v. Daugherty* (1915) 107 Tex. 226, L.R.A.1917F, 989, 176 S. W. 717, affirmed in (1913) — Tex. Civ. App. —, 160 S. W. 129.

West Virginia.—*State v. Low* (1899) 46 W. Va. 451, 33 S. E. 271.

Thus, it was held in *State v. Low* (W. Va.) *supra*, that an instrument conveying all the oil and gas in and underlying certain described premises, on condition that the grantee shall, within ninety days after a well shall have been completed, pay the grantor a specified sum, or, if he should exercise his option not to pay such sum, then the grant should become null and void, conveyed a defeasible title in the fee to the gas and oil, which should be placed by the assessors upon the land books and the taxes thereon charged in the name of the grantee.

And in *Rockwell v. Warren County* (1910) 228 Pa. 430, 139 Am. St. Rep. 1006, 77 Atl. 665, affirming (1909) 39 Pa. Super. Ct. 468, where the supreme court repudiated the attempted distinction between seated and unseated land in respect to the severability of estates in the surface and in the oil, gas, and coal, or other minerals underlying the surface, and held that oil, gas, and minerals reserved from the grant of the surface of tracts of unseated land are the subjects of separate taxation as real estate, the court clearly observed the distinction between the grant or reservation of coal, oil, or gas in place, and a mere license to mine the coal or to drill for oil and gas, unaccompanied by the right of ownership in the minerals underlying the surface, and declared that the freehold constitutes an estate in land taxable as such, but the latter does not.

While, in *Ridgeway Light & Heat*

Co. v. Elk County (1899) 191 Pa. 465, 43 Atl. 323, also, it was held that gas rights conveyed by deeds and conveyances apart from the soil were in their nature separately assessable as land to the owners thereof; though the rights in question were held in this case, and in the companion case of *St. Mary's Gas Co. v. Elk County* (1899) 191 Pa. 458, 43 Atl. 321, 20 Mor. Min. Rep. 76, to be exempt from local taxation because they were owned by a public corporation, and were indispensable and necessary to carry out the purpose for which it was chartered.

The fact that the instrument creating the right is called a lease is not conclusive that it does not sever the fee.

Thus, in *Wolfe County v. Beckett* (1907) 127 Ky. 252, 17 L.R.A. (N.S.) 688, 105 S. W. 447, the court, in discussing the question of the taxability of oil and gas held under lease, where the statute subjected to taxation all property not exempted by the Constitution, said: "It is contended, however, that property held under lease is not subject to taxation in the hands of the lessee. As a general proposition this is true, but there is a wide difference between an ordinary lease of lands and an oil or gas lease. Under the former, the lessee has only the right to occupy and cultivate the land, and take therefrom the growing crops. At the expiration of his lease, the property is intact. Its condition is substantially the same as it was when he entered upon the land. The property owned by the lessor is not diminished. Its value is practically the same. This is not true, however, of an oil or gas lease. The latter carries with it not only the privilege of going upon the lands for that purpose, but the right to take therefrom during the continuance of the lease such oil or gas as may be found. The title to the oil or gas is vested by the lease in the lessee. It is his property of recognized value. He controls it and disposes of it as his own. Not only is the oil or gas property, but the lease under which it is taken from the ground is property, which has substantial value, and is the subject of fre-

quent sale. If, at the expiration of the lease, the property be returned to the lessor, its value has been diminished to the extent that oil and gas have been taken therefrom, and the value of the property to that extent has been enjoyed by the lessee. It is contended, however, that the oil in situ, being a part of the realty, cannot be severed therefrom except by deed. It is admitted that the leases held by appellees are of the usual kind. They give to appellees the right to drill and operate for oil and gas for a definite term of years, and, in case oil or gas is found in paying quantities, to continue said operations so long as same is found in quantities that pay. Appellees agree, on their part, to deliver one eighth of all oil found by reason of such operations, in suitable pipe lines, to the owner of the fee, the lessor, and to pay a fixed sum per year for each well the product of which is carried and marketed from the premises. The remainder of the oil or gas is the property of the lessee. Why, then, say that a deed is necessary to sever the oil from the realty, when the lease accomplished the same result? During the continuance of the lease the ownership of the oil or gas is vested in the lessee; and, as the lease continues so long as oil or gas may be found in paying quantities, does not the lessor part with his title to the oil in situ for all practical purposes, for the reason that it has no value if it cannot be produced in quantities that pay? We therefore conclude that the form of contract is immaterial, and that it makes no difference whether the oil or gas privileges be conveyed by deed or lease, just so the effect of the instrument is to vest in the lessee all property rights to the oil or gas that may be found in paying quantities on the leased premises."

And in *Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co.* (1910) 83 Kan. 136, 109 Pac. 1002, after deciding that a statute providing for the taxation of strata of minerals in land, title to which had been vested in persons other than the owner of the surface, applied to oil and gas as well as to solid minerals, it was held that while

the ordinary agreement giving the lessee the right to enter and explore for oil and gas, and to sever and own any that may be found, paying a royalty to the owner of the land, is a mere license which grants no estate, gives no title, does not operate to sever the oil and gas from the land, and is, therefore, not separately taxable to the lessee, yet an instrument called a lease by which the owner of the land grants, conveys, and warrants to another, his heirs, successors, and assigns, all the coal, oil, and gas under a tract of land, together with the right to use the surface of the land so far as it is necessary in taking out the minerals, the consideration being that the lessee shall give the lessor certain quantities of the coal and oil produced, and a certain amount annually for each gas well used, together with gas sufficient to supply the residence of the grantor, and stipulating that if no well is drilled within a specified time the grantee shall reconvey the property to the grantor, operates to sever the coal, oil, and gas from the remainder of the land, and the interest conveyed thereby becomes subject to be separately taxed.

So, also, the right under "an oil and gas lease, so-called, which purports to grant to one and his heirs all the oil and gas in and under" the described premises, was held in *People ex rel. Carrell v. Bell* (1908) 237 Ill. 332, 19 L.R.A.(N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511, to be a freehold interest, and to be taxable as an interest in real property, under a statute declaring that any mining right, or right to dig for or obtain iron, lead, copper, coal, or other mineral from land, may be conveyed by deed or lease; and when the owner of any land shall convey, by deed or lease, any mining right therein, such conveyance shall be considered as so separating such right from the land that the same shall be taxable as real estate.

And "oil leases," so-called, which purported to grant, bargain, sell, and convey all the oil, gas, coal, and other minerals in and under a particular tract of land; habendum: "To have and to hold . . . the above-de-

scribed premises, rights, properties, and privileges, . . . under the said grantee, and the heirs, successors, and assigns of such, forever, upon the following terms," under penalty of forfeiture of "the rights and estates hereby granted" in certain contingencies, were held in *Texas Co. v. Daugherty* (1915) 107 Tex. 226, L.R.A.1917F, 989, 176 S. W. 717, to constitute a grant of a defeasible title in fee to the oil and gas in the ground, separately taxable to the grantee as an interest in real property.

III. Licenses to drill and operate.

But where the right is held to be a mere license to drill and operate wells without any transfer of title to the oil or gas in situ, the weight of authority is against the right to tax it separately. *Barnes v. Bee* (1905) 138 Fed. 476, affirmed in (1906) 79 C. C. A. 433, 149 Fed. 727; *Kansas Natural Gas Co. v. Neosho County* (1907) 75 Kan. 335, 89 Pac. 750; *Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co.* (1910) 83 Kan. 136, 109 Pac. 1002; *Jones v. Wood* (1895) 9 Ohio C. C. 560, 6 Ohio C. D. 538, affirmed without opinion in (1896) 54 Ohio St. 627, 47 N. E. 1119; *Re Indian Territory Illuminating Oil Co.* (1914) 43 Okla. 307, 142 Pac. 997; *Rockwell v. Warren County* (1910) 228 Pa. 430, 139 Am. St. Rep. 1006, 77 Atl. 665; *Moore's Appeal* (1895) 4 Pa. Dist. R. 703; *State v. South Penn Oil Co.* (1896) 42 W. Va. 80, 24 S. E. 688; *Carter v. Tyler County Ct.* (1898) 45 W. Va. 806, 43 L.R.A. 725, 32 S. E. 216; *Peterson v. Hall* (1905) 57 W. Va. 535, 50 S. E. 603.

Thus, in *Jones v. Wood* (1895) 9 Ohio C. C. 560, 6 Ohio C. D. 538, affirmed without opinion in (1896) 54 Ohio St. 627, 47 N. E. 1119, the court, construing the provisions of the tax law as to the assessment on minerals, said: "In order to have minerals separately assessed and listed from the soil, they must be owned separately, and owned as land; a mere interest in them by lease to a party is not sufficient; he must have a fee in them as of land; and if he has, if they have been so separated by the owner of the whole from the soil, then . . . the board of equalizations has a right to

assess their value, and direct that they should be entered upon the duplicate as against the owners thereof" and held that since the instrument in question, which provided that the party of the first part "does covenant and agree to lease and by these presents has leased and granted the exclusive right unto the party of the second part, his heirs or assigns, for the purpose of operating and drilling for petroleum and gas, to lay pipe lines, erect necessary buildings, release and subdivide all that certain tract of land situate," etc., as a consideration for which the second party was to pay a certain amount in cash and a share of any oil that might be obtained, amounted only to a license or a lease at will of the right to drill and operate, and not to a conveyance of the oil in situ, the right given thereby could not be taxed as real property.

And it was stated in *Moore's Appeal* (1895) 4 Pa. Dist. R. 703, that, where coal, oil, or other mineral underlying a tract of land is conveyed by deed or lease, the grantee takes an estate in land assessable and taxable to him; but if the instrument is but a lease for a definite term, with the probability or possibility of its reversion to the grantor, the estate is not assessable as land, to the grantee. In this case it was held that the assessment of the land to the owner properly included its enhanced value from its oil-producing capacity.

So it was said in *Re Indian Territory Illuminating Oil Co.* (1914) 43 Okla. 307, 142 Pac. 997: "Oil and gas while lying in a stratum of earth, constitute a sort of *ferre naturæ* which, if taxed at all prior to being reduced to possession, must be taxed as real property to the owner of the land under which, for the time being, they may lie, and cannot be taxed against one who has a mere lease or license to go upon the premises, search for, and, if found, take them away." It will be observed that the hypothesis of this proposition does not include a case where the fee of the oil or gas is severed from the fee of the soil.

The interest of a lessee under an oil and gas lease conferring the right to

"enter upon, operate for, and procure oil and gas" is not subject to separate taxation under a statute providing that, where the fee to the surface is in one person, and the right or title to minerals therein in another, such right shall be valued and listed separately from the fee, as that statute applies only when the right or title to minerals in place has been severed from the right or title to the surface. *Kansas Natural Gas Co. v. Neosho County* (1907) 75 Kan. 335, 89 Pac. 750.

Similarly, in *State v. South Penn Oil Co.* (1896) 42 W. Va. 80, 24 S. E. 688, it was held that the rights acquired under an oil lease whereby the owner did not agree to part with any part of his ownership in the oil in situ, or in any part of the thing or corpus to which his ownership applied, but contracted, by words of grant and demise, that the lessee should have the exclusive right to mine, bore, and explore for, excavate and produce oil, etc., if it could be found within the time fixed, and, if found, then to have and to hold the land demised for boring, etc., for a specified term of years, or as long as oil and gas might be found in paying quantities, paying the lessor a royalty of one eighth, were not separately assessable under a statute providing that when mineral, mineral water, oil, gas, or coal privileges or interests are held by a party, exclusive of the surface, the same shall be assessed separately to such party, since that applied only to cases where a separate oil or mineral right amounted to a freehold, whereas, under the instrument in question, the lessee had no more than a chattel interest.

So, also, it has been held that a conveyance of a fractional undivided interest in oil, gas, and other minerals under a tract does not sever the ownership of the minerals in situ from the title to the soil, and is therefore not subject to separate assessment as real estate, under a statute providing that, where one person becomes the owner of the surface and another of the minerals, the assessor shall divide the value at which the whole had before been assessed between the different owners. *Barnes v. Bee* (1905) 138

Fed. 476, affirmed in (1906) 79 C. C. A. 433, 149 Fed. 727.

In *Carter v. Tyler County Ct.* (1899) 45 W. Va. 806, 43 L.R.A. 725, 32 S. E. 216, it was held that a prospective production of oil under a lease for oil and gas purposes upon the usual terms and conditions, including the payment of one eighth of the oil produced as royalty, cannot properly be charged to the lessee on the personal property books of the county, since the oil, while it remains in situ, must be regarded as realty and as the property of the lessor.

And it was stated in *Peterson v. Hall* (1905) 57 W. Va. 535, 50 S. E. 603, that a lessee under an ordinary oil lease for years has no vested taxable interest in the oil still in the ground, either before or after he has found paying wells.

But it is apparent that the term "real estate," for the purposes of taxation, may be so defined by statute as to cover the interest in oil and gas without regard to the severance of the fee therein from the surface. See cases set out *infra*, under subd. IV.

IV. Effect of particular statutory or constitutional provisions.

While, in practically all the cases under the preceding subdivisions of this annotation, the construction and effect of the particular statute under which the right to tax separately the interests in oil or gas entered into and affected the result in some degree, the real basis of the decisions was the determination of the construction and effect of the instrument by which the right or privilege was created. There are, however, several cases in which the decisions were based directly upon the provisions of the statutes involved.

So, it was held in *Graciosa Oil Co. v. Santa Barbara County* (1909) 155 Cal. 144, 20 L.R.A.(N.S.) 211, 99 Pac. 483, that the rights of a holder of an oil lease may be taxed separately from those of the owner of the fee, under a statute providing that the term "real estate" shall include all mines and minerals in and under land, and all rights and privileges pertaining there-

to, notwithstanding that the lease in question was construed to vest in the lessee merely an estate for years, so far as necessary for the purpose of taking oil therefrom, and did not create an absolute present title to the oil strata in place. The court observed that an absolute estate in underlying strata may be created, and the estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of respective owners of two adjoining tracts of land; adding that, for the purposes of separate ownership, land may be divided horizontally as well as superficially and vertically. As shown, however, the court held that the rights, under the lease were within the statute, notwithstanding that the lease did not sever the estates in the surface and the subterranean stratum. The fact that this condition was not created by the lease in question was not regarded as excluding it from the operation of the statute providing for separate taxation.

And in *Greene County v. Smith* (1921) — Ark. —, 228 S. W. 738, it was held that under a statute defining "real property and lands" as meaning not only the land itself, with all things therein contained, but also all buildings, structures, and improvements and other fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise appertaining thereto, a lease of land for oil and gas production is real property, and consequently not subject to taxation where the lands leased were in another state.

Similarly, in *Texas Co. v. Daugherty* (1913) — Tex. Civ. App. —, 160 S. W. 129, it was held that where the statute provided that real property, for the purposes of taxation, should be construed to include the land and all rights and privileges belonging to it or in any wise appertaining thereto, it was unnecessary to determine whether the leases in controversy conveyed any title to the oil and gas beneath the surface, as the interest created thereby would be taxable in any event. It will be noted, however,

that the appellate court, although affirming the decision in this case in (1915) 107 Tex. 226, L.R.A.1917F, 989, 176 S. W. 717, supra, based the affirmation on the determination that the leases did convey title in fee to the oil and gas in the ground, and seems to have taken the view that, if they had not done so, the rights created thereby would not have been taxable against the lessee, but would only have been taken into consideration in fixing the assessment against the owner of the surface.

In *Re Hazelwood Oil Co.* (1920) 195 App. Div. 23, 185 N. Y. Supp. 809, it was held that the practice of taxing oil wells on leased land as real property was proper where the legislature had provided by statute that "oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract, or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation." It was further held that such wells might be assessed as real estate against a foreign corporation lessee, in spite of a statute providing for taxing foreign corporations for the privilege of doing business in the state and exempting the personal property of such corporations from local taxation, where the statutory definition of personal property for the purpose of such exemption did not include oil wells and machinery.

In *Wolfe County v. Beckett* (1907) 127 Ky. 252, 17 L.R.A.(N.S.) 688, 105 S. W. 447, it was said that if there were any doubt of the purpose of the legislature to tax oil or gas leases under a section of the law providing that all property should be taxed unless exempted by the Constitution, that doubt was removed by the enactment of another section providing: "That it shall be the duty of all persons owning any real or personal property, mineral rights, or standing (branded) trees of any kind whatever, on the lands of another, or any coal, oil, or gas privileges, by lease or otherwise, or any interest therein, in this state,

other than in the county in which the said owners reside, or, if they should reside out of the state, to list the property for taxation personally or by authorized agent, in the county where situated, at the same time and in the same manner as is now required by law of resident owners," etc.

And in *Mt. Sterling Oil & Gas Co. v. Ratliff* (1907) 127 Ky. 1, 104 S. W. 993, it was held that, under the same statute, the right to one sixteenth of the oil to be produced, reserved by the owner of an oil leasehold in an assignment of the same, whether it be called personal property, a chattel real, incorporeal hereditament, or privilege, is property, and as such subject to taxation.

In *Raydure v. Estill County* (1919) 183 Ky. 84, 209 S. W. 19, it was held that leases giving the exclusive right to enter upon the lands described therein for the purpose of drilling for oil and gas, and, if found, to remove and market same, for a term of five years, or so long thereafter as oil or gas is found and produced therefrom in paying quantities, are "property" within the meaning of a constitutional provision that "all property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale," and therefore taxable, the court saying: "We are unable to perceive any sound reason why an oil lease that may be a subject of barter and sale should not be taxed, if it has a cash value and will bring something at a fair voluntary sale. Indeed, it would be a deliberate and flagrant violation of the Constitution to hold that an oil lease having a cash value, and that could be sold on the open market for cash in some amount at a fair voluntary sale, was not assessable property." It was also stated that in view of the decisions in *Wolfe County v. Beckett*, and *Mt. Sterling Oil & Gas Co. v. Ratliff* (Ky.) supra, the question was no longer an open one in Kentucky. The statute under which the assessment in question was imposed was also attacked on the

ground that it was discriminatory, in that nonresidents were thereby required to list with the assessor such property as oil leases, while residents were not required to do so, and that, moreover, there was no statutory provision for the assessment of oil leases against residents. It was held, however, that there was authority under the general provisions of the tax laws for assessing such property against residents, and that discrimination could not be predicated on the mere difference in the method of listing property of residents and nonresidents, so long as there was no discrimination as to the property taxed and the rate of taxation thereon. It was also claimed that, since there were some producing wells on the property covered by the lease, the lease itself could not properly be taxed, in view of a statute imposing an oil production tax; but it was held

that this was in the nature of a license or occupation tax, and not a property tax, and did not include, but was distinct and separate from, the ad valorem tax to which the leases were subject, and could not operate to exempt them therefrom.

V. Inclusion of oil and gas rights in fixing taxable value of capital stock.

The holding of the reported case (*TRANSCONTINENTAL OIL CO. v. EMERSON*, ante, 507) that oil and gas leases held by a corporation are to be taken into consideration in fixing the valuation for tax purposes of its capital stock, seems to be supported by *Re Indian Territory Illuminating Oil Co.* (1914) 43 Okla. 307, 142 Pac. 997, reversed on other grounds in (1916) 240 U. S. 522, 60 L. ed. 779, 36 Sup. Ct. Rep. 453, although it was held that the leases themselves could not be regarded as taxable entities. *M. A. L.*

RE ESTATE OF ABRAHAM GARTENLAUB, Otherwise Known as A. Gartenlaub, Deceased.

ALICE G. B. GARTENLAUB, Appt.,

v.

UNION TRUST COMPANY OF SAN FRANCISCO, Trustee, etc., of Sarah Fox et al., Respts.

California Supreme Court (In Banc)—May 12, 1921.

(— Cal. —, 198 Pac. 209.)

Life tenant — who pays premium on investments.

1. In the absence of a clear direction in the will to the contrary, the premium paid by a trustee for investments which had only a definite time to run must be deducted from income which, under the will, belonged to the life tenant, so as to preserve the remainder intact.

[See note on this question beginning on page 527.]

— accounting — fluctuations in value of investments.

2. The fluctuations in value of investments by a trustee holding property for life tenant and remainderman are to be wholly disregarded in any accounting between life tenant and remainderman for funds invested in income-bearing property.

[See 17 R. C. L. 630.]

Trust — management of estate — reimbursement of principal — effect of statute.

3. Deduction from interest of the premiums paid for investment of trust funds for the purpose of reimbursing the principal does not violate a statute forbidding accumulations of income except during minority and for the benefit of the minor.

— bequest of net income — effect on distribution of premiums for investment.

4. A bequest to life tenant of the entire net income is not a direction that the corpus of the estate shall bear the loss due to premiums paid for investments.

[See 26 R. C. L. 1376.]

— excluding particular bonds from investment — effect.

5. Any inference to be deduced from a direction by testator in creating a trust, that investments shall not be made in a particular class of bonds because they return too low a rate of interest, must be based on facts as they exist at the time the provision was made; and the mere fact that, because of their subsequent depreciation in value, the income returned is increased, does not indicate that a direction to pay the entire net income to a life tenant carried the intent that premiums on investments should be borne by the corpus of the estate.

— allowance of attorney's fees.

6. A trustee should not be denied the fees of his attorney in a litigation between life tenant and remainderman as to the charging of premiums on investments, if the litigation arose upon the settlement of the trustee's account, and concerned the interpretation of the instrument creating the trust and a determination of the appropriate mode of executing the trust.

Life tenant — who pays fees of trustee's attorneys.

7. Under a will creating a trust to pay net income to life tenant and corpus to remainderman, the expense of services of trustee's attorneys in preparing annual accounts should be charged to income, but fees of attorneys in representing the trustee at a hearing in a litigation between life tenant and remainderman as to who should pay the premiums upon investment should be charged to corpus.

APPEAL by the widow of decedent from an order of the Superior Court for the City and County of San Francisco (Nourse, J.) settling the fourth annual account of the testamentary trustee of Abraham Gartenlaub, deceased. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Mr. Garret W. McEnerney, for appellant:

The sums paid by a trustee as premiums on bonds of a trust estate purchased above par are properly chargeable against the principal of the trust estate, and not against the income thereof.

Hemenway v. Hemenway, 134 Mass. 446; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493, 4 N. E. 69; *Shaw v. Cordis*, 143 Mass. 443, 9 N. E. 794; *Ballantine v. Young*, 76 N. J. Eq. 613, 75 Atl. 1100; *Furness's Estate*, 12 Phila. 130; *Boyer's Estate*, 8 Pa. Dist. R. 613; *Boyer v. Chauncey*, 12 Pa. Super. Ct. 526; *Penn-Gaskell's Estate*, 208 Pa. 346, 57 Atl. 715; *Hite v. Hite*, 93 Ky. 257, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; *American Secur. & T. Co. v. Payne*, 33 App. D. C. 178; *Jones v. Bennett* [1896] 1 Ch. 778, 65 L. J. Ch. N. S. 422, 74 L. T. N. S. 157, 44 Week. Rep. 419; *Sherry v. Sherry* [1913] 2 Ch. 508, 109 L. T. N. S. 474; *Re Hoyt*, 160 N. Y. 607, 48 L.R.A. 126, 55 N. E. 282; *Lynde v. Lynde*, 113 App. Div. 411, 99 N. Y. Supp. 283; *Kemp v. Macready*,

165 App. Div. 124, 150 N. Y. Supp. 618.

The trustee was not entitled to participate in or to receive any allowance for services of its attorney rendered in litigation between the appellant and the remaindermen in respect of the application of trust moneys, inasmuch as such litigation was not adverse to the trust estate, but was limited to the rival claims of beneficiaries of the trust, in respect of the application of trust moneys, and the rival claimants were represented by their own attorneys.

Griffith v. Dale, 109 Md. 697, 72 Atl. 471; *Taylor v. Denny*, 118 Md. 124, 84 Atl. 369; *Bailey v. Buffalo Loan, Trust & S. D. Co.* 214 N. Y. 689, 108 N. E. 561; *Billings v. Warren*, 216 Ill. 281, 74 N. E. 1050; *Sanger v. Ryan*, 122 Cal. 52, 54 Pac. 522; *Mitau v. Roddan*, 149 Cal. 1, 6 L.R.A. (N.S.) 275, 84 Pac. 145, *Re Jessup*, 80 Cal. 625, 22 Pac. 260; *Roach v. Coffey*, 73 Cal. 281, 14 Pac. 840; *Re Wood*, 143 Cal. 522, 77 Pac. 481; *Re Murphy*, 145 Cal. 464, 78 Pac. 960; *Hemingray v. Hemingray*, 29 Ky. L. Rep. 879, 96 S. W.

574; *Kilgour v. Crawford*, 51 Ill. 249; *Grubb's Appeal*, 82 Pa. 23; *Loveland v. Loveland*, 96 Ill. App. 488; *Lilly v. Shaw*, 59 Ill. 72; *Ernst v. Ernst*, 192 Mo. App. 256, 182 S. W. 103; *Gardner v. McAuley*, 105 Ark. 439, 151 S. W. 997.

If the trustee were entitled to any allowance for the services rendered by its attorney in litigation of the beneficiaries of the trust inter se, such allowance should have been charged against the principal, and not against the income of the trust estate.

Sawyer v. Baldwin, 20 Pick. 378; *Cogswell v. Weston*, 228 Mass. 219, 117 N. E. 37; *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789; *Robertson v. De Brulatour*, 188 N. Y. 301, 80 N. E. 938; *Re Slocum*, 60 App. Div. 438, 69 N. Y. Supp. 1036, 169 N. Y. 153, 62 N. E. 130; *Re Osborne*, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298; *Re Schaefer*, 178 App. Div. 117, 165 N. Y. Supp. 19, 222 N. Y. 533, 118 N. E. 1076; *Re Stanfield*, 135 N. Y. 292, 31 N. E. 1013; *Ex parte Humbird*, 114 Md. 627, 80 Atl. 209; *Washington County Hospital Asso. v. Hagerstown Trust Co.* 124 Md. 1, L.R.A.1915A, 738, 91 Atl. 787; *Quay's Estate*, 253 Pa. 80, 97 Atl. 1029; *Re Hubbuck* [1896] 1 Ch. 754, 65 L. J. Ch. N. S. 271, 73 L. T. N. S. 738, 44 Week. Rep. 289; *Re Bennett* [1896] 1 Ch. 778, 65 L. J. Ch. N. S. 422, 74 L. T. N. S. 157, 44 Week. Rep. 419.

The services rendered by the trustee's attorney in respect of the annual accounting of the trustee, and which are the so-called "ordinary" services mentioned in the order appealed from, should have been charged to the principal of the trust estate, because they were incurred in respect of the administration of the trust and belong to the class of expenses uniformly charged against principal. *Cogswell v. Weston*, 228 Mass. 219, 117 N. E. 37; *Chisholm v. Hammersley*, 114 App. Div. 565, 100 N. Y. Supp. 38.

Mr. Norman A. Eisner, for respondent Trust Company:

The general rule is that the trustee shall be allowed its expenses and attorneys' fees excepting in cases of gross misconduct.

Underhill, Trusts & Trustees, p. 429; *Perry, Trusts*, 6th ed. 894; *Re O'Connor*, 2 Cal. App. 478, 84 Pac. 317; 39 Cyc. 339; *Denvir v. Park*, 169 Mo.

App. 335, 152 S. W. 604; *Re Welling*, 51 App. Div. 355, 64 N. Y. Supp. 1025, 53 App. Div. 639, 65 N. Y. Supp. 1060; *Blair v. Cargill*, 111 App. Div. 853, 98 N. Y. Supp. 109; *Morton v. Barrett*, 22 Me. 257, 39 Am. Dec. 575.

Where the life beneficiary is left net income the necessary expenses of administering the trust must be borne by the income.

Re Long Island Loan & Trust Co. 79 Misc. 176, 140 N. Y. Supp. 752; *Re Albertson*, 113 N. Y. 434, 21 N. E. 117; *Re Brooklyn Trust Co.* 92 Misc. 674, 157 N. Y. Supp. 547.

Messrs. Heller, Powers, & Ehrman and Samuel S. Stevens also for respondents.

Lennon, J., delivered the opinion of the court:

Objections interposed to the settling of an annual account of a testamentary trustee from the basis of the present appeal. The decedent, Abraham Gartenlaub, who died June 1, 1914, devised and bequeathed the greater part of his estate in trust to the Union Trust Company of San Francisco, and empowered the trustee to convert into money the estate thus received and invest the same in certain described bonds. By the terms of the will the trustee was directed to pay to Alice G. B. Gartenlaub, the wife of the testator, monthly, during her lifetime, three fourths of the "entire net income, revenue, and profit of every kind arising from said estate in said month in any way whatever." The said Alice Gartenlaub appeals from an order of the superior court of San Francisco settling the fourth annual account of the trustee. Sarah Fox, who is the sister of the testator and the life tenant in respect to the remaining one fourth of the "net income, revenue, and profit," her two children, Harry and Gussie Fox, who are the remaindermen under the trust, and the trustee, are the respondents. Appellant contends that, in the account attacked, the trustee has erroneously deducted certain sums from "income" and credited them to "principal."

Pursuant to the provisions of the

will, the trustee has invested funds of the trust estate in certain bonds which it purchased at a premium. Obviously the amount of the premium cannot be collected from the obligor when the bonds mature, for the latter is liable only for the face value thereof. Consequently, if the bonds are retained by the trustee until maturity, the principal of the trust estate will be depleted by an amount equal to the premium paid. For the purpose of preventing a shrinkage of the principal in this manner, the trustee has, on each coupon date, deducted a portion of the interest collected on the bonds and credited the same to principal. It is calculated that at maturity the sum of the amounts thus taken from interest and credited to principal will equal the premium originally paid for the bonds. This deduction from interest is assigned by appellant as an unwarranted diminution of the income of the life tenant.

Whether a premium paid for securities purchased by a trustee for a trust estate should be charged against the principal or the income of the estate has never been decided in California, and upon this question we find the decisions in the other states in sharp conflict. Whatever view may be accepted, it is clear that some definite rule of action must be prescribed by this court, and departures therefrom permitted only where the creator of the trust has given a clear and unmistakable direction to the contrary of that rule. The determination of the course to be pursued by trustees in such cases cannot be made wholly dependent upon the peculiar circumstances of each case as it arises, as has been attempted in some states. *McLouth v. Hunt*, 154 N. Y. 179, 39 L.R.A. 230, 48 N. E. 548; *Hemenway v. Hemenway*, 134 Mass. 446, 452; *Shaw v. Cordis*, 143 Mass. 443, 9 N. E. 794. Such attempt has proven unsatisfactory in these states, for the reason that in the majority of cases the creator of the trust fails to make specific pro-

vision for the contingency in question, and therefore, if the duty of the trustee in this particular be governed entirely by the intention to be ascertained from the instrument creating the trust or the circumstances surrounding the execution of that instrument, "no trustee will know how to safely act, and a question constantly arising in the administration of estates will be involved in great confusion and be the cause of great litigation." *Re Stevens*, 187 N. Y. 471, 12 L.R.A. (N.S.) 814, 80 N. E. 358, 10 Ann. Cas. 511; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493, 4 N. E. 69.

The decisions which hold that a premium must be charged wholly to the principal of the trust estate, which is the rule contended for by appellant, are based largely upon the reason that a premium is paid to secure safety of investment, as well as high interest, and that therefore the premium is for the benefit of the remainderman as well as the life tenant. There is also the argument that there is a possibility that the bonds may be sold before maturity, and, owing to the fluctuations in market value, may, when thus disposed of, bring more than the sum for which they were purchased, so that these matters are likely to balance themselves in time. *Hite v. Hite*, 93 Ky. 257, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; *Penn-Gaskell's Estate*, 208 Pa. 346, 57 Atl. 715. The weight of authority, however, and, we believe, the better view, is the rule finally adopted in New York in the case of *Re Stevens*, supra, to the effect that "in the absence of a clear direction in the will to the contrary, where investments are made by the trustee, the principal must

be maintained intact from loss by payment of premium on securities having only a definite term to run."

This rule has been consistently followed in New York (*Dexter v. Watson*, 54 Misc. Rep. 484, 106 N. Y.

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who pays
premium on
investments.

Supp. 80; *Furniss v. Cruikshank*, 191 App. Div. 450, 181 N. Y. Supp. 522, 528), and has been adopted in New Jersey, Connecticut, and Wisconsin (*Ballantine v. Young*, 74 N. J. Eq. 572, 70 Atl. 668; *Curtis v. Osborn*, 79 Conn. 555, 65 Atl. 968; *Wells's Estate*, 156 Wis. 294, 144 N. W. 174). See note, 4 A.L.R. 1249.

A testator who creates a trust such as that in the instant case has two objects in view: First, the payment of the income arising from a fund to certain persons during lifetime; second, the transfer of that fund to certain individuals upon the death of the life tenants. The existence of a corpus, principal, or fund is an essential element of the trust, and the preservation of this principal until the termination of the life estates is indispensable to the fulfilment of the testator's plans. Therefore, any depletion of the principal tends to frustrate the fundamental purpose of the trust and should be avoided; and, where the price paid for a bond consists of more than the par value thereof, that method of accounting should be adopted which will prevent the impairment of the principal, unless the testator has clearly directed to the contrary. Otherwise the life tenant who is entitled to receive only income will, in effect, have received a part of the principal. In other words, where a premium is paid, the ostensible interest yielded by the bond cannot be considered entirely as interest on the face value of the bond, for a sum in excess of the face value has gone into the investment, and the amount of interest remains unchanged, resulting, necessarily, in a decreased rate of return. A portion of the nominal interest is therefore a repayment of the premium.

This duty to restore to principal the total amount invested in the bonds cannot be evaded upon the theory that the bonds may, as a result of fluctuations in market value, be sold at higher prices than those for which they were purchased. A trustee is not permitted to buy and sell on speculation. The fluctuations

in market value after purchase by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remainderman for funds from the trust estate invested in income-bearing property. *Re Stevens*, supra.

The deduction from interest of the amount paid as premium is not a violation of §§ 723 and 724 of the Civil Code, prohibiting accumulations of income except during minority and for the benefit of the minor. The entire net income from the bonds is distributed; for, as previously stated, a portion of the interest on the bonds is in reality return of a part of the principal invested therein to the corpus of the trust estate, in the same sense that sums of money are returned to principal when a loan is repaid in instalments. The trustee is not withholding any part of the income for the purpose of investing it as new capital. *Re Steele*, 124 Cal. 533, 541, 57 Pac. 564.

In the present case the testator has given no direction that the principal of the trust estate should bear the loss occasioned by the wearing away of premium. The bequest to appellant of three fourths of the "entire net income" cannot be interpreted as such a direction, in view of the fact that part of the interest on the bonds is not, strictly speaking, income, but a return of capital. It is pointed out that the testator provided that no investments of trust funds should be made in bonds of the United States, "for the reason that said bonds yield too low a rate of interest." At the time of the hearing, United States Liberty bonds were yielding a higher rate of interest than many of the bonds of the

—accounting—
fluctuations in
value of
investments.

Trust—manage-
ment of estate—
reimbursement
of principal—
effect of statute.

—bequest of net
income—effect
on distribution
of premiums for
investment.

trust estate after the deduction from their interest return of a proportionate part of the premium. This, it is urged by appellant, shows that no deduction should be made from the interest on the bonds of the trust estate, since the return to the life tenant would thereby be made lower than intended by the testator. This inference cannot be drawn from the provision in question, for any inference

—excluding particular bonds from investment—effect.

deduced from the provision in regard to United States bonds must be based upon the

facts existing at the time the testator made the provision. At the time the will was executed and that the testator died, the year 1914, the interest on United States bonds was far lower than the lowest yield of any bonds of the trust estate after deductions on account of premium. The will contains the following provision: "If at the end of any one year it shall appear that my said wife has not received an average of at least the sum of seven hundred and fifty (\$750) dollars for each month of said year, . . . then and in that event said trustee shall resort to the personal property of the corpus of said trust estate, and thereout shall take sufficient to make up and pay over to my said wife a sum sufficient to make the aggregate receipts of my said wife the equivalent of seven hundred and fifty (\$750) dollars for each month of said year." (Italics ours.)

Appellant's income from the estate has not fallen below the sum of \$750 per month, but has far exceeded that minimum, and, consequently, the only contingency upon which the testator has authorized payments to the life tenant from the corpus of the trust estate has not arisen. The testator has not only not directed the charging of premium to principal, but has clearly indicated that the corpus is not to be resorted to unless the income falls below the specified minimum.

The order appealed from made an allowance to the trustee of \$500 as compensation to its attorney for legal services rendered by the latter upon a former appeal to the supreme court from an order settling the second annual account of the trustee (Re Gartenlaub, — Cal. —, 197 Pac. 90, and \$250 for services rendered upon the hearing of the fourth annual account of the said trustee. It is contended that these matters constituted litigation between the life tenant and remaindermen, which was not hostile to the trust itself and in which the participation of the trustee was gratuitous and uncalled for, and therefore that the trustee is not entitled to an allowance for attorney's fees. It is a general rule that trustees are entitled to reimbursement for expense incurred in good faith in the execution of the trust. *Denvir v. Park*, 169 Mo. App. 335, 152 S. W. 604. While the participation of a trustee in litigation between rival claimants not involving the execution of the trust would seem unwarranted, the present case does not present such a state of facts. The litigation arose upon the settling of the trustee's accounts, and concerned the interpretation of the instrument creating the trust and a determination of the proper mode of executing the trust. The trustee was therefore directly interested in its representative capacity, and was not without authority to employ a legal representative in the interests of the trust estate.

—allowance of attorney's fees.

"A rule which has been applied in a great variety of cases affecting the administration and execution of trusts is that a trustee has a right, whenever necessary to the proper administration, preservation, and execution of the trust and the prosecution or defense of actions, to employ counsel and to be reimbursed from the trust estate for whatever sums he has paid for the services of such counsel. The rule is applicable even though the cestui que trust employed counsel to repre-

sent the same interests, and although, to a certain extent, the private and personal interests of the trustee may also be involved in the litigation." 39 Cyc. 339.

It is immaterial that counsel for the trustee supported appellant's claim upon the hearing of the fourth account and later altered his position, maintaining on this appeal that the items representing a portion of the premium on bonds were correctly charged against income. The duty of the trustee and its counsel was to aid the court in deciding upon a correct administration of the trust funds, without regard to the conflicting claims of beneficiaries. If, upon the appeal, the order of the court below appeared to the trustee correct, it was the duty of the trustee to support that order.

The \$500 thus allowed the trustee for attorney's services rendered in the litigation, as well as an additional allowance for so-called "ordinary" services of attorneys in connection with the preparation and presentation of the annual account of the trustee, were ordered paid from the income of the trust estate. The reasonableness of the sums allowed is not questioned, but it is claimed that they should have been charged to principal rather than income. The decision of *Cogswell v. Weston*, 228 Mass. 219, 117 N. E. 37, lays down the following rule for the payment of the expenses incurred in the execution of a trust: "The regular annual or periodically recurring expenses arising in the administration of a productive trust commonly are paid out of the income, while extraordinary and unusual expenses are chargeable against the capital. The costs of litigation generally fall in the latter class. These rules apply in cases where the question concerns life tenants and remaindermen, both guiltless of any wrong against the trust, and where the point of incidence of proper expenses must be determined as between innocent persons."

The following cases hold that costs of litigation in connection with

the execution of a trust are payable from the principal of the trust: *Re Osborne*, 209 N. Y. 450, 50 L.R.A. (N.S.) 510, 103 N. E. 723, 731, 823, Ann. Cas. 1915A, 298; *Re Schaefer*, 222 N. Y. 533, 118 N. E. 1076, affirmed in 178 App. Div. 117, 165 N. Y. Supp. 23. Where litigation becomes necessary to remove a doubt or ambiguity so as to insure the correct administration of the trust, the expense is an extraordinary charge, which, unless otherwise provided by the testator should be borne by all parties. If the expense of litigation incident to the trust is paid from principal, the life tenant, as well as the remainderman, shares the burden; for in that event the life tenant is deprived of the interest on the sum taken from principal. However, expenses in regard to matters concerning the ordinary management of the trust, such as the preparation of annual accounts, are usually payable from income. *Howe, Income & Principal*, p. 67. That these ordinary expenses are to be paid from income in this case, at least, is clear from the fact that the will provided that the life tenants should have only the "net" income, thus indicating that all current expenses are to be deducted from income.

Life tenant—
who pays fees
of trustee's
attorneys.

The order appealed from must be modified in accordance with the rule set forth in the immediately preceding paragraph; that is to say, the income must be credited and principal charged with the amount allowed to the trustee as compensation for its attorney for "extraordinary" services in connection with the execution of the trust. The trial court is directed to so modify the order, and when so modified the order will stand affirmed, without costs to either party upon this appeal.

We concur: Angellotti, Ch. J.; Sloane, J.; Wilbur, J.; Olney, J.; Shaw, J.; Lawlor, J.

Petitions for rehearing and modification of judgment denied June 9, 1921.

ANNOTATION.

Liability as between life tenant and remainderman for a premium paid for bonds.

The earlier cases on this question are discussed in the note in 4 A.L.R. at page 1249.

The conclusion reached in the reported case (*RE GARTENLAUB*, ante, 520), is in accord with the majority view, as shown in the earlier note in case of bonds purchased by the trustee. As stated in the reported case, and as appears from the earlier note, this is the rule announced in New York in *Re Stevens* (1907) 187 N. Y. 471, 12 L.R.A.(N.S.) 814, 80 N. E. 358, 10 Ann. Cas. 511. *Re Stevens* is followed in the recent New York case of *Furniss v. Cruikshank* (1921) 230 N. Y. 495, 130 N. E. 625.

Where the bonds in question were owned by the creator of the trust, it appears from the note above referred to that the rule generally followed is that the loss of premium due to the approach of maturity must be borne by the corpus of the fund. This is the rule followed in *Re Thomas* (1919) 109 Misc. 523, 179 N. Y. Supp. 559. In that case a sinking fund which the trustees had reserved to amortize bonds purchased by the testator at a premium was ordered paid to the life tenant. The court says: "There is no provision in the will either impliedly or expressly requiring the setting up of the sinking fund, and the life beneficiaries are therefore entitled to the full income derived therefrom without any deduction for a sinking fund."

The decision in *Wells's Estate* (1914) 156 Wis. 294, 144 N. W. 174, to

the effect that executors had rightfully set aside and credited to corpus a portion of the annual interest received upon United States bonds held by the deceased, and still owned by the estate, and which, according to the appraisal of the estate, commanded a considerable premium at the time of the deceased to meet the shrinkage on their value as they approach maturity, is based upon the intention of the testator. The court says that that court has definitely adopted the principle that where a trust is created in funds of which the income is to be paid to certain beneficiaries for life, and the principal to others on the termination of the life estate, and the trustees invest a part of the funds in securities at a premium, the trustees should take from the annual income and add to the corpus such sum as will, under established rules, at the maturity of the securities repay to the corpus the amount paid as premiums, and pay to the life tenant the balance only of the annual income. It is further stated that it is unnecessary to decide whether there is any logical difference in the rules of law which should apply to securities held by the deceased at a premium and the securities purchased by the executors at a premium, since in the case at bar an intention was very clearly manifested that the principal or corpus of the estate should, at all hazards, be preserved intact. W. A. E.

UNITED STATES, Petitioner,

v.

BROOKLYN EASTERN DISTRICT TERMINAL.

United States Supreme Court—March 24, 1919.

(249 U. S. 296, 63 L. ed. 613, 39 Sup. Ct. Rep. 283.)

Master and servant — switching crews.

1. Switching crews employed by a terminal company which acts as

agent for a number of interstate railways are, while engaged in moving at one time a locomotive with seven or eight cars between the terminal company's docks and its warehouses or team tracks, "persons actually engaged in or connected with the movement of any train," within the meaning of the Hours of Service Act of March 4, 1907, which prohibits any common carrier by railroad, engaged in interstate commerce, from requiring or permitting an employee to remain on duty for a longer period than sixteen consecutive hours.

[See note on this question beginning on page 537.]

— hours of service — common carrier
— terminal company.

2. A navigation corporation engaged in conducting the usual terminal operations for a number of interstate railways, including the transportation between its docks and warehouses and points on any of the said railways of all property that is offered, is a "common carrier," subject

to the Hours of Service Act of March 4, 1907, although all the services rendered are performed under contracts with such railway companies as agent for them, and not on its own account, and all the freight transported is contained only in cars furnished by the railway companies with which it has contracts.

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment reversing a judgment of the District Court for the Eastern District of New York against defendant for penalties incurred by alleged violations of the Hours of Service Act. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. William L. Frierson, Assistant Attorney General, and Neal L. Thompson, for petitioner:

Defendant is a common carrier.

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; United States v. Union Stock Yards & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; United Stockyards Co. v. United States, 94 C. C. A. 626, 169 Fed. 406; United States v. Erie R. Co. 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621.

Whenever an engine and cars have been assembled into a train, any movement of such train is within the air-brake provision.

United States v. Erie R. Co. *supra*.

Mr. Henry B. Closson, for respondent:

The Hours of Service Act applies only to common carriers engaged in the transportation of passengers or property by railroad; and only to those actually engaged in or connected with the movement of any train which is engaged in the [interstate] transportation of passengers or property by railroad.

Baltimore & O. R. Co. v. Interstate

Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; United States v. Chicago, M. & P. S. R. Co. 218 Fed. 701, 219 Fed. 632.

The defendant is not a common carrier.

United States v. Ramsey, 42 L.R.A. (N.S.) 1031, 116 C. C. A. 568, 197 Fed. 144; Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 38, 70 Am. St. Rep. 432, 52 N. E. 665; 6 Cyc. 366; United States v. Union P. R. Co. 130 C. C. A. 34, 213 Fed. 332; Texas & P. R. Co. v. Henson, 56 Tex. Civ. App. 468, 121 S. W. 1127; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 615.

Decisions sustaining prosecutions against transportation corporations for violation of the provisions of the Safety Appliance Act requiring the use of automatic couplers, grab irons, and drawbars cannot properly be cited as decisions that the corporations in question were common carriers.

Belt R. Co. v. United States, 22 L.R.A. (N.S.) 582, 93 C. C. A. 666, 168 Fed. 542; United States *ex rel.* Atty. Gen. v. Union Stockyard & Transit Co. 192 Fed. 336; United States v. Union

Stock Yards Co. 94 C. C. A. 626, 161 Fed. 919, 169 Fed. 404; Hines v. Stanley-G. I. Electric Mfg. Co. 199 Mass. 522, 85 N. E. 851.

The defendant is not engaged in the transportation of property by railroad; and for that reason also is not subject to the Hours of Service Act.

Taggart v. Republic Iron & Steel Co. 73 C. C. A. 144, 141 Fed. 910; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300.

Even if the Terminal could be held to be a common carrier, and one engaged in the transportation of property by railroad as well, the employees in question were not actually engaged in or connected with the movement of any train.

United States v. Erie R. Co. 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621; United States v. Chicago, B. & Q. R. Co. 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634; La Mere v. Railway Transfer Co. 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915C, 667; United States v. Grand Trunk R. Co. 203 Fed. 775; Atchison, T. & S. F. R. Co. v. United States, 117 C. C. A. 341, 198 Fed. 637; United States v. Pere Marquette R. Co. 211 Fed. 220; Clary v. Chicago, M. & St. P. R. Co. 141 Wis. 411, 123 N. W. 649; Lynch v. Great Northern R. Co. 112 Minn. 382, 128 N. W. 457.

Mr. Justice Brandeis delivered the opinion of the court:

The Hours of Service Act (March 4, 1907, chap. 2939, 34 Stat. at L. 1415, Comp. Stat. 1916, § 8677)¹ prohibits any common carrier by railroad engaged in interstate commerce from requiring or permitting an employee to remain on duty for a longer period than sixteen consecutive hours. For alleged violation of this provision, proceedings were

brought against the Brooklyn Eastern District Terminal in the district court of the United States for the eastern district of New York. The defendant contended that it was not a common carrier; that it was not engaged in interstate commerce by railroad; and that its employees were not "connected with the movement of any train." Upon facts which were agreed the trial court entered judgment for the government. The circuit court of appeals reversed the judgment on the ground that, while the Terminal was engaged in interstate commerce, and the employment in question was connected with the movement of trains, it was not a common carrier. 152 C. C. A. 275, 239 Fed. 287, 15 N. C. C. A. 325. The case comes here on writ of certiorari (243 U. S. 647, 61 L. ed. 945, 37 Sup. Ct. Rep. 475); and the substantial question before us is whether the Terminal is within the scope of the Hours of Service Act, as being a common carrier. The essential facts are these:

1. The Terminal is a navigation corporation with an authorized capital stock of one hundred thousand dollars (\$100,000), incorporated under § 10 of article 3 of the Transportation Corporations Law of the state of New York, which reads as follows:

"Seven or more persons may become a corporation, for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating, or owning steam, sail, or other boats, ships, vessels, or other property, to be used in any lawful business, trade, commerce, or navigation upon the

¹ Act of March 4, 1907, chap. 2939, 34 Stat. at L. 1415.

"That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad . . . from one state . . . to any other state. . . . The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether

16 A.L.R.—34.

owned or operated under a contract, agreement, or lease; and the term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours. . . ."

ocean or any seas, sounds, lakes, rivers, canals, or other waterways, and for the carriage, transportation, or storing of lading, freight, mails, property, or passengers thereon." [Consol. Laws, chap. 63.]

In its certificate of incorporation, the corporate powers and purposes of the defendant are stated as follows:

"The purposes for which it is formed are to build for its own use, equip, furnish, fit, purchase, charter, navigate, and own steam, sail, and other boats, ships, vessels, and other property, to be used in the business of carrying, transporting, storing, and lading merchandise in New York harbor and the waters adjacent thereto and connected therewith and the territory bordering thereon."

2. The Terminal operates a union freight station at Brooklyn under individual contracts with ten interstate railroads and several steamship companies. From the railroads it receives both carload and less-than-carload freight, and transports the same from their termini to its Brooklyn docks. There, the cars containing such freight are hauled from the car floats by its locomotives and placed for unloading either on its steam tracks or at its freight houses. The Terminal receives likewise from shippers both carload and less-than-carload outgoing freight originating at Brooklyn and consigned to points upon the various railroads with which it has contracts. The cars carrying this outgoing freight are then switched and loaded by its locomotives upon its floats and transported by its tugs to the docks of the several railroads.

3. For its services in handling freight as above set forth the Terminal is paid, not by the shipper or consignee, but by the railroad or steamship company upon whose account the transportation service is performed, at the rate of 3 cents per 100 pounds of freight moving to or from points east of the western

termini of said railroads, and 4 cents per 100 pounds on freight moving to or from points beyond such termini. Upon prepaid shipments from shippers not on the credit lists of the railroads it collects from the shipper at Brooklyn the money and charges for the transportation of such freight from that point to its final destination; and also collects from the consignee at Brooklyn the charges for the transportation of such freight from its point of origin to that place, when such charges have not been prepaid. The freight moneys and charges so received by the defendant from shippers or consignees are accounted for and paid over by it without deduction to the railroads or steamship lines upon whose account they are collected.

4. The Terminal does not hold itself out as a common carrier; nor does it file with the Interstate Commerce Commission any tariffs or concurrences with tariffs, or copies of the contracts with the common carriers by whom it is paid for the transportation of freight, as heretofore set forth. The terminal at Brooklyn is designated by such railroads and rail and water lines, in the tariffs filed by them with the Interstate Commerce Commission, as one of their receiving and delivering stations for freight in the port of New York; and through bills of lading to such terminal as such station are issued by them on freight to be delivered there. For all freight originating at Brooklyn, bills of lading of the railroad or steamship line to which the freight is to be delivered are there issued to the shipper by one of the defendant's employees, who is duly authorized to issue such bills of lading by the railroad or steamship line by which the freight is to be transported to its final destination or destinations after the same is delivered to such railroad or steamship line by defendant.

5. The tracks of the Terminal which extend from its float bridges to several warehouses, coal pockets,

platforms, and team tracks have an aggregate length of $8\frac{1}{2}$ miles. One track connecting its several dock and delivery tracks, which is kept clear for operating its switching engines, is about 1 mile in length. The length of haul effected by its locomotives in moving cars between its float bridges and warehouses, platforms, pockets, and team tracks varies from a few yards to nearly a mile. The number of cars so hauled as part of a movement varies from a single car to eight cars. As an incident to such movement its locomotives hauling cars cross a public street in Brooklyn.

6. Defendant owns or hires no cars itself, and no cars, except the ones heretofore mentioned, are ever moved over its tracks. For the use of such cars defendant pays no charges; and except by the switching service heretofore described, it transports freight only by water. It handles interstate and intrastate freight indiscriminately, the larger part being interstate. It transports no passengers.

7. In connection with the movement of one or more cars between the floats and the loading tracks, warehouses, and team or delivery tracks, defendant employs four to eight switching crews during the day and two at night, each crew consisting of a conductor, engineer, and two or more brakemen.

The Hours of Service Act declares (in the 1st section) that "the term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease." Hence, neither the character of the Terminal's railroad nor its independent ownership excludes it from the scope of the act. But the Terminal contends that it is not subject to the provisions of the statute, since it is not incorporated as a common carrier and does not hold itself out as such; does not file tariffs; and does not undertake to

transport property for all who may apply to have their goods transported; but merely transports as agent such freight as is delivered to it by or for those carriers, and those only, with whom it has elected to make special contracts; and that, under these contracts, it performs for the railroads, and not for the public, a part of the whole carriage which they, as common carriers, have undertaken with the shipper to perform.

We need not undertake a definition of the term "common carrier" for all purposes. Nor are we concerned with questions of corporate power or of duties to shippers, which frequently compel nice distinctions between public and private carriers. We have merely to determine whether Congress, in declaring the Hours of Service Act applicable "to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad," made its prohibitions applicable to the Terminal and its employees engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the state of incorporation considers it such; but upon what it does. *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 254, 60 L. ed. 984, 986, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765.

The relation of the Terminal to the several railroads is substantially the same as that of the terminal considered in *United States v. Baltimore & O. R. Co.* 225 U. S. 306, 56 L. ed. 1100, 32 Sup. Ct. Rep. 817, 231 U. S. 274, 288, 58 L. ed. 218, 225, 34 Sup. Ct. Rep. 75. The transportation performed by the railroads begins and ends at the terminal. Its docks and warehouses are public freight stations of the railroads. These, with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line,

like the stockyards in *United States v. Union Stock Yard & Transit Co.* 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83, and the wharfage facilities in *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279. They are clearly unlike private plant facilities. Compare *Tap Line Cases (United States v. Louisiana & P. R. Co.)* 234 U. S. 1, 25, 58 L. ed. 1185, 1194, 34 Sup. Ct. Rep. 741. The services rendered by the Terminal are public in their nature, and of a kind ordinarily performed by a common carrier. If these terminal operations were conducted directly by any, or jointly by all, of the ten railroad companies with which the Terminal has contracts, the operations would clearly be within the scope of the Hours of Service Law. The evils sought to be remedied exist equally, whether the terminal operations are conducted by the railroad companies themselves or by the Terminal as their agent; and whether the Terminal acts only as such agent for railroads, or undertakes in addition to transport on its own account goods for shippers. The precise question presented is, therefore, whether the fact that the Terminal conducts these operations, not as an integral part of a single railroad system, but wholly as an agent for one or several, exempts the railroad companies, because they are not the employer, and exempts the Terminal because it is not a common carrier; thus making inapplicable a provision regarding the physical operation of the property devised for the protection of employees and the public.

One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character,—that is, conveying between Brooklyn and points on any

of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier (*United States v. Sioux City Stock Yards Co.* 162 Fed. 556); nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads whose only service is hauling cars for other railroads have been held liable as common carriers under the Safety Appliance Acts (*Union Stockyards Co. v. United States*, 94 C. C. A. 626, 169 Fed. 404; *Belt R. Co. v. United States*, 22 L.R.A.(N.S.) 582, 93 C. C. A. 666, 168 Fed. 542), and under the Twenty-Eight Hour Law (*United States v. Sioux City Stock Yards Co.* supra).²

What the Terminal contracts to transport, however, is not primarily cars, but their contents. Its compensation is measured not by the weight, size, or character of the car, but by the weight and the origin or destination of the goods carried therein. These goods the Terminal must, under its contracts with the railroad companies, receive and carry at the rates specified for all who offer them, as fully as the railroad companies do at their other stations. The incidental services performed by the Terminal in respect to these goods are also the same as those performed by the railroad companies at their other stations. For all freight originating at Brooklyn, it issues through bills of lading to destination. Upon prepaid shipments originating there, it collects from the shippers the charges for transportation from Brooklyn to final destination, except where shippers are on the credit lists of the railroad companies. Upon goods arriving over its line at Brooklyn, it collects from the con-

² Compare also *McNamara v. Washington Terminal Co.* 37 App. D. C. 384, 394, et seq.; *State ex rel. Winnett v. Union Stock Yards Co.* 81 Neb. 67, 115 N. W. 627.

signees the charges from point of origin, unless these were prepaid. As the Terminal receives both from railroad companies and from shippers also less-than-carload freight, it doubtless performs the loading and unloading, as is done at other railroad stations; and for freight delivered at Brooklyn takes appropriate receipts. In no respect, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations. True, the service is performed by the Terminal under contracts with the railroad companies as agent for them, and not on its own account. But a common carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another. The relation of connecting carriers with the initial carrier is frequently that of agent. See *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872. The relation of agency may preclude contractual obligations to the shippers, but it cannot change the obligations of the carrier concerning the physical operation of the railroad under the Hours of Service Act, which, as this court has said, must be liberally construed to secure the safety of employees and the public. *Atchison T. & S. F. R. Co. v. United States*, 244 U. S. 336, 61 L. ed. 1175, 37 Sup. Ct. Rep. 635, Ann. Cas. 1918C, 794.

It is now admitted that the Terminal is engaged in interstate com-

merce; and it is clear that at least "switching crews" engaged in moving —switching crews. at one time a locomotive with seven or eight cars between the docks and the warehouses or team tracks, a distance of nearly a mile, are engaged in the movement of a "train." The decisions under the Safety Appliance Acts depend upon the particular context in which the word "train" there occurs, and are not here applicable. Compare *United States v. Erie R. Co.* 237 U. S. 402, 407, 408, 59 L. ed. 1019, 1022, 1023, 35 Sup. Ct. Rep. 621.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

NOTE.

"What employers are within 'hours of labor' statutes," is the subject of an annotation following *STATE v. CROUNSE*, post, 537. The reported case (*UNITED STATES v. BROOKLYN EASTERN DIST. TERMINAL*, ante, 527) is treated in connection with other cases involving an interpretation of the Federal Hours of Service Act for employees of "common carriers," in subd. II. f, of that annotation. And of especial interest is the holding to the effect that the test whether or not a corporation is an employer within an "hours of labor" statute depends upon what it does, and not upon the declaration of purposes enumerated in its charter. In the latter connection, see subd. I. of the note.

STATE OF NEBRASKA, Plff. in Err.,

v.

WILLIAM G. CROUNSE.

Nebraska Supreme Court — February 10, 1921.

(— Neb. —, 181 N. W. 562.)

Master and servant — hours of labor — newspaper business.

A newspaper publishing company, engaged exclusively in printing and

Headnote by FLANSBURG, J.

publishing a daily newspaper, though it employs machinery and mechanical labor in its operation, is not a "manufacturing nor a mechanical establishment," as such terms are used in the statute regulating the hours of labor for women.

[See note on this question beginning on page 537.]

ERROR to the District Court for Douglas County (Estelle, J.) to review a judgment dismissing a prosecution charging defendant with violating the statute relating to the hours of labor of women. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Clarence A. Davis, Attorney General, and Mason Wheeler, Assistant Attorney General, for the State:

The Female Labor Law, being a remedial statute, should be liberally construed.

Wenham v. State, 65 Neb. 395, 58 L.R.A. 825, 91 N. W. 421; State v. Paxton & G. Co. 93 Neb. 216, 140 N. W. 167; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Gran v. Houston, 45 Neb. 813, 64 N. W. 245.

A newspaper printing and publishing establishment is a mechanical establishment within the purview of the Female Labor Law.

Wenham v. State, supra; Cowling v. Zenith Iron Co. 65 Minn. 263, 33 L.R.A. 508, 60 Am. St. Rep. 471, 68 N. W. 48; New Orleans v. Robira, 42 La. Ann. 1098, 11 L.R.A. 141, 8 So. 402; New Orleans v. Lagman, 43 La. Ann. 1180, 10 So. 244; Engle v. Sohn, 41 Ohio St. 691, 52 Am. Rep. 103; Press Printing Co. v. State Assessors, 51 N. J. L. 75, 16 Atl. 173; State, Evening Journal Assn., Prosecutor, v. State Assessors, 47 N. J. L. 36, 52 Am. Rep. 107, note; Re Kenyon, 1 Utah, 47; State v. Dupre, 42 La. Ann. 561, 7 So. 727.

Mr. A. V. Shotwell also for the State.

Messrs. Stout, Rose, Wells, & Martin, for defendant in error:

The statute in question is penal, and should not be extended by construction so as to apply to persons not clearly within its terms.

Wenham v. State, 65 Neb. 395, 58 L.R.A. 825, 91 N. W. 421; State v. Stapel, 103 Neb. 135, 170 N. W. 665; State v. Dailey, 76 Neb. 770, 107 N. W. 1094.

The business of publishing a newspaper is not "mercantile, mechanical, or manufacturing," nor does it come within the word "office" as used in the statute.

25 Cyc. 471; Graham v. Hendricks, 22 La. Ann. 523; Re San Gabriel Sanatorium Co. 95 Fed. 271; Re Cameron Town Mut. F. Lightning & Windstorm Ins. Co. 96 Fed. 756; Re Woodside Coal Co. 105 Fed. 56, 3 N. B. N. Rep. 336; Re White Star Laundry Co. 117 Fed. 570; Re Pacific Coast Warehouse Co. 123 Fed. 749; Carr v. Riley, 198 Mass. 70, 84 N. E. 426; People v. Federal Security Co. 255 Ill. 561, 99 N. E. 668; Re Mechanical Business Cases, 9 Pa. Co. Ct. 1; Mullinnix v. State, 42 Tex. Crim. Rep. 526, 60 S. W. 768; Cowling v. Zenith Iron Co. 65 Minn. 263, 33 L.R.A. 508, 60 Am. St. Rep. 471, 68 N. W. 48; Com. v. Arrott Mills Co. 145 Pa. 69, 22 Atl. 243; State v. Eckendorf, 46 La. Ann. 131, 14 So. 518; People ex rel. Union Pacific Tea Co. v. Roberts, 145 N. Y. 375, 40 N. E. 7; Ward v. Norton, 86 Kan. 906, 122 Pac. 881; Re Wilkes-Barre Light Co. 224 Fed. 248; Williams v. Park, 72 N. H. 305, 64 L.R.A. 33, 56 Atl. 463; People v. R. F. Stevens Co. 178 App. Div. 306, 165 N. Y. Supp. 39; People ex rel. Empire State Dairy Co. v. Sohmer, 218 N. Y. 199, L.R.A. 1917A, 48, 112 N. E. 755; Standard Tailoring Co. v. Louisville, 152 Ky. 504, 44 L.R.A. (N.S.) 303, 153 S. W. 764, Ann. Cas. 1915B, 220; Patterson v. New Orleans, 47 La. Ann. 275, 16 So. 815; Muir v. Samuels, 110 Ky. 605, 62 S. W. 481; Murphy v. Bennett, 11 App. Div. 298, 42 N. Y. Supp. 61; Comiskey v. Winston, 179 App. Div. 251, 166 N. Y. Supp. 458; People v. Horn Silver Min. Co. 105 N. Y. 76, 11 N. E. 155; Re Tecopa Min. & Smelting Co. 110 Fed. 120, 3 N. B. N. Rep. 841; Hernischel v. Texas Drug Co. 26 Tex. Civ. App. 1, 61 S. W. 419; Com. v. Keystone Laundry Co. 203 Pa. 289, 52 Atl. 326; Re Rheinstrom & Sons Co. 207 Fed. 118; Re Elk Park Min. & Mill. Co. 101 Fed. 422; Re Wentworth Lunch Co. 86 C. C. A. 393, 159 Fed. 413; Re Capital Pub. Co. 3 McArth. 405; Press Printing Co. State Asses-

sors, 51 N. J. L. 75, 16 Atl. 173; Oswald v. St. Paul Globe Pub. Co. 60 Minn. 82, 61 N. W. 902; State, Evening Journal Asso., Prosecutor, v. State Assessors, 47 N. J. L. 36, 52 Am. Rep. 107, note.

The statute, so far as it applies to employment in an office, is unconstitutional, because the act is broader than its title.

Wenham v. State, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421; West Point Water Power & Land Improv. Co. v. State, 49 Neb. 223, 68 N. W. 507; State ex rel. Graham v. Tibbets, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990; Webster v. Hastings, 59 Neb. 563, 81 N. W. 510; Preston v. Stover, 70 Neb. 632, 97 N. W. 812; Plattsmouth v. Murphy, 74 Neb. 749, 105 N. W. 293; Dinuzzo v. State, 85 Neb. 351, 29 L.R.A. (N.S.) 417, 123 N. W. 309; State ex rel. School Dist. v. Barton, 91 Neb. 357, 136 N. W. 22; Rushart v. Crippen, 99 Neb. 682, 157 N. W. 611; Johnson v. School Dist. 102 Neb. 347, 167 N. W. 210.

Flansburg, J., delivered the opinion of the court:

Defendant, as superintendent of employees of the World Publishing Company, was charged with a violation of the statute prohibiting the employment of women in "manufacturing, mechanical, or mercantile establishment," for more than nine hours a day or in the nighttime after 10 P. M. Laws 1919, chap. 190, title 4, art. 2, § 5. The complaint filed alleged that the World Publishing Company was a "manufacturing, mechanical, or mercantile establishment." The case was tried upon a stipulation of facts, by which it is shown that the said company is a corporation engaged exclusively in publishing and printing a daily newspaper, with morning, evening and Sunday editions, and that the corporation does no job printing or contract work of any kind; that eight women are employed in the mailing room, and they fix the names of subscribers to newspapers by means of a device which moistens a printed name slip, detaches it from a roll, and glues it to the particular paper in question. These women were employed after 10 o'clock P. M., and before 6 A. M.,

which, if the company is found to be within the provisions of the act, is a time when such employment is prohibited. The district court found that the company was not within the act, and dismissed the case. To this ruling the county attorney took exception, and now presents here the sole question of whether or not the newspaper publishing company, in this case, is a manufacturing or mechanical establishment within the meaning of the law.

The courts are not in entire accord on the question of whether or not such a publishing company is a manufacturing establishment within the commonly understood meaning of that term. In State v. Dupre, 42 La. Ann. 561, 7 So. 727, and by dictum in Re Kenyon, 1 Utah, 47, the view is taken that a newspaper is a manufactured product and the publishing house a manufacturing establishment. In its literal sense, it seems to us, the term is hardly capable of that interpretation. Webster's New International Dictionary defines "manufacture" as "the process or operation of making wares or any material products by hand, by machinery, or by other agency; often, such process or operation carried on systematically with division of labor and with the use of machinery."

The work which characterizes the business of publishing a newspaper is the gathering and disseminating of news, the furnishing to subscribers of various kinds of information, the carrying of advertisements, and the writing of editorials and articles on matters of public interest. Machinery and mechanical labor are indispensable, but are only incidental to the carrying on of the main purpose of the business. A newspaper is the product of intellectual effort, not of mechanical labor. That such business is not manufacturing is supported by the following decisions: Oswald v. St. Paul Globe Pub. Co. 60 Minn. 82, 61 N. W. 902; Re Capital Pub. Co. 3 MacArth. 405; State, Evening Journal Asso.,

Prosecutor, v. State Assessors, 47 N. J. L. 36, 52 Am. Rep. 107, note; Press Printing Co. v. State Assessors, 51 N. J. L. 75, 16 Atl. 173.

In the case of *State, Evening Journal Asso., Prosecutor, v. State Assessors*, supra, the court said (page 41 of 47 N. J. L., 52 Am. Rep. 107, note): "It is true that in the production of his papers, which he sells, he employs manual labor and mechanical skill. But so does the sculptor who produces, as the result of his handiwork and genius, the statue; so does the painter who executes his painting with his palette and his brush; so does the lawyer who prepares his brief, or the author who writes a book. But neither the sculptor nor the painter is classified as a manufacturer by reason of his works; nor would the lawyer or the author be regarded as a manufacturer, though they employed a printer—the former to print his brief, and the latter his book. In the ordinary and general use of the word 'manufacturer,' the publishing of a newspaper does not come within the popular meaning of the term. As was said by the court in the case . . . [*Re Capital Pub. Co.* 3 MacArth. (D. C.) 405]: 'No definition of the word "manufacturer" has ever included the publisher of a newspaper, and the common understanding of mankind excludes it. . . . It gives employment to printing presses, types, and editors, and yet, in the whole history of newspapers from the close of the seventeenth century, this word "manufacturer" has never been applied to them or appropriated by them in the whole range of English literature.'"

A newspaper publishing house not being, then, a manufacturing establishment, can it be said to be a mechanical establishment, within the purview of the law?

The definition of mechanical, as given by Webster's New International Dictionary is: "(1) Of, pertaining to, or concerned with, manual labor; engaged in manual

labor; of the artisan class. (2) Of, pertaining to, or concerned with, machinery or mechanism; made or formed by a machine or with tools."

The statute is not directed specifically at mechanical labor wherever the same may be performed, but at all labor performed by women in those institutions only which are to be classed as mechanical establishments. For the general purpose of the law, it was evidently deemed best by the lawmakers to describe in what establishments female labor should be regulated, rather than to attempt to regulate certain kinds of labor in all establishments. Almost all business establishments employ some mechanical element in their operations. The mere fact that machinery or mechanical appliances, or mechanical or manual labor, is used, or found to be employed, does not necessarily characterize the establishment as a mechanical establishment. It seems to us that, before the establishment can be said to be a mechanical establishment, the mechanical element must predominate. In such operations as mining, or in waterworks, where water is pumped and distributed to consumers, or in laundries or repair shops, the mechanical element clearly does predominate, and the products of those enterprises can be readily said to be the products of mechanical effort. Such enterprises, though not manufacturing, would clearly be mechanical in their nature. *Cowling v. Zenith Iron Co.* 65 Minn. 263, 33 L.R.A. 508, 60 Am. St. Rep. 471, 68 N. W. 48; *Ward v. Norton*, 86 Kan. 906, 122 Pac. 881.

On the other hand, in *Mullinnix v. State*, 42 Tex. Crim. Rep. 526, 527, 60 S. W. 768, the court held that the business of photography is not mechanical, the court saying: "In our opinion, this clause of the Constitution does not embrace the calling of a photographer or artist, but more properly refers to mechanics; that is, builders and carpenters. True, a photographer may do some

work with tools of a mechanical character; that is, his business may be partly mechanical. In its broadest sense, a mechanic is anyone who is a skilled worker with tools; but one may have a business which is partly mechanical, such as a farmer, a surgeon, or an artist, and the like, and not be a mechanic."

In the case of *New Orleans v. Robira*, 42 La. Ann. 1098, 11 L.R.A. 141, 8 So. 402, the court said that photography was not a mechanical pursuit, since the mind of the party engaged in the business was chiefly concerned, the hands and body being less so.

What has been said with regard to manufacturing has also some bearing in the interpretation of the word "mechanical," as applied to es-

tablishments. A newspaper cannot be said to be the product of mechanical effort, any more than it can be said to be a manufactured article; nor can it be said that a newspaper publishing house, taken as an entirety, is a mechanical establishment within the meaning of the law.

Master and
servant—hours
of labor—
newspaper
business.

It is our opinion, therefore, that a newspaper publishing house, such as the one here before us, is not one of the institutions where the legislature intended to regulate the hours of employment of women.

The exception taken by the county attorney to the ruling of the District Court is, therefore, overruled.

Rose, J., not sitting.

ANNOTATION.

What employers are within "hours of labor" statutes.

I. In general, 537.

II. Particular statutes:

- a. Manufacturing and mechanical establishments, 538.
- b. Factories and workshops, 539.
- c. Mercantile establishments and shops, 542.
- d. Public institutions, 543.
- e. Public works, 544.
- f. Common carriers, 545.
- g. Miscellaneous, 546.

I. In general.

In determining what employers are within the meaning of statutes regulating hours of labor, it has been said that the statutes should be "read in the light of the general purpose of the legislature in enacting" them. *Com. v. Riley* (1912) 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388, affirmed in (1914) 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469. And, of course, the legislative intent must be determined, and, when determined, is controlling. See *State v. Pacific American Fisheries* (1913) 73 Wash. 37, 131 Pac. 452, affirmed on rehearing in banc in (1913) 76 Wash. 699, 136 Pac. 363, and *Willesden Urban Council v. Morgan* [1915] 1 K. B. (Eng.) 349, [1914] W. N. 454, 84 L. J. K. B. N. S. 373, 112 L.

T. N. S. 423, 79 J. P. 166, 13 L. G. R. 390, 59 Sol. Jo. 148, 31 Times L. R. 93. And see *People v. Transit Development Co.* (1917) 178 App. Div. 288, 165 N. Y. Supp. 114, wherein the court quoted with approval *Schapp v. Bloomer* (1905) 181 N. Y. 125, 73 N. E. 568, 18 Am. Neg. Rep. 186, to the effect that, in construing statutes regulating hours of labor, the courts should endeavor to ascertain their fair and reasonable meaning so as to avoid any construction which would either extend or limit the provisions beyond that which was evidently intended.

So, it has been said that whether or not a particular corporation is an employer within the meaning of a statute relating to hours of labor depends upon what it does, and not upon the purpose declared by its charter, or how the state of incorporation considers it. *UNITED STATES v. BROOKLYN EASTERN DIST. TERMINAL* (reported herewith) ante, 527.

It has been held that a corporation cannot claim exemption from the criminal provisions of an hours of labor law, on the ground that, as such, it is incapable of entertaining a criminal

intent as required by the statute. *United States v. John Kelso Co.* (1898) 86 Fed. 304. The court said: "It will be observed that, by the express language of this statute, there must be an intentional violation of its provisions in order to constitute the offense which the statute defines. In view of this express declaration, it is claimed in behalf of defendant that the act is not applicable to corporations, because it is not possible for a corporation to commit the crime described in the statute. The argument advanced to sustain this position is, in substance, this: That a corporation is only an artificial creation, without animate body or mind, and therefore, from its very nature, incapable of entertaining the specific intention which, by the statute, is made an essential element of the crime therein defined. . . . In a general sense, it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act—that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better-considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act. . . . Of course, there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder, and other offenses, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are, for this reason, never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted

upon a corporation—as, for instance, a fine. In the act of Congress now under consideration, it is made an offense for any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer employed upon any of the public works of the United States, to require or permit such laborer to work more than eight hours in any calendar day. A corporation may be a contractor or subcontractor in carrying on public works of the United States, and as such it has the power or capacity to violate this provision of the law. Corporations are, therefore, within the letter, and, as it is as much against the policy of the law for a corporation to violate these provisions as for a natural person so to do, they are also within the spirit of this statute; and no reason is perceived why a corporation which does the prohibited act should be exempt from the punishment prescribed therefor. If the law should receive the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to a natural person. Such an intention should not be imputed to Congress, unless its language will admit of no other interpretation."

II. Particular statutes.

a. Manufacturing and mechanical establishments.

As to who is a manufacturer within meaning of tax exemption provisions, see annotation following *Louisville v. J. Zinmeister & Sons*, 10 A.L.R. 1273.

It has been held that whether or not a particular person or corporation engaged in manufacturing is within the purview of a statute prohibiting manufacturers from working employees more than ten hours a day must be determined by the facts of the cases as they arise. *State v. J. J. Newman Lumber Co.* (1912) 103 Miss. 263, 45 L.R.A.(N.S.) 858, 60 So. 215, on suggestion of error from (1912) 102 Miss. 802, 45 L.R.A.(N.S.) 851, 59 So. 923.

And in Massachusetts it has been held that a statute regulating the hours of labor of women and children

in manufacturing and mechanical establishments, and requiring the posting of notices of working hours, applies to all manufacturing and mechanical establishments which regularly and permanently employ women and children for full working day, or for any substantial number of hours daily. *Com. v. Riley* (1912) 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388, affirmed in (1914) 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469, holding that notices need not be posted where there is practically no permanent employment.

And in *State v. J. J. Newman Lumber Co.* (Miss.) supra, it was held that a Mississippi statute, prohibiting persons engaged in manufacturing and repairing from working their employees more than ten hours per day, was limited to concerns having an organized force of laborers working with machinery to produce from raw materials the finished product.

The case of *STATE v. CROUNSE* (reported herewith) ante, 533, seems to have been the only one to have passed upon the question whether or not a newspaper publishing company, engaged exclusively in printing and publishing a daily newspaper, is a manufacturing or mechanical establishment within the meaning of a statute regulating the hours of labor for women in such establishments. And the decision to the effect that the statute does not apply to such a company is of especial importance, since the court, in reaching it, expressly states that the test is whether or not the mechanical element predominates in the particular enterprise under consideration, and that the mere fact that machinery or mechanical appliances are used does not necessarily characterize an establishment as a mechanical one.

In *State v. Pacific American Fisheries* (1913) 73 Wash. 37, 131 Pac. 452, affirmed on rehearing in banc in (1913) 76 Wash. 699, 136 Pac. 363, in construing a statute entitled, "An Act to Regulate and Limit the Hours of Employment of Females in Any Mechanical or Mercantile Establishment, Except Establishments Engaged in

Canning Perishable Articles," and which provided that the provisions of the act "shall not apply to nor affect females employed in canning fish," it was held that an establishment engaged in canning fish was not exempt as to females not actually employed in canning fish, but rather engaged in independent work in the establishment, such as lacquering the cans after they had been filled, cooked, and sealed, which lacquering process was for the purpose of preserving the cans from leaks, and which in fact was not done until some considerable time after the actual canning was completed.

And one operating a cottonseed-oil mill engaged in separating cottonseed into its component parts, and giving to those parts new forms which render them suitable for new uses, was held in *Buckeye Cotton Oil Co. v. State* (1912) 103 Miss. 767, 60 So. 775, to be engaged "in manufacturing," within the meaning of a Mississippi statute making it unlawful for any person, firm, or corporation engaged in manufacturing to work employees more than ten hours per day.

And a shop kept by a woman on the second floor of her dwelling, in which from five to ten girls are employed in making dresses, has been held to be a "manufacturing establishment" within the meaning of a statute forbidding the employment of females in such establishments more than eight hours per day. *Hotchkiss v. District of Columbia* (1915) 44 App. D. C. 73, L.R.A.1917C, 922, Ann. Cas. 1918D, 683.

b. Factories and workshops.

In *People v. Transit Development Co.* (1917) 178 App. Div. 288, 165 N. Y. Supp. 114, construing the New York Labor law, which regulates the hours of rest in factories, and defines a "factory" as including any "mill, workshop, or other manufacturing or business establishment, and all buildings, sheds, structures, or other places used in connection therewith, where one or more persons are employed at labor," except "power houses, generating plants," etc., it was held that a subsidiary corporation of a rapid

transit company, engaged in generating and supplying electricity for operation of street cars, etc., was, as regards a machine shop and repair room which it maintained in the basement of its power house, engaged in carrying on a factory within the meaning of the act. The machine shop in question was operated by power, and furnished employment for four or five machinists and their helpers, who were engaged in making small parts, and repairing, assembling, and adjusting broken machines, etc.

On the other hand, in *People v. R. F. Stevens Co.* (1917) 178 App. Div. 306, 165 N. Y. Supp. 39, appeal dismissed in (1917) 221 N. Y. 622, 117 N. E. 1079, which has reargument denied in (1917) 221 N. Y. 667, 117 N. E. 1080, it was held that an establishment for the pasteurizing and bottling of milk was not a "factory," within the meaning of that term as defined in the New York Factory Law.

A considerable number of cases have interpreted the terms "factory" and "workshop," as used in the various English factory and workshop acts. Such cases as have involved the provisions relating to hours of labor follow:

Thus, under the earlier statutes, which defined a "factory" as meaning all buildings and premises wherein steam, water, or other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, articles of metal not being machinery, either separately, or mixed together with any other material, or any fabric made thereof, excepting parts of factories used solely for the manufacture of goods made entirely of any other material than those enumerated, etc., it has been held that an establishment using steam power, where braces and girths were manufactured from webbing and leather, was a "factory," and that the act applied to a room in which there was no machinery, but in which a child was employed in pricking pieces of leather with an awl to be used as part of the articles manufactured in the building.

Taylor v. Hickes (1862) 31 L. J. Mag. Cas. N. S. 242, 12 C. B. N. S. 152, 142 Eng. Reprint, 1100, 6 L. T. N. S. 784, 9 Jur. N. S. 21. A similar conclusion was reached in *Haydon v. Taylor* (1863) 33 L. J. Mag. Cas. N. S. 30, 4 Best & S. 519, 122 Eng. Reprint, 554, 9 L. T. N. S. 382, 12 Week. Rep. 103, in respect to a place where thread was wound on spools by machinery; in *Whymper v. Harney* (1865) 34 L. J. Mag. Cas. N. S. 113, 18 C. B. N. S. 243, 144 Eng. Reprint, 436, 11 L. T. N. S. 711, 11 Jur. N. S. 269, 13 Week. Rep. 440, where steam power was used to operate machinery for the winding or weaving of cotton thread over strips of steel, which were used in making "crinoline skirts;" and in *Palmer's Shipbuilding & Iron Co. v. Chaytor* (1869) L. R. 4 Q. B. (Eng.) 209, 10 Best & S. 177, 38 L. J. Mag. Cas. N. S. 63, 19 L. T. N. S. 638, 17 Week. Rep. 401, to a department of a works comprising blast furnaces, iron rolling mills, engine building, and iron shipbuilding, in which steam machinery was used for cutting and shaping iron plates, and in which iron rivets were heated, both being used in the department.

And under the English Factory and Workshop Act of 1878, which defined a "textile factory" in language similar to that used in the earlier acts, it has been held that premises in which the business of "hooking, lapping, making up, and packing of cloth for exportation" was carried on was a "factory" within the meaning of the act. *Rogers v. Manchester Packing Co.* [1898] 1 Q. B. (Eng.) 344, 67 L. J. Q. B. N. S. 310, 78 L. T. N. S. 17, 62 J. P. 166, 46 Week. Rep. 350, 14 Times L. R. 196, 18 Cox, C. C. 698.

But construing the provision of the Act of 1878, which defines a "nontextile factory" as any premises, etc., wherein any manual labor is exercised by way of trade, or for purposes of gain in or incidental to the making of any article or part thereof, or the altering, repairing, or finishing of any article, or adapting an article for sale by the use of steam, water, or mechanical power, it has been held that premises used solely by wholesale and

retail beer dealers for the washing of bottles by motor-driven rotary brushes, and the bottling of beer by hand, are not a "factory." *Law v. Graham* [1901] 2 K. B. (Eng.) 327, 70 L. J. K. B. N. S. 608, 84 L. T. N. S. 599, 65 J. P. 501, 49 Week. Rep. 622, 17 Times L. R. 474, 19 Cox, C. C. 725. And that the portion of statutory definition of "nontextile factory" which expressly refers to such laundries as are carried on by way of trade, or for the purpose of gain, does not apply to a hotel laundry used for the washing of hotel linen or the clothing of visitors, see *Caledonian R. Co. v. Paterson* (1898) 1 Fraser (Jus. Cas.) 24, 2 Adam, 620, 36 Scot. L. R. 60, 6 Scot. L. T. 194, as set out in 14 Laws of England (Halsbury) p. 437.

And in *James Keith v. Kirkwood* [1914] S. C. (J.) 150, 51 Scot. L. R. 664, 7 Adam, 472, where the first floor of premises occupied by a firm of wholesale and retail grocers, wine merchants, and Italian warehousemen, contained a portable bottle-filling machine used for bottling beer, and the ground floor another machine used for washing bottles, both of which were operated by electricity, it was held, first, that the premises on the first floor were not a "nontextile factory" in respect that the process of bottling beer was neither an "adapting for sale of any article," nor a "manufacturing process;" and, secondly, that the premises on the ground floor were not "bottle-washing works," since the bottle washing was merely incidental to the firm's proper business, the acts under construction expressly applying to "manufacturing process" and "bottle-washing works" carried on with the aid of mechanical power. And that where a building is occupied by a tenant who used the ground floor as a shop, the first floor partly as a shop and stock room, and partly as a millinery room for the trimming of hats, no mechanical power being used, the second floor as a factory for dressmaking, and the third floor as a storeroom, the millinery room is not a factory, or part of a factory, within the English Factory and Workshop Act of 1901,

see *Vines v. Inglis* [1915] S. C. (J.) 18, 52 Scot. L. R. 43.

On the other hand, however, it was held in *Hoare v. Truman* [1902] 71 L. J. K. B. N. S. (Eng.) 380, 86 L. T. N. S. 417, 66 J. P. 342, 50 Week. Rep. 396, 18 Times L. R. 349, 20 Cox, C. C. 174, that premises used for the purpose of aerating and bottling beer, the aerating being done by motor power and the bottling by hand, was a "nontextile factory," the court being of the opinion that the mixing of the carbonic acid gas and beer by mechanical power was adapting it for sale within the meaning of the act. And that to use a grindstone driven by mechanical power in a stone-dressing yard for sharpening the tools of workmen employed in the yard is a process "in aid of" the process of stone dressing, see *Petrie v. Weir* [1900] 2 F. (Ct. Sess.) 1041, 37 Scot. L. R. 795, 8 Scot. L. T. 75, as set out in 14 Laws of England (Halsbury) p. 437.

And under the Act of 1878, which defines a "workshop" as any premises, room, or place, not being a factory, within which, or within the close or curtilage or precincts of which premises, any manual labor is exercised by way of trade, or for purposes of gain in or incidental to the making of any article or part thereof, the altering, repairing, ornamenting, or finishing of any article, or the adapting for sale of any article, and to which, or over which, premises, room, or place the employer of the persons working therein has the right of access or control—it has been held that premises used in the daytime as a retail candy store, and at night for the packing of the candy in ornamental boxes for sale is a "workshop." *Fullers v. Squire* [1901] 2 K. B. (Eng.) 209, 70 L. J. K. B. N. S. 689, 85 L. T. N. S. 249, 65 J. P. 660, 49 Week. Rep. 683.

But in order that any particular work may come within the term "factory," as used in the English Acts regulating the hours of labor in factories, it must be carried on in some particular place or premises. See 14 Laws of England (Halsbury) p. 443, citing, to this effect, *George v. MacDonald* [1901] 4 F. (Ct. Sess.) 190, 39

Scot. L. R. 136, 9 Scot. L. T. 267, which held that a traction engine hauling a threshing machine was not a factory while in transit.

c. Mercantile establishments and shops.

In *People v. Luna Amusement Co.* (1917) 178 App. Div. 797, 165 N. Y. Supp. 832, it was held that a booth 6 feet square, and maintained for the purpose of selling chewing gum, was a "mercantile establishment" within the meaning of the New York Labor Law which regulates hours of labor, and defines a mercantile establishment as "any place where goods, wares, and merchandise are offered for sale." This was upon the theory that chewing gum is a subject of manufacture and sale, and that the dimensions of the shop and the magnitude of the sales cannot determine whether an establishment is within or without the statute. And in *People v. Louis K. Liggett Co.* (1918) 184 App. Div. 937, 171 N. Y. Supp. 44, affirmed without opinion in (1919) 227 N. Y. 617, 125 N. E. 922, it was held that the same provisions construed in the preceding case controlled the hours of labor of a female employed in a pharmacy in selling razor blades.

So, in *Com. v. John T. Connor Co.* (1915) 222 Mass. 299, L.R.A.1916B, 1236, 110 N. E. 301, Ann. Cas. 1918C, 337, a company operating a grocery store, which employed a woman cashier whose duty it was to receive pay from customers and incidentally to do some bookkeeping for more than ten hours per day, was held amenable to a statute providing that no woman shall be employed in laboring in any mercantile, etc., establishment more than a certain number of hours per day, the court ruling that the store was a mercantile establishment, and the fact that the statute also expressly named telegraph and telephone operators as within its inhibition indicated that a liberal meaning should be attached to the phrase "employed in laboring."

But in *Hotchkiss v. District of Columbia* (1915) 44 App. D. C. 73, L.R.A.1917C, 922, Ann. Cas. 1918D, 683, it was held that one maintaining

in her dressmaking shop goods and trimmings for the accommodation of customers, which are sold only for gowns to be made on the premises, was not within a statute forbidding the employment of females in "mercantile establishments," more than eight hours per day.

The English Shop Hours Act of 1892 provided that no young person should be employed "in or about a shop" over a certain number of hours per week, and that, unless the context of the act "otherwise requires," the word "shop" means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed public houses and refreshment houses of any kind." The courts in a number of cases have had occasion to determine what constitutes a "shop" within the meaning of this act. Thus, in *Collman v. Roberts* [1896] 1 Q. B. (Eng.) 457, 65 L. J. Mag. Cas. N. S. 63, 74 L. T. N. S. 198, 60 J. P. 184, 44 Week. Rep. 445, 18 Cox, C. C. 273, it was held that a news shop which employed a boy for a greater number of hours than the statute permitted was a "shop" under the act, although part of the boy's work consisted in fetching newspapers and delivering them outside the shop to customers, the court being of the opinion that such outside work was "in or about" the shop. So, in *W. H. Smith & Son v. Kyle* [1902] 1 K. B. (Eng.) 286, 71 L. J. K. B. N. S. 16, 85 L. T. N. S. 428, 18 Times L. R. 32, 66 J. P. 101, the court was of the opinion that a bookstall at a railway station was a "shop," within the meaning of the hours of labor provisions of the act. And in *Savoy Hotel Co. v. London County Council* [1900] 1 Q. B. (Eng.) 665, 69 L. J. Q. B. N. S. 274, 82 L. T. N. S. 56, 64 J. P. 262, 49 Week. Rep. 351, 16 Times L. R. 148, it was held that a building used solely as a public hotel and restaurant, and which had a license as an inn for the retailing of intoxicating liquors, was a "shop," although it had no bar, and was not, in the ordinary sense of the term, a public house.

And under the English Shop Act of 1912, which regulates hours of labor

in shops, and defines a "shop" as including any premises where any retail trade or business is carried on, and "retail trade or business" as including the sale of refreshments or intoxicating liquors, it has been held that both the grillroom and the kitchen, in a licensed hotel mainly patronized by transients, are shops within the meaning of the act; at least, as regards servants employed wholly or mainly in the serving of transient customers. In this case, however, the court expressed doubt that the hotel itself, as such, was a shop within this act. And in *Wallace v. Dixon* [1917] 2 Ir. R. 236, 51 Ir. L. T. 49, a coal merchant's branch office where orders only were taken, no coal being kept there, was held to be a "shop" within the meaning of the Act of 1912, the court maintaining that the word "shop," as used in the provision of the act under consideration, had an extended and artificial meaning that went beyond the popular and otherwise recognized meaning of the word. And that a bookstall is a shop within the meaning of the English Shop Act of 1912, see *Ward v. W. H. Smith & Son* [1913] 3 K. B. (Eng.) 154, 82 L. J. K. B. N. S. 941, 109 L. T. N. S. 439, 77 J. P. 370, 11 L. G. R. 741, 29 Times L. R. 536. And see *Fyfe v. John Menzies & Co.* [1919] 57 Scot. L. R. 22, which, as cited in *Laws of England* (1920 Supp.) p. 749, involved the sale of tobacco at a railway bookstall. So it has been held that an incorporated company engaged in carrying on business as milliners, fancy drapers, and ladies' outfitters cannot avoid liability for breach of the hours of labor provisions of the 1912 Shop Act, there being nothing in the act excluding incorporated companies. *Evans & Co. v. London County Council* [1914] 3 K. B. (Eng.) 315, 83 L. J. K. B. N. S. 1264, 111 L. T. N. S. 288, 78 J. P. 345, 12 L. G. R. 1079, 30 Times L. R. 509. But this act has been held not to apply to an automatic vending machine, which required no personal attention during the prohibited hours. *Willesden Urban Council v. Morgan* [1915] 1 K. B. (Eng.) 349, [1914] W. N. 454, 84 L. J. K. B. N. S. 373, 112 L. T. N. S. 423, 79 J. P. 166,

13 L. G. R. 390, 59 Sol. Jo. 148, 31 Times L. R. 93. In this case the court said that the purpose of the act was to prevent "the personal serving of customers" during the hours when shop assistants were prohibited from working, and that the machine, therefore, did not violate the spirit of the act. And that a hairdressing department on premises occupied by a large firm of retail drapers and general warehousemen, which department occupied but a small portion of the premises and was maintained primarily for the convenience of customers shopping in the various departments of the warehouse, is not a hairdresser's shop within the meaning of the English Shop Act of 1912, regulating the hours of closing of shops, see *Thomson v. Somerville* [1917] S. C. (Scot.) 3, as set out in *Mews, Ann. Eng. Dig. Supp.* (1918) col. 189.

In *Pinnock v. Aldridge* (1901) 27 New Zealand L. R. 340, as set out in 2 *Labatt's Master & Servant*, p. 2368, it was held that the proprietor of a hotel was not a "hotel keeper" within the meaning of § 15, clause (a), ¶ (ii) of the Shops of Office Act of 1904, which regulated working hours, and that, if he combined with that business the occupation of a restaurant keeper, he came within the provisions of clause (a) ¶ (i), of that section, and was therefore bound to give to each assistant employed in his refreshment room a half holiday in each week, on such day, in the case of each assistant, as he might see fit. Mr. Labatt also states that it was the opinion of the court that the object of the statute was to give to each assistant in all the excepted businesses a half holiday on some day of the week, optional with the employer, but to take away that privilege if the employer combined with the excepted business some other business which fell within the provisions of § 4, and not within the exceptions enumerated in § 15.

d. Public institutions.

In *People v. Chicago* (1912) 256 Ill. 558, 43 L.R.A. (N.S.) 954, 100 N. E. 194, Ann. Cas. 1913E, 305, the Illinois Woman's Ten-hour Law of 1911, which prohibited the employment of females

in any "public institution, incorporated or unincorporated," more than ten hours during any one day, was held to apply to an isolation hospital owned and operated by the city of Chicago.

And in *Burns v. Fox* (1904) 98 App. Div. 507, 90 N. Y. Supp. 254, it was held that a state armory is a state institution within the meaning of the exception to the general labor law of New York, whereby eight hours constitute a day's work, which exception provides that the provisions of the act shall not apply to persons regularly employed in "state institutions."

e. Public works.

In *State v. Atkin* (1902) 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519, affirmed in (1903) 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, construing an act which provided that "eight hours shall constitute a day's work for all laborers," etc., employed "by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality of said state," it was held that it applied to a contractor undertaking to pave a street under a contract with a city, who permitted his employees to work more than eight hours per day in carrying out such contract. And see *Re Dalton* (1899) 61 Kan. 257, 47 L.R.A. 380, 59 Pac. 336, wherein one contracting with a county for the construction of a courthouse and jail was held amenable to the penalties of the same act, he having permitted an employee to work more than eight hours per day in the construction of the building.

And a contractor for the construction of a filtration plant for a city was held, in *Com. v. Casey* (1910) 43 Pa. Super. Ct. 494, to come within a statute providing that eight hours should constitute a day's work for mechanics, workmen, and laborers "in the employ of the state, or any municipal corporation therein, or otherwise engaged on public works," so that he might be convicted for a violation of its provisions.

But a contractor who has let a job for the construction of a city sewer to a subcontractor, and has nothing to do with the work except to see that the

specifications are complied with, has been held not to be an employer of the subcontractor's men, so as to render him liable to prosecution for working them more than eight hours, under a statute prescribing a punishment for anyone violating a provision making eight hours a day's work on all works or undertakings carried on or aided by a municipal, county, or state government, and on all contracts let by them. *State v. Hughes* (1909) 38 Mont. 468, 100 Pac. 610.

So, in *People ex rel. Warren v. Beck* (1894) 144 N. Y. 225, 39 N. E. 80, it was held that a provision of a city charter that a contractor submitting proposals for city work shall bind himself not to accept more than eight hours as a day's work did not apply in any way to the superintendent of a paving company having a contract for street paving, whatever effect it might have on the company itself.

And in *Downey v. Bender* (1901) 57 App. Div. 310, 68 N. Y. Supp. 96, it was held that a statute requiring that no laborer, workman, or mechanic in the employ of a contractor, subcontractor, or other person doing public work shall be employed more than eight hours in any day did not apply to a company furnishing gas and electricity for the state capitol and executive mansion, and which furnished the same commodities for general consumption in the city of Albany and elsewhere.

In *Genilla v. Hanley* (1907) 6 Cal. App. 614, 92 Pac. 752, a contract to construct a sewer in a street, awarded pursuant to a statute requiring the entire costs to be paid by assessments upon contiguous property, and expressly exempting the city from any liability, was held not to be within the provisions of a statute requiring all contracts for public work to stipulate for eight-hour workdays, and providing as a penalty for violation of the stipulation, deduction of a specified sum per day from the moneys due the contractor from the city as a party to the contract. The court said: "There is no contention that the city council ordered the whole or any part of the cost of the work paid out of the mu-

municipal treasury, as it might have done under the provisions of § 26 of the said Street Improvement Act. Indeed, the contract in question contains an express stipulation to the effect that in no case will the city be liable for any portion of the expense of the work. Hence, there could be no money becoming due the contractor from the city, and therefore none which any representative of the city was authorized to withhold and retain as forfeited under the stipulation. While the superintendent of streets may receive and receipt for money paid on account of assessments made upon the lots and parcels of land to cover the cost of the work, he, to such extent at least, acts as the agent of the contractor. It will thus be seen there is no 'representative of the state or political subdivision, party to the contract, authorized to pay to said contractor moneys becoming due to him under the said contract.' Where a duty is prescribed by a statute, and a remedy is therein provided for a breach of such duty, and the remedy is such that it cannot be applied to a particular subject, it is but fair to infer that such subject was not within the view of the legislature when it enacted the statute. In the present case, the legislature, having in the act itself not only fixed the penalty, but provided the manner for enforcing the same in case of a violation of the stipulation, must be presumed to have intended the act to apply to those cases only wherein the penalty could be enforced in the manner designated, namely, by a retention of the forfeitures out of the amount due to the contractor from the political subdivision, party to the contract. It is clear that such remedy is wholly inapplicable to the case at bar."

Under the Federal Eight Hour Law of August 1, 1892, which prohibited a contractor for "a public work of the United States," requiring or permitting any laborer or mechanic employed thereon to work over eight hours in any one day except in case of emergency, it has been held that the construction of a lock and dam across a navigable stream under a contract with the Federal government is "a

public work of the United States," although the consideration was a grant to the contractor of the right to use water in excess of that needed for navigation for the generation of electric power to be sold by it. *Chattanooga & T. River Power Co. v. United States* (1913) 126 C. C. A. 170, 209 Fed. 28. This was upon the theory that the improvement was for the primary public purpose of improving navigation and that the grant of water-power rights was purely incidental. On the other hand, however, it has been held in construing the Federal Eight Hour Law of 1892, which forbids contractors on any public work of the United States to permit or require laborers and mechanics employed thereon to work more than eight hours in any day, except in case of emergency, that one dredging a channel in Boston harbor was not engaged upon a public work within the meaning of the statute. *Ellis v. United States* (1907) 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589. Nor does this act apply to one building barges at his own risk, to be purchased by the government when completed, if satisfactory, although they were built under government inspection. *United States v. Ollinger* (1893) 55 Fed. 959.

f. Common carriers.

A navigation corporation engaged in conducting the usual terminal operations for a number of interstate railroads, including the transportation between its docks and warehouses and points on any of such railroads of all property that is offered, has been held to be a "common carrier," subject to the Federal Hours of Service Act of March 4, 1907, which regulates the hours of labor of employees of common carriers by railroad, engaged in interstate commerce, and defines the term "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, although all the services rendered are per-

formed under contracts with such railroad companies as agents for them, and not on its own account, and all the freight transported is contained only in cars furnished by the railroad companies with which it has contracts. *UNITED STATES v. BROOKLYN EASTERN DIST. TERMINAL* (reported herewith) ante, 527, which reversed (1917) 152 C. C. A. 275, 239 Fed. 287, 15 N. C. C. A. 325.

And again, in *United States v. Atlanta Terminal Co.* (1919) 171 C. C. A. 505, 260 Fed. 779, certiorari denied in (1920) 251 U. S. 559, 64 L. ed. 414, 40 Sup. Ct. Rep. 219, it was held that a terminal company which was incorporated as a railroad company, and had a station and tracks, but no cars or engines, which terminal facilities were used by several interstate carriers under operating orders issued by the terminal company, was a "common carrier" within the meaning of that term as used in the Federal Sixteen Hour Law of 1907.

And it has been held that the Federal statute limiting the hours during which a "common carrier" may keep an employee on duty applies to a receiver appointed by a Federal court for an interstate railroad. *United States v. Ramsey* (1912) 42 L.R.A. (N.S.) 1031, 116 C. C. A. 568, 197 Fed. 144. In reaching this conclusion the court said: "It seems to us clear that . . . Congress, in using the term 'common carrier,' used it in the sense in which such words are generally meant and understood; that the object and purpose of the statute would be entirely defeated, in all cases in which a railroad or other common carrier is

operated by a receiver, if the words 'common carrier' should be given a more restricted meaning than generally understood. It seems clear that a receiver, in the operation of a railroad, is a common carrier within the meaning of the statute; and although he is not personally liable, he is liable in his official capacity, and the payment of any judgment obtained would be subject to the order of the court appointing the receiver, in the exercise of its equitable powers."

g. Miscellaneous.

In *Com. v. Griffith* (1910) 204 Mass. 18, 25 L.R.A. (N.S.) 957, 134 Am. St. Rep. 645, 90 N. E. 394, a general statutory provision that no child shall be employed at work after 7 o'clock in the evening was held to apply to theatrical performances in which a child had a speaking part; and this notwithstanding another statute expressly prohibited the employment of children in a certain class of theatrical exhibitions.

In *Re Martin* (1909) 157 Cal. 60, 106 Pac. 239, it was held that a statute limiting hours of labor in "smelters and other institutions for the reduction or refining of ores or metals," included quartz mills where quartz was crushed and pulverized for the purpose of extracting the ore therefrom.

In *Brown v. Kennedy* (1888) 7 New Zealand L. R. 255, it was held, according to 2 Labatt's Master & Servant, p. 2368, that a manager in charge of an establishment was a "person employing," within the meaning of the (repealed) New Zealand Employment of Females Act of 1881, § 2. G. J. C.

ALLAN FORBES, Trustee in Bankruptcy of Benjamin P. Cheney,
v.

FREDERICK E. SNOW et al., Trustees, etc., et al.

Massachusetts Supreme Judicial Court — June 2, 1921.

(— Mass. —, 181 N. E. 299.)

Bankruptcy — right of trustee to equitable interest of bankrupt.

1. Where one under a will and an agreement of compromise between

those interested therein has an interest which will pass under his will or descend to his heirs, it may be reached in equity, or by his trustee in bankruptcy, and applied to his debts.

[See note on this question beginning on page 552.]

Trust — beneficiary interest — application to debts.

2. The income derived from a trust estate by a beneficiary who has a vested assignable expectant interest therein may be reached in equity and applied to the payment of his debts.

Bankruptcy — right of trustee to aid of equity.

3. The right of a bankruptcy trustee to sell all the property of the bankrupt does not prevent his coming into a court of equity to reach property in possession of the bankrupt's trustees.

REPORT by the Supreme Judicial Court for Suffolk County for determination by the full court of questions arising upon the overruling by a single justice of a demurrer, by defendant Cheney, bankrupt, to a bill filed to obtain possession of his interest in a trust estate for the payment of his debts. *Affirmed.*

The facts are stated in the opinion of the court.

The demurrer to the bill was as follows:

Now comes Benjamin P. Cheney, summoned as one of the defendants in the above-entitled suit, and demurs to the plaintiffs' bill, and assigns as cause of demurrer:

(1) That the plaintiff in his bill does not set forth any equitable grounds upon which to maintain his suit, substantially in accordance with the provisions of Revised Laws, chap. 159, § 3.

(2) That the plaintiff's bill does not allege that the trusts created under the will of Benjamin P. Cheney, late of Dover, deceased, and the compromise agreement relating thereto, approved by a decree of this honorable court, are not valid and existing trusts; further, it contains no allegations that the purposes of said trusts have yet been fulfilled; neither does it appear that the other parties in interest in the trusts have assented to the termination of said trusts.

(3) The plaintiff alleges in his bill that all the property of the defendant Cheney passes to him as trustee in bankruptcy under the provision of the United States statutes relating to estates in bankruptcy; if so, it follows, as a matter of law, that he has full authority to sell any or all of said property, un-

der the supervision of the bankruptcy court.

(4) That the plaintiff is seeking the instructions of this court as to the performance of his official duties, acting under an appointment by a court of superior and general jurisdiction, relative to the administration of an estate of a bankrupt, under the laws of the United States, a subject-matter over which this court has no jurisdiction.

(5) It having been expressly adjudicated by final decree in this court, now in full force and effect, in the suit of Woodard v. Snow, 233 Mass. 267, 5 A.L.R. 1381, 124 N. E. 35, that the income of a child of the testator under the will of Benjamin P. Cheney, late of Dover, deceased, and the compromise agreement thereunder, was a vested interest and subject to assignment, a bill to reach and apply the same cannot be maintained, under the provisions of Revised Laws, chap. 159, § 3, and acts in addition and amendment thereto.

(6) The rights of Woodard and Warren, trustees, having been adjudicated by a decree now in full force and effect, said Woodard and Warren are improperly joined as parties defendant in this suit.

(7) The allegations of the plaintiff's bill as to the defendants State

Street Trust Company, J. R. Whipple Company, and Thomas G. Washburn, respectively, do not allege that the defendant Cheney is indebted to either of them, or that any suits are now pending as against any other party named in this suit; neither do they allege in what court, if any, said suits are pending, or whether they have been terminated by final decree, or what interest of the defendant Benjamin P. Cheney, said State Street Trust Company, J. R. Whipple Company, and Thomas G. Washburn, respectively, seek to reach and apply. The allegations as to all said defendants are too vague and indefinite to warrant their being made parties respondent in this suit.

(8) That with the exception of the assignment of income to Woodward and Warren, trustees, which the plaintiff alleges in his bill was a legal and valid assignment, it does not appear from the allegations in the plaintiff's bill that the alleged assignment made by the defendant Cheney, of his right to receive income, made to Richard Olney and others, trustees under said will, was a legal or valid assignment, or that said assignment is now in force; neither is it alleged in the plaintiff's bill that the further assignment of such income, made to one Herbert P. Queal, was a legal or valid assignment or that said assignment is now in force.

(9) That this court cannot grant the relief prayed for, as it has no jurisdiction to direct a sale of property vested in a trustee in bankruptcy, the control of all matters in the administration of a bankrupt's estate being exclusively vested in the courts of the United States of America.

(10) The trustee in bankruptcy of the estate of Benjamin P. Cheney has no greater or further rights in the principal of the trust fund, under the will of Benjamin P. Cheney, late of Dover, deceased, than the bankrupt. The bankrupt

could not call for a termination of the trust.

(11) The trustee in bankruptcy cannot exercise the power of appointment, that being a personal privilege, and not a property right. If the power of appointment is not exercised, then the principal of the trust fund vests in such person or persons as may be the heirs at law of Benjamin P. Cheney, as of the date of his death, and those persons cannot be determined in his lifetime.

(12) The plaintiff, as an alleged party in interest, seeks an accounting from trustees acting under a will duly probated in the probate court for the county of Norfolk in this commonwealth, and, the probate court being now a court of superior and general jurisdiction, a bill for an accounting under a trust created by will, as far as the termination of said trust, can be had only in the court in which said will was probated, this court having no original probate jurisdiction.

Messrs. Joseph A. Locke, George F. Wales, and Francis L. Maguire, for plaintiff:

The legal title to the trust fund was vested in the trustees under the agreement of compromise under a simple trust, and the right to receive the whole income, as well as the absolute "jus disponendi" of the principal, was in the bankrupt.

Forbes v. Lothrop, 137 Mass. 523; Sparhawk v. Cloon, 125 Mass. 263.

Inasmuch as the compromise agreement, which was created by the bankrupt's own voluntary act, provided that he should retain the benefit and control of his property, the principal can be reached by his trustee in bankruptcy.

Pacific Nat. Bank v. Windram, 133 Mass. 175.

The equitable life estate of the bankrupt, subject to such prior liens as may exist, can be reached and applied by his trustee in bankruptcy, as well as the right of the bankrupt to have the principal of the trust fund, at his death, pass to his estate as general assets; such right constituting a vested interest in an equitable contingent remainder.

Alexander v. McPeck, 189 Mass. 34, 75 N. E. 88.

A trustee in bankruptcy is a creditor and can maintain a bill to reach and apply, or to recover, assets, or to enforce rights belonging to the estate of the bankrupt against persons who claim adversely thereto.

Clarke v. Fay, 205 Mass. 236, 27 L.R.A.(N.S.) 454, 91 N. E. 328; **Boston Safe Deposit & T. Co. v. Luke**, 220 Mass. 484, L.R.A.1917A, 988, 108 N. E. 64; **Sparhawk v. Cloon**, 125 Mass. 263; **Daniels v. Eldredge**, 125 Mass. 356; **Billings v. Marsh**, 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000; **Collier**, Bankr. 10th ed. p. 658.

The bankrupt's rights are determined, not by the will, but by the agreement of compromise.

Woodard v. Snow, 233 Mass. 267, 5 A.L.R. 1381, 124 N. E. 35; **Baxter v. Treasurer**, 209 Mass. 459, 95 N. E. 854; **Brandeis v. Atkins**, 204 Mass. 471, 26 L.R.A.(N.S.) 230, 90 N. E. 861.

Whether or not the plaintiff can call for a termination of the trust, as provided for in the agreement of compromise, so far as it affects the bankrupt, is solely a question of equity to be decided by the court.

Sparhawk v. Cloon, 125 Mass. 263; **Pacific Nat. Bank v. Windram**, 133 Mass. 175; **Forbes v. Lothrop**, 137 Mass. 523; **Young v. Snow**, 167 Mass. 287, 45 N. E. 686.

The bankrupt had the complete equitable interest in the fund, irrespective of the question of whether he or his father created the trust. He could have assigned or alienated the equitable life estate and the equitable fee in remainder, and therefore the plaintiff can reach the principal.

Forbes v. Lothrop, 137 Mass. 523; **Alexander v. Young**, 6 Hare, 393, 67 Eng. Reprint, 1219, 12 Jur. 996; **Barford v. Street**, 16 Ves. Jr. 135, 33 Eng. Reprint, 935; **Daniels v. Eldredge**, 125 Mass. 356; **Sears v. Choate**, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786.

The covenant by the bankrupt to execute a will in favor of all his creditors amounts to a defective execution of a power which equity will aid.

Coates v. Lunt, 210 Mass. 314, 96 N. E. 685; **Montague v. Silsbee**, 218 Mass. 107, 105 N. E. 611; **Holmes v. Coghill**, 12 Ves. Jr. 206, 33 Eng. Reprint, 79, 8 Revised Rep. 323, 21 Eng.

Rul. Cas. 577; **Johnson v. Touchet**, 37 L. J. Ch. N. S. 25, 17 L. T. N. S. 191, 16 Week. Rep. 71; **Townshend v. Windham**, 2 Ves. Sr. 1, 28 Eng. Reprint, 1; **Shattuck v. Burrage**, 229 Mass. 448, 118 N. E. 889; **Cunningham v. Bright**, 228 Mass. 385, 117 N. E. 909.

In any event plaintiff is entitled to reach the equitable life estate and the vested equitable remainder in fee.

Alexander v. McPeck, 189 Mass. 34, 75 N. E. 88; **Woodard v. Snow**, 233 Mass. 267, 5 A.L.R. 1381, 124 N. E. 35; **Clarke v. Fay**, 205 Mass. 236, 27 L.R.A.(N.S.) 454, 91 N. E. 328; **Boston Safe Deposit & T. Co. v. Luke**, 220 Mass. 484, L.R.A.1917A, 988, 108 N. E. 64; **Eaton v. Boston Safe Deposit & T. Co.** 240 U. S. 427, 60 L. ed. 723, 36 Sup. Ct. Rep. 391, Ann. Cas. 1918D, 90; **Billings v. Marsh**, 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000; **Sparhawk v. Cloon**, 125 Mass. 263; **Daniels v. Eldredge**, 125 Mass. 356.

Mr. Samuel M. Child, for defendant **Cheney**:

It having been expressly held that the income under the trusts created by the will of Benjamin P. Cheney, deceased, is assignable by a beneficiary thereunder, the income can be attached in an action at law, and cannot be reached by bill in equity.

Woodard v. Snow, 233 Mass. 267, 5 A.L.R. 1381, 124 N. E. 35; **Hooker v. McLennan**, 236 Mass. 117, 127 N. E. 626.

As the bill contains no allegation that the trusts are not valid and existing trusts, or that the purposes of the trusts have yet been fulfilled, or that the other parties in interest have assented to the termination of the trusts, the trusts cannot be terminated.

Claffin v. Claffin, 149 Mass. 19, 3 L.R.A. 370, 14 Am. St. Rep. 393, 20 N. E. 454; **Young v. Snow**, 167 Mass. 287, 45 N. E. 686; **Dunn v. Dobson**, 198 Mass. 142, 84 N. E. 327.

The trustee in bankruptcy has no greater or further rights in the principal of the trust fund than the bankrupt, there being no allegation in the bill of any unlawful preference, or property fraudulently conveyed.

Bennett v. Aetna Ins. Co. 201 Mass. 554, 131 Am. St. Rep. 414, 88 N. E. 835.

A trustee in bankruptcy cannot ex-

ercise the power of appointment that being a personal privilege, and not a property right.

Crawford v. Langmaid, 171 Mass. 309, 50 N. E. 606.

Where property is given to the personal representative to be distributed under the Statutes of Distribution in force as of the date of the death of the life tenant, it is distributed as a part of the estate of the testator, and not as of the estate of the life tenant.

Alexander v. McPeck, 189 Mass. 34, 75 N. E. 88.

The court in construing similar provisions, in order to carry out the intent of the testator or grantor, has held that the persons who were to take are such as will be fixed at the death of the life tenant, and not those to be determined as of the death of the testator.

Coffin v. Jernegan, 189 Mass. 508, 75 N. E. 958; *Wood v. Bullard*, 151 Mass. 324, 7 L.R.A. 304, 25 N. E. 67; *White v. Underwood*, 215 Mass. 299, 102 N. E. 426; *Carr v. New England Anti-Vivisection Soc.* 234 Mass. 217, 125 N. E. 159; *Crawford v. Langmaid*, 171 Mass. 309, 50 N. E. 606.

De Courcy, J., delivered the opinion of the court:

This bill in equity by the trustee in bankruptcy of Benjamin P. Cheney, against said Cheney and the trustees under the will of Benjamin P. Cheney, Sr., is brought mainly for the purpose of obtaining possession of the interest of the bankrupt in the trust estate, for the payment of his debts. All other beneficiaries and parties interested in the trust, and all prior assignees and attaching creditors of the bankrupt, are joined as defendants. The single justice overruled the demurrer of the defendant Cheney, and reported to the full court the questions raised by the demurrer.

In 1895 Benjamin P. Cheney, father of the bankrupt, died testate. While an appeal was pending from the decree of the probate court allowing the will, a compromise agreement was executed. A single justice of this court on March 27, 1896, found the agreement to be "just and reasonable," and ordered

a decree confirming it. That decree has not been reversed. The 9th paragraph of the agreement of compromise provided that the net income of the residue of the estate should be divided equally among the children of the testator, payment to be made semiannually during the life of each. "And in the event that any child shall die at a time intermediate between said payments, said trustees shall pay to the legal representatives of such child a proportionate part of said income." It further provided for the payment of a proportional share of the principal, upon the death of any child, "to the executor or executors of such deceased child, to be disposed of as provided in his or her will, or, if such child shall die intestate, to his or her legal representatives to pass or be distributed under the Statutes of Descent and Distribution then in force in this commonwealth."

It is alleged in the bill that prior to his bankruptcy the defendant Cheney made certain assignments of his right to receive income; that the annual net income accruing from the interest of said bankrupt at present amounts to about \$32,000; and that there are also outstanding attachments of his interest in the trust estate, made more than four months previous to the filing of the petition in bankruptcy. In the case of *Woodard v. Snow*, 233 Mass. 267, 5 A.L.R. 1381, 124 N. E. 35, where the validity of one of these assignments was in question, it was held that Cheney had "a vested assignable expectant interest in the income," and that "the right of Cheney and the right of the assignee to receive the income of the trust fund was a present, equitable right of ownership which ripened into an ordinary property right when the income, accumulated in the hands of the trustee, became payable under the terms of the trust." It follows that the income, held and to be received by the

trustees of the trusts created under said will and agreement of compromise for the benefit of the defendant Cheney, subject to the rights of said assignees and attaching creditors, can be reached in equity and applied to the payment of his debts.

Under the agreement of compromise the defendant has an absolute right to dispose by will of the trust estate held for his benefit during life. If he should die intestate, this fund will go to his "legal representatives." From similar language used elsewhere in the will and agreement, and from the expressed intention of the testator that "each of said children, his or her executors or legal representatives, may eventually receive an equal share of my estate not given or devised to others than said children," presumably this fund will be treated as general assets of his estate if he should fail to make a will. See *Sargent v. Sargent*, 168 Mass. 420, 47 N. E. 121. In any event, he has the right to receive the whole income, and also the absolute *jus disponendi* of the principal. The vested equitable remainder, as well as the equitable life estate, can be reached in equity under Rev. Laws, chap. 159, § 3, cl. 7 (Gen. Laws, chap. 214, § 3, cl. 7), and applied to the payment of his debts.

Bankruptcy—
right of trustee
to equitable
interest of
bankrupt.

Sparhawk v. Cloon, 125 Mass. 263; *Daniels v. Eldredge*, 125 Mass. 356; *Alexander v. McPeck*, 189 Mass. 34, 75 N. E. 88. See *Shattuck v. Burrage*, 229 Mass. 448, 118 N. E. 889. And his interest can be reached by his trustee in bankruptcy. Bankruptcy Act, chap. 5, § 47a (U. S. Comp. Stat. § 9631); *Clarke v. Fay*, 205 Mass. 228, 236, 27 L.R.A. (N.S.) 454, 91 N. E. 328.

Considering now the specific grounds of the defendant Cheney's demurrer: The first and fifth are disposed of by what has been said. As to the second and tenth, the question whether the plaintiff can call for a termination of the trust, especially without the consent of the defendant, is not before us at this time. See *Young v. Snow*, 167 Mass. 287, 289, 45 N. E. 686; *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786. The right of the trustee in bankruptcy to sell all the property of the bankrupt does not preclude him from coming into this court to

obtain possession of the bankrupt's interests now in the possession of the defendant trustees. This is sufficient answer to the third and fourth. The sixth, seventh, and eighth are answered by the fact that these are necessary parties, as their rights are involved in the suit. The ninth is directed to the administration of the bankrupt's estate, a subject not raised by the plaintiff's bill. The accounting referred to in the twelfth ground is merely incidental to the relief prayed for. The eleventh raises issues that need not now be determined in considering whether the bill is demurrable. Irrespective of the exercise of the power of appointment, the plaintiff can reach and apply certain interests of the bankrupt in the trust fund. We may add that the effect of the defendant's covenant in his agreement of April 10, 1914, with Woodard and others, to execute a will by which his interest should be devised and bequeathed to the protection of all his creditors, is not now before us.

The decree overruling the demurrer of the defendant Cheney is to be affirmed.

Ordered accordingly.

ANNOTATION.

Right of trustee in bankruptcy as regards property held in trust for bankrupt.

I. General trusts, 552.

II. Spendthrift trusts:

- a. In general, 554.
- b. Trusts determinable by bankruptcy, 557.
- c. Trusts determinable on alienation, 558.
- d. Trusts vesting, discretion in trustees, 561.
- e. Under special statutory regulations, 563.

I. General trusts.

It is well settled that where a cestui que trust has a vested interest under a valid trust which is alienable by him, or which can be reached by his creditors, such interest constitutes assets which pass, under the bankruptcy acts, to his trustee in bankruptcy.

United States.—*Nichols v. Eaton* (1875) 91 U. S. 716, 23 L. ed. 254, 18 Nat. Bankr. Reg. 421; *Hammond v. Whittredge* (1907) 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396, affirming (1905) 189 Mass. 45, 75 N. E. 222; *Sanford v. Lackland* (1871) 2 Dill. 6, Fed. Cas. No. 12,312; *Durant v. Hospital L. Ins. Co.* (1877) 2 Low. Dec. 575, Fed. Cas. No. 4, 188, 16 Nat. Bankr. Reg. 324; *Re Dunavant* (1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41, 1 N. B. N. Rep. 542; *Scott v. Cline* (1919) 168 C. C. A. 656, 257 Fed. 706.

Colorado.—*Ury v. Van Every* (1919) 181 Cal. 604, 188 Pac. 985.

Connecticut.—*Loomer v. Loomer* (1904) 76 Conn. 522, 57 Atl. 167.

Kentucky.—*Wallace v. Everett* (1910) — Ky. —, 125 S. W. 745.

Massachusetts.—*FORBES v. SNOW* (reported herewith) ante 546. See *Sparhawk v. Cloon* (1878) 125 Mass. 263.

North Dakota.—*Currie v. Look* (1906) 14 N. D. 482, 106 N. W. 181.

Virginia.—*Smith v. Proffitt* (1887) 82 Va. 832, 1 S. E. 67.

England.—*Stratton v. Hale* (1789) 2 Bro. Ch. 490, 29 Eng. Reprint, 269; *Allen v. Impett* (1818) 2 J. B. Moore, 240, 8 Taunt. 263, 129 Eng. Reprint, 384; *Re Goldney* (1842) 3 Deacon

Bankr. 570, *Mont. & C. Bankr.* 75, 8 L. J. Bankr. N. S. 17.

In *Loomer v. Loomer* (Conn.) supra, in holding that a beneficial interest in a general trust, which interests was wholly unrestrained and under the absolute control of the beneficiary, was alienable so as to pass to the trustee in bankruptcy of the beneficiary, the court said: "The testator's two sons, Lyman H. and Andrew F., at the time of their adjudication as bankrupts, were each, as cestuis que trustent, entitled, under the paragraph of the will in question, to receive one eighth of the net income of the trust estate during the continuance of the trust to pay income as aforesaid, and were each the owner of an equitable remainder in fee in an undivided one eighth of the trust estate, with the right to have the full legal title thereto upon the termination of the trust. It needs no argument to show that, upon the adjudication in bankruptcy of Lyman and Andrew, all their remainder title and interest passed to the trustee in bankruptcy. National Bankrupt Act (Act July 1, 1898, chap. 541, § 70a, 30 Stat. at L. 565, Comp. Stat. § 9654, 1 Fed. Stat. Anno. 2d ed. p. 1150. It is, however, contended that their rights to the income under the trust did not so pass. Whatever may be said upon the much-mooted question as to the legality of so-called spendthrift trusts, it is clear that the trust in question possesses none of the attributes of the trusts so described. The beneficial interests are absolute, and left wholly unrestrained and under the control of the beneficiaries. Such equitable estates, we have repeatedly held, are alienable, and may be subjected to the rights of creditors upon attachment and execution. . . . The equitable interests in question, therefore, passed to the trustee in bankruptcy, who thus, by virtue of the bankruptcy proceedings, came to stand in the shoes of the two bankrupts, as respects their rights un-

der the paragraph of the will in question."

And the right of the trustee in bankruptcy of a beneficiary is not affected by the fact that he for a time is ignorant of the existence of such property of the bankrupt, notice to the trustee not being necessary to complete the title. *Whittredge v. Sweetser* (1905) 189 Mass. 45, 75 N. E. 222, affirmed in (1907) 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396.

And the general rule is not altered by the fact that the trust funds are in accordance with the terms of the trust, being accumulated by the trustee at the time of the bankruptcy, to be paid over when the beneficiary has attained a certain age. *Sanford v. Lackland* (1871) 2 Dill. 6, Fed. Cas. No. 12,312.

And where the trust is created out of the beneficiary's own funds, it has been held that the property passes to his trustee in bankruptcy notwithstanding the trust was created before the Bankruptcy Act was passed, especially if the purpose of the trust was to conceal the property from creditors. *Carr v. Hilton* (1852) 1 Curt. C. C. 230, Fed. Cas. No. 2,436. And for a better reason, where the creation of the trust does not antedate the act. *Currie v. Look* (1903) 14 N. D. 482, 106 N. W. 131; *Smith v. Proffitt* (1883) 82 Va. 332, 1 S. E. 67.

And the previous levy of an execution on an interest in the nature of a resulting trust, and a sale thereunder, do not prevent the trust property passing to the trustee in bankruptcy where, by the law of the state, a resulting trust is not the subject of execution and sale. *Re Dunavant* (1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41, 1 N. B. N. Rep. 542.

Where by express statute lands are held by the government in trust for Indian allottees who are not allowed to alienate the same during the trust period, the interest of an Indian who becomes bankrupt during the duration of the trust does not pass to his trustee in bankruptcy, the Allotment Act not being affected by § 70 of the Bankruptcy Act so as to avoid the inalienation clause of the former. *Re Russi*

(1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6.

In *Hull v. Farmers' Loan & T. Co.* (1917) 245 U. S. 312, 62 L. ed. 312, 38 Sup. Ct. Rep. 103, affirming a judgment entered pursuant to a mandate of the New York court of appeals, issued in (1915) 213 N. Y. 315, 107 N. E. 653, which affirmed (1913) 155 App. Div. 636, 140 N. Y. Supp. 811 (applying the New York rule as to the validity of the trust in question), a suit by a trustee in bankruptcy, it appeared that a testator bequeathed to a trustee the sum of \$50,000, in trust to pay the income to the testator's son during his life, with a remainder over to others, subject to the "wish . . . that my son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of the trust fund." Immediately after the probate of the will the son filed a voluntary petition in bankruptcy and obtained his discharge. Then the trustee named by the will instituted proceedings for a judicial settlement of the estate, in which the son was adjudged entitled to the principal of the trust fund, which was paid over to him. Later the trustee in bankruptcy instituted proceedings against the trustee and the son to recover the principal, claiming that the right to it had passed to him under the Bankruptcy Act. In holding that the trustee in bankruptcy could not recover, the court said: "We need not inquire whether the several propositions of state and Federal law which underlie this contention are correct. This is not a case where a testator seeks to bequeath property which shall be free from liability for the beneficiary's debts. *Ullman v. Cameron* (1906) 186 N. Y. 345, 116 Am. St. Rep. 553, 78 N. E. 1074. Here the testator has merely prescribed the condition on which he will make a gift of the principal. Under the law of New York he has the right to provide, in terms, that such payment of the principal should be made only if and when Francis should have received in bankruptcy a discharge from his debts, and that no part of the fund should go to

his trustee in bankruptcy. The language used by the testator is broader in scope, but manifests quite as clearly his intention that the principal shall not be paid over under circumstances which would result in any part of it being applied in satisfying debts previously incurred by Francis. The Bankruptcy Act presents no obstacle to carrying out the testator's intention. *Eaton v. Boston Safe Deposit & T. Co.* (1916) 240 U. S. 427, 60 L. ed. 723, 36 Sup. Ct. Rep. 391, Ann. Cas. 1918D, 90. As the court of appeals said: "The nature of the condition itself determines the controversy."

But where trust funds because of local laws are inalienable, it has been held that they do not pass to the trustee in bankruptcy of the beneficiary. This conclusion is supported by *Re McKay* (1906) 143 Fed. 671, 16 Am. Bankr. Rep. 238, wherein it was held that the interest of the beneficiary of an express trust of personal property did not pass to the trustee in bankruptcy of the beneficiary where, by the laws and decisions of New York, which were controlling, the right of a beneficiary to compel performance of a trust and receive the income of the personal property is inalienable, and ordinarily the rights and benefits granted cannot be assigned or transferred by the beneficiary.

II. Spendthrift trusts.

a. In general.

It is well settled that in jurisdictions where spendthrift trusts are valid as against creditors, the interest of the beneficiary does not pass to his trustee in bankruptcy. *Spindle v. Shreve* (1880) 9 Biss. 199, 4 Fed. 136, affirmed in (1884) 111 U. S. 542, 28 L. ed. 512, 4 Sup. Ct. Rep. 522; *Eaton v. Boston Safe Deposit & T. Co.* (1916) 240 U. S. 427, 60 L. ed. 723, 36 Sup. Ct. Rep. 391, Ann. Cas. 1918D, 90, affirming (1915) 220 Mass. 484, L.R.A. 1917A, 988, 108 N. E. 64; *Durant v. Massachusetts Hospital L. Ins. Co.* (1877) 2 Low. Dec. 575, Fed. Cas. No. 4,188, 16 Nat. Bankr. Reg. 324; *Billings v. Marsh* (1891) 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000; *Munroe v. Dewey* (1900) 176

Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340, 4 Am. Bankr. Rep. 264; *Brown v. Lumbert* (1915) 221 Mass. 419, 108 N. E. 1079.

Thus, in *Eaton v. Boston Safe Deposit & T. Co.* (1916) 240 U. S. 427, 60 L. ed. 723, 36 Sup. Ct. Rep. 391, Ann. Cas. 1918D, 90, affirming (1915) 220 Mass. 484, L.R.A. 1917A, 988, 108 N. E. 64, supra, it was held that the equitable interest of the beneficiary in a trust created by a bequest of a fund to a trustee to pay the income thereof to the beneficiary during life, "free from interference or control of her creditors," did not pass to the trustee in bankruptcy under § 70a (5) of the Bankruptcy Act, which vests in the trustee all property that the bankrupt "could by any means have transferred," where the local law treats such restriction against interference or control by creditors as limiting the character of the equitable property, and inherent in it, but the Federal Supreme Court, while it affirmed the judgment of the Massachusetts court, which court seemingly was of the opinion that its conclusion would not be altered by the fact, if such it were, that the equitable interest was assignable by the bankrupt within the meaning of the Bankruptcy Act, intimated that this conclusion was broader than was necessary, saying: "If it be true without qualification that the bankrupt could have assigned her interest, and by so doing could have freed from the trust both the fund and any proceeds received by her, the argument would be very strong that the statute intended the fund to pass. There would be an analogy, at least, with the provision giving the trustee all powers that the bankrupt might have exercised for her own benefit (§ 70a (3)), and there would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts. The conclusion that the fund was assignable was based on two cases, and we presume was meant to go no farther than their authority required. The first of these simply held that an executor was not liable on his bond for paying over an

annuity to an assignee as it fell due, when the assignor, to whom it was bequeathed free from creditors, had not attempted to avoid his act. *Ames v. Clarke* (1871) 106 Mass. 573. The other case does not go beyond a dictum that carries the principle no farther. *Huntress v. Allen* (1907) 195 Mass. 226, 122 Am. St. Rep. 243, 80 N. E. 949. It is true that, where the restriction has been enforced, there generally has been a clause against anticipation; but the present decision, in following them, holds the restricting clause paramount, and therefore we feel warranted in assuming that the power of alienation will not be pressed to a point inconsistent with the dominant intent of the will. Whether, if that power were absolute, the restriction still should be upheld, as in case of a statutory exemption that leaves the bankrupt free to convey his rights, it is unnecessary to decide. The law of Massachusetts treats such restrictions as limiting the character of the equitable property in it. . . . The policy of the Bankruptcy Act is to respect state exemptions, and, until the Massachusetts decisions shall have gone farther than they yet have, we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

And again, in *Munroe v. Dewey* (1900) 176 Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340, 4 Am. Bankr. Rep. 264, where the income of certain property was willed to one for life, with the provision that no income or principal should be assignable or alienable by anticipation, or subject to attachment, levy, or seizure by any creditor of the beneficiary prior to his actual receipt thereof, it was held that the trustee in bankruptcy of the beneficiary was not entitled to receive such income from the trustee under the will, the court relying on the decision in *Billings v. Marsh* (1891) 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000, which is set out *infra*, and stating that it saw no ground for a distinction in the words of § 70 of the Bankruptcy Act.

And in *Durant v. Massachusetts Hospital L. Ins. Co.* 2 Low. Dec. 575,

Fed. Cas. No. 4,188, 16 Nat. Bankr. Reg. 324, *supra*, where the income of a fund was left in trust for the support of B and his wife C, and the education and support of their children, the principal and the annuity to be inalienable, and not to be subject to debts, in holding that the trustee in bankruptcy of B could acquire no part of the funds, the court said: "Then the question remains: What interest have the creditors of S. K. Williams, Jr., in this annuity? It was conceded at the argument, and is the law, that whatever Williams could have assigned, or his creditors could have reached by any proceedings in equity, can be made available by his assignee for the payment of his debts. There are cases in which the courts have inferred from the terms of the settlement, or from the situation of the parties, that the beneficiaries were to take equal shares, *per capita*. One of the earliest of these cases is *Rippon v. Norton* (1839) 2 Beav. 63, 48 Eng. Reprint, 1102, but the propriety of the decree in that case was questioned in *Wallace v. Anderson* (1853) 16 Beav. 533, 51 Eng. Reprint, 885, and such an artificial mode of division could not have been contemplated and would not be just, in existing circumstances of this family. There are other cases in which an inquiry has been ordered before a master into the necessities of the wife and children, with an intimation that whatever was not wanted for their support and education would belong to the assignee. Where, however, the trustees have a discretion by which they may deprive the debtor of income altogether, I understand the modern doctrine in England to be that the assignee in bankruptcy will take only, what, if anything, the trustees actually appropriate to the debtor. *Lord v. Bunn* (1843) 2 Younge & C. Ch. Cas. 98, 63 Eng. Reprint, 43; *Kearsley v. Woodcock* (1843) 3 Hare, 185, 67 Eng. Reprint, 348, 8 Jur. 150; *Trappes v. Meredith* (1870) L. R. 10 Eq. (Eng.) 604, reversed on another point in (1871) L. R. 7 Ch. 248, 39 L. J. Ch. N. S. 366, 727, 21 L. T. N. S. 782, 20 Week. Rep. 130. In England, the assignees, in bankruptcy formerly acquired all

the debtor's property, present and future, until his discharge; and even now they take it under his discharge, or the close of the proceedings in bankruptcy, whichever event may first occur; and by the insolvent law, under which some of the decisions were made, his person only was discharged, and the assignee took the whole property until the debts were fully paid. Under this system it was possible for a court of equity to shape its decrees from time to time to meet events as they occurred. If, for example, the children died or were emancipated, and the trusts as to them were accomplished, it could decree a larger amount to the assignee; and, if more children were born, might vary the decree in an opposite sense. But the assignee, under our bankrupt law, takes at once whatever interest is assignable, and must sell it promptly in his turn; and what I have to decide is whether I can decree that any specific part of this annuity has come into his hands to be disposed of in that way. In principal and reasoning, this case, as I have already said, is governed by *Nichols v. Eaton* (1875) 91 U. S. 716, 23 L. ed. 254. There the trustees had a full discretion how to dispose of the income; and it was held that the assignee took nothing. I think the debtor in this case has such a discretion, from the very necessity of the case. The trust does not depend upon the person of the trustee; and I am inclined to think that the supreme judicial court would have power to appoint some other person to receive this income, if it were shown that by reason of his insolvency and its consequences, or for any other reason, the debtor had become unfit to fill the office of trustee; and I think such a new trustee would have a full discretion in the appropriation of the income. If this is not so, but the bankrupt is entitled to some part of this income, yet I think it impossible for any court to say what that part is; for the reason that it may be a constantly varying quantity, and that it would be both impracticable and unjust for me to undertake to decree to the assignee an interest for the life of the bankrupt in any such ali-

quot part. It is plain that, if I cannot do that, I cannot give him anything which will be of value to the creditors. No doubt this amounts to saying that the bankrupt will have some benefit from the trust; but this is the actual result of the English decisions concerning discretionary trusts, which is approved and followed in *Nichols v. Eaton* (U. S.) *supra*. This effect is pointed out by Mr. Robson, in his work on *Bankruptcy*, 3d ed. p. 396, and I do not see how a court can prevent it."

A case presenting a question similar to that raised in the above cases, with the exception that it involved the rights of an assignee in insolvency under a state statute which provided that all the estate, real and personal, of the debtor, shall be conveyed to and be vested in the assignee, is *Billings v. Marsh* (1891) 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000. In this case the will established a life trust in property, and provided that no part of it should be "assignable," or "in any way liable to be taken" for any of the beneficiaries' debts or liabilities before payment, conveyance, or transfer to him; and it was held that the trust interest did not pass to the assignee in insolvency, as such interest was not property which the debtor "could have lawfully sold, assigned, or conveyed, or which might have been taken upon execution."

But where the provision of a trust that it shall not be liable for the debts of the beneficiary is invalid as to creditors, it has been held that the beneficiary's trustee in bankruptcy is entitled to the beneficiary's interest in the trust; provided, of course, that his rights have not otherwise been terminated. *Graves v. Dolphin* (1826) 1 Sim. 66, 57 Eng. Reprint, 503, 5 L. J. Ch. 46, 27 Revised Rep. 166 (holding that the trust might have been made determinable by the bankruptcy, but that the policy of the law did not permit property to be so limited that it shall continue in the enjoyment of the bankrupt notwithstanding his bankruptcy); *Harvey v. Palmer* (1851) 15 Jur. 982, 4 De Gex & S. 425, 64 Eng.

Reprint, 897 (holding that a trust, to be entirely free from claims of creditors of the beneficiary, was invalid as to the proviso, so that the estate passed to the assignee upon the bankruptcy of the beneficiary); *Youngehusband v. Gisborne* (1846) 15 L. J. Ch. N. S. (Eng.) 355, 7 L. T. N. S. 221, 10 Jur. 419 (see case as quoted *infra*). And see *Stratton v. Hale* (1739) 2 Bro. Ch. 490, 29 Eng. Reprint, 269; *Lester v. Garland* (1832) *Montagu Bankr. Cas.* (Eng.) 471; and *Irwin v. Irwin* (1845) 8 Ir. Eq. Rep. 9. In *Youngehusband v. Gisborne* (Eng.) *supra*, in holding that a trust for personal support passed to the beneficiary's assignee in bankruptcy, notwithstanding a proviso in the instrument creating the trust that the trust funds should not be liable for debts or alienable by the beneficiary, the lord chancellor said: "There is no dispute as to the general principle applying to cases of this nature. A person may give property to be enjoyed until a party becomes bankrupt or insolvent, and, in case of the happening of either of these events, then over; but he cannot give a continuing estate, and deprive the party having it of the incidents belonging to the ownership of the property. This is perfectly clear. In the present instance, the trustees are empowered to raise an annuity of £400, and are directed to pay it into the hands of the legatee until he should attempt to charge or encumber it; then to apply the same for or towards the personal support, clothing, and maintenance of the legatee, and for no other purpose whatsoever. The legatee is entitled to the whole benefit of the property; the whole interest and advantage are vested in him. I am therefore of opinion that, under these circumstances, it passes to the assignees. If the cases before Vice Chancellor Shadwell are in contradiction to this, I dissent from them. The judgment, therefore, must be affirmed. The legatee was entitled to the whole interest; though it was to be applied in a particular manner, yet it was in him. I have no doubt about this case."

b. Trusts determinable by bankruptcy.

Where a special trust is, by the ex-

press terms thereof, terminated by the bankruptcy of the beneficiary, nothing passes to his trustee in bankruptcy. *Nichols v. Eaton* (1875) 91 U. S. 716, 23 L. ed. 254, 13 Nat. Bankr. Reg. 421, affirming (1873) 8 Cliff. 595, Fed. Cas. No. 10,241. The court said that in such a case the bankruptcy of the beneficiary terminates all his legal vested rights in the trust estate, and leaves nothing in him which can go to his trustees or assignee in bankruptcy.

And in England it has been held that, where a trust is determinable on bankruptcy, nothing passes to the trustee in bankruptcy. *Graves v. Dolphin* (1826) 1 Sim. 66, 57 Eng. Reprint, 503, 27 Revised Rep. 166, 5 L. J. Ch. 46 (dictum); *Trappes v. Meredith* (1871) L. R. 7 Ch. (Eng.) 248, 41 L. J. Ch. N. S. 237, 26 L. T. N. S. 5, 20 Week. Rep. 180, in the Scotch court of sessions (1871) 10 Sc. Sess. Cas. 3d Series 38, 44 Sc. Jur. 25; *Re Bullock* (1891) 60 L. J. Ch. N. S. (Eng.) 341, 64 L. T. N. S. 736, 39 Week. Rep. 472, 7 Times L. R. 402 (dictum); *Re Ashby* [1892] 1 Q. B. (Eng.) 872, 66 L. T. N. S. 353, 40 Week. Rep. 430, 9 Morrell, 77. And see *Manning v. Chambers* (1847) 1 DeG. & S. 282, 63 Eng. Reprint, 1069, 16 L. J. Ch. N. S. 245, 11 Jur. 466; *Freeman v. Rowen* (1865) 35 Beav. 17, 55 Eng. Reprint, 800; *White v. Chitty* (1866) L. R. 1 Eq. (Eng.) 372, 35 L. J. Ch. N. S. 843, 12 Jur. N. S. 181, 13 L. T. N. S. 750, 14 Week. Rep. 366; and *Re Cooper* (1917) 86 L. J. Ch. N. S. (Eng.) 507, 116 L. T. N. S. 760, [1917] W. N. 145, 61 Sol. Jo. 444, 52 L. T. Jo. 189. But compare *Davidson v. Chalmers* (1864) 33 Beav. 653, 55 Eng. Reprint, 522, 33 L. J. Ch. N. S. 622, 10 Jur. N. S. 910, 11 L. T. N. S. 217, 12 Week. Rep. 592; *Robins v. Rose* (1874) 43 L. J. Ch. N. S. (Eng.) 334, 30 L. T. N. S. 152; *Ancona v. Waddell* (1878) L. R. 10 Ch. Div. (Eng.) 157, 27 Week. Rep. 186, 48 L. J. Ch. N. S. 115, 40 L. T. N. S. 31, and *Re Burroughs-Fowler* [1916] 2 Ch. (Eng.) 251, 85 L. J. Ch. N. S. 550, [1916] *Hansell Bankr. R.* 108, 114 L. T. N. S. 1204, [1916] W. N. 196, 32 Times L. R. 493, 60 Sol. Jo. 538. Also *Lester v. Garland* (1832) *Montagu, Bankr. Cas.* (Eng.) 471.

v. Trusts determinable on alienation.

In England, it has been held that, in the case of a trust expressly determinable on alienation, the trustee takes nothing, since the bankruptcy proceedings work a forfeiture of the trust. *Dommett v. Bedford* (1796) 3 Ves. Jr. 149, 30 Eng. Reprint, 941, 6 T. R. 684, 101 Eng. Reprint, 771; *Brandon v. Robinson* (1811) 18 Ves. Jr. 429, 34 Eng. Reprint, 379, 1 Rose, 197, 11 Revised Rep. 226; *Cooper v. Wyatt* (1821) 21 Revised Rep. 336, 5 Madd. Ch. 482, 56 Eng. Reprint, 980; *Godden v. Crowhurst* (1842) 10 Sim. 643, 59 Eng. Reprint, 766, 11 L. J. Ch. N. S. 145; *Rochford v. Hackman* (1852) 9 Hare, 475, 68 Eng. Reprint, 597, 21 L. J. Ch. N. S. 511, 16 Jur. 212; *Re Amherst* (1872) L. R. 13 Eq. (Eng.) 464, 25 L. T. N. S. 870, 20 Week. Rep. 290; *Ex parte Eyston* (1877) L. R. 7 Ch. Div. (Eng.) 145, 47 L. J. Bankr. N. S. 62, 37 L. T. N. S. 147, 26 Week. Rep. 181; *Re Bullock* (1891) 60 L. J. Ch. N. S. (Eng.) 341, 64 L. T. N. S. 736, 39 Week. Rep. 472, 7 Times L. R. 402 (dictum). And see *Trappes v. Meredith* (1871) L. R. 7 Ch. (Eng.) 248, 41 L. J. Ch. N. S. 237, 26 L. T. N. S. 5, 20 Week. Rep. 180, in the Scotch Court of Sessions (1871) 10 Sc. Sess. Cas. 3d Series, 38, 44 Scot. Jur. 25; *Re Parnham* (1872) 20 Week. Rep. (Eng.) 396, 41 L. J. Ch. N. S. 292. But compare *Re Wheeler* [1899] 2 Ch. (Eng.) 717, 68 L. J. Ch. N. S. 663, 48 Week. Rep. 10, 81 L. T. N. S. 172, 15 Times L. R. 545, 6 Manson, 372.

Thus, in *Dommett v. Bedford* (Eng.) *supra*, where a testator bequeathed to his nephew an annuity for life on a trust conditioned that if the annuity, or any part thereof, should be alienated, it should immediately cease and determine, it was held that the bankruptcy of the beneficiary terminated the trust, so that the assignee in bankruptcy could take nothing.

So, in *Godden v. Crowhurst* (1842) 10 Sim. 643, 59 Eng. Reprint, 766, 11 L. J. Ch. N. S. 145, *supra*, where it appeared that a testator left an estate in trust for his son, making a provision that if the son did anything which would forfeit the estate, if vested, then the trustees should apply the said in-

terest to the support of the son and his wife or children, it was held that the trust for the benefit of the son, wife, and children was valid, and the son's assignees in bankruptcy had no interest in the provision.

And in *Brandon v. Robinson* (1811) 18 Ves. Jr. 429, 34 Eng. Reprint, 379, *supra*, where it appeared that a testator bequeathed property in trust, and directed that the eventual share of a son should be invested in certain securities in the name of his trustees, and that the produce thereof should be paid by the trustees to the son into his own proper hands, etc., to the intent that the same should not be grantable, transferable, or otherwise assignable by way of anticipation, and that on the son's decease the principal and produce thereof should be paid to the persons entitled to the personal estate of the son who had died intestate, Lord Chancellor Eldon said: "There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that, if the property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited. In the case of *Foley v. Burnell* (1782) 1 Bro. Ch. 274, 28 Eng. Reprint, 1125, 4 Bro. P. C. 319, 2 Eng. Reprint, 216, this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley, with the view of depriving the creditors of his sons of any resort to their property; but it was argued here, and as I thought admitted, that if the property was given to the sons, it must remain subject to the incidents of property; and it could not be preserved from the creditors, unless given to someone else. So the old way of expressing a trust for a

married woman was that the trustees should pay into her proper hands, and upon her own receipt only; yet this court always said she might dispose of that interest (*Pybus v. Smith* (1790) 1 Ves. Jr. 189, 30 Eng. Reprint, 294, 3 Bro. Ch. 340, 29 Eng. Reprint, 570; see the notes in 1 Ves. Jr. 194, 30 Eng. Reprint, 297, and 5 Ves. Jr. 17, 31 Eng. Reprint, 451), and her assignee would take it; as, if there was a contract entitling the assignee, this court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before *Miss Watson's Case* that these words, 'not to be paid by anticipation,' etc., were introduced. I believe these were Lord Thurlow's own words; with whom I had much conversation upon it. He did not attempt to take away any power the law gave her, as incident to property which, being a creature of equity, she could not have at law; but, as under the words of the settlement it would have been hers absolutely, so that she could alien, Lord Thurlow endeavored to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation; reasoning thus: That equity, making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it; but the case of a disposition to a man, who, if he had the property, has the power of aliening, is quite different. This is a similar trust. If upon these words it can be established that he had no interest, until he tenders himself personally to the trustees to give a receipt, then it was not his property until then; but if personal receipt is, in the construction of this court, a necessary act, it is very difficult to maintain that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it would not be assets for his debts. It clearly would be so. Next, is there in this will enough to show that, as this interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? To prevent that, it must

be given to someone else; and unless it can be established that this, by implication, amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest capable of being parted with. The principal, at the death of the bankrupt, will be under quite different circumstances. The testator had a right to limit his interest to his life, giving the principal to such person as may be his next of kin at his death, to take it as the personal estate, not of the son, but of him, the testator; as if it was the son's personal estate, but as the gift of the testator."

And in *Cooper v. Wyatt* (1821) 5 Madd. Ch. 482, 56 Eng. Reprint, 980, supra, the vice chancellor said: "The true inquiry in this case is whether, by the expressions used in this will, it can be collected to have been the intention of this testator that the estate should determine as to the nephew in the event of his bankruptcy. Here is no gift to the nephew other than a direction that the payment shall be made into his proper hands, but not to his assigns, and for his own use and benefit; which expressions naturally import an intention of personal enjoyment by the nephew, and the exclusion of all who attempt to claim through him; and in this sense the words 'his assigns' will as well comprehend the assignees by operation of law, as the assignees by his own act. The words of the proviso, if considered alone, are very large: 'If by any ways or means whatsoever he shall sell, dispose of, or encumber the right, benefit, or advantage he may have for life, or any part thereof.' It is no strain to consider his bankruptcy as a way or means by which his interest in this property is disposed of; but this proviso is best construed by reference to the previous direction of payment, because the purpose of this proviso is merely to direct the application of the rents and profits when they can no longer be paid into the proper hands of the nephew, and for his own use and benefit. We may, therefore, read the proviso thus: When my said nephew shall by any ways or means sell, dispose of, or encumber the right,

benefit, or advantage given to him by this will, by which I mean, when the rents and profits can no longer be paid into the proper hands of my said nephew for his own use and benefit, according to my previous direction, then such right, benefit, or advantage shall cease and determine as to him, and be applied for the benefit of his children. Upon the whole, therefore, I think that the true construction of this will is that the testator did intend that the interest of the nephew should cease whenever it could no longer be the subject of his immediate personal enjoyment, and that it did not vest in the assignees under his bankruptcy."

But it has been held that any amount over that necessary for the purposes of the trust passes to the assignee in bankruptcy. *Page v. Way* (1840) 3 Beav. 20, 49 Eng. Reprint, 8, 4 Jur. 600; *Kearsley v. Woodcock* (1843) 3 Hare, 185, 67 Eng. Reprint, 348, 8 Jur. 120.

And in *Lear v. Leggett* (1829) 2 Sim. 479, 57 Eng. Reprint, 867, affirmed in (1830) 1 Russ. & M. 690, 39 Eng. Reprint, 265, it was held that where a trust for life was not subject to alienation, and was subject to a limitation that, if the beneficiary should alienate or attempt to alienate, it should operate as a forfeiture and the provision would devolve upon the next successor, the interest of the beneficiary passed to his assignee in bankruptcy because bankruptcy was not a voluntary alienation, which was contemplated by the will. The vice chancellor said: "This is not a case in which I can hold, on the words of this proviso, that the limitation over took effect; and it appears to me that the cases which have been cited in support of the children's claim do not warrant the argument in their favor. The words of this will must, as in all cases of the like nature, be construed with great strictness. In *Dommett v. Bedford*, the annuity on which the question arose was given by reference to the annuity given to the niece. There the testator gave the annuity to his niece, Anne Ireland, and declared that the same should from time to time

be paid to herself only, and that receipt under her hand, and no other, should be a sufficient discharge for the payment thereof, his intent being that the said annuity, or any part thereof, should not be alienated for the whole term of her life, or for any part of the said term, and that, if the same should be so alienated, the said annuity should immediately thereupon cease and determine. The testator does not say that if the annuity was alienated by the act of the party it should cease; therefore, that is not a case in which the benefit was to go over on an act done by the party. The case of *Cooper v. Wyatt* is totally different from the one now before me. The vice chancellor, in giving judgment, calls in aid of his construction of the proviso, the mode in which the benefit is given to the nephew, and says: 'Here is no gift to the nephew other than a direction that the payment should be made into his proper hands, but not to his assigns, and for his own use and benefit, which expressions naturally import an intention of personal enjoyment by the nephew, and the exclusion of all who attempt to claim through him, and in this sense the words, "his assigns," will as well comprehend the assignees by operation of law, as assignees by his own act.' The judgment, therefore, did not rest on the proviso alone, but on the proviso taken in connection with the limited words of the gift. (His Honor here read that part of the will in this case in which the trusts were declared, and then proceeded.) Now here is a gift totally unlike the gifts in *Dommett v. Bedford* and *Cooper v. Wyatt*. The testator then directs that the gift shall not be subject to any alienation, or disposition by sale, mortgage, or otherwise in any manner whatsoever. Now these words alone do not create any forfeiture. The testator then declares that in case his son or his daughters should charge, or attempt to charge, affect, or encumber, etc. Now all these words refer to a voluntary act of the party, and point out a voluntary alienation, and I am of the opinion that no act has been done in this case which can be said to be a voluntary alienation, or attempt to

alienate, and I must therefore declare that the assignees are entitled to the life interest of Alexander Goudge, the son, in the fund in question." This decision was followed in *Ex parte Pixley* (1889) 6 Morrell (Eng.) 95, 60 L. T. N. S. 710, 37 Week. Rep. 620.

So, in *Green v. Spicer* (1830) 1 Russ. & M. 395, 39 Eng. Reprint, 153, Tamlyn, 396, 48 Eng. Reprint, 158, 8 L. J. Ch. 105, where the trust directed the application of a fund for the benefit of the beneficiary, it was held that his rights pass to his trustee in bankruptcy, notwithstanding a proviso in the instrument creating the trust that the beneficiary shall not have power to sell, mortgage, or anticipate the income of the fund. And see *Metcalfe v. Metcalfe* (1889) L. R. 43 Ch. Div. (Eng.) 633, 59 L. J. Ch. N. S. 159, 61 L. T. N. S. 767, 38 Week. Rep. 397.

d. Trusts vesting discretion in trustees.

Where the beneficiary has no title, legal or equitable, in the property, and no control over the trust, as where his rights rest absolutely in the discretion of the trustees, the property is not subject to the control of creditors, and the trustee in bankruptcy has no rights therein. *Robertson v. Schard* (1909) 142 Iowa, 500, 134 Am. St. Rep. 430, 119 N. W. 529; *Brown v. Lumbert* (1915) 221 Mass. 419, 108 N. E. 1079; *Twopenny v. Peyton* (1840) 10 Sim. 487, 59 Eng. Reprint, 704, 9 L. J. Ch. N. S. 172, 4 Jur. 456. In *Twopenny v. Peyton* (Eng.) supra, it appeared that a trust was created by will and codicil for the maintenance and support of the testator's nephew, and, in holding that his assignees in bankruptcy were not entitled to any interest, the vice chancellor, Sir L. Shadwell, said: "This case is distinguishable from those that have been cited; for, in the first place, there is a gift in the will to the nephew for his life, and then the testatrix, in her codicil, after taking notice that her nephew had become a bankrupt and a lunatic, revokes the bequest for life to her nephew, and directs her executors, during his life, to apply for his maintenance and support, and for no other purpose, the whole of such part of the interest

of that portion of the residue which, by her will, she had bequeathed in trust for him, at such time or times, in such proportions and in such manner as they should, in their discretion, think most expedient. In my opinion, therefore, it would be impossible for the executors to apply the income of the trust fund for the benefit of the nephew generally, or for any purpose beneficial to him, which is not comprehended under the terms 'maintenance and support.' Besides, the executors are not directed to apply the whole of the income for the maintenance and support of the nephew, but only such a proportion of it as they, in their discretion, should think expedient. I am therefore of opinion that, in this case, a trust is created for the mere special purpose of supporting and maintaining the nephew; and under such a trust the assignee cannot take any interest."

And it has been held, under a will vesting an absolute discretion in trustees, that, where they have paid trust funds to the beneficiary under an agreement that he is to repay the same, he may repay the same as against his trustee in bankruptcy, so that the latter cannot recover the same. *Perry v. Avery* (1907) 148 Mich. 211, 111 N. W. 746. And see *Bird v. Johnson* (1854) 18 Jur. (Eng.) 976.

And even where the trust, although in terms determinable by bankruptcy, provides that the trustees in their discretion may pay to the beneficiary such part of the income to which he would have been entitled under the preceding trust, in case the forfeiture had not happened, it has been held that the assignee in bankruptcy of the beneficiary cannot subjugate to his control what comes to the beneficiary after his bankruptcy. This was the conclusion reached in *Nichols v. Eaton* (1875) 91 U. S. 716, 23 L. ed. 254, 18 Nat. Bankr. Reg. 421, affirming (1873) 3 Cliff. 598, Fed. Cas. No. 10,241. In reaching this conclusion, Clifford, C. J., discussed the trust provision under consideration as follows: "It must be assumed throughout that all the rights which the bankrupt had before that

time enjoyed under the will were determined by the bankruptcy. All such rights being determined, the only question is whether he acquired any new rights under that clause, or, in other words, whether the clause vested in the bankrupt any property interest in the income of the trust fund. Carefully examined, the language found in the will is very precise and expressive in its legal effect; so much so, that it may be said to speak its own construction. It is as follows: 'In case, after the cessation of said income as to my said sons respectively otherwise than by death, as hereinbefore provided for, it shall be lawful for any said trustees, in their discretion, but without its being obligatory upon them, to pay or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such parts of the income to which my said sons respectively would have been entitled under the preceding trust, in case the forfeiture hereinbefore provided for had not happened.' Under that clause, no right whatever vested in the bankrupt to any portion of the income, which he could enforce in any court of law or equity. Such a claim cannot be recognized by any court, as the property is held by the trustees under the limitations, in case of bankruptcy, provided in the antecedent clause, and could not pass under those limitations unless some portion of it was paid to, or applied for, the use of the bankrupt, or his wife and children, by the trustees, in their discretion, it being expressly declared by the testatrix that no obligation is imposed upon the trustees to pay any sums to him or them, or to apply a dollar in that direction, the provision being that it is lawful, in the contingency described, for the trustees to do so, but without it being obligatory, showing that it is a mere naked power in the trustees, which vested nothing, either in the bankrupt or his wife and children, which either he or they could enforce under any circumstances. Courts cannot adjudge under that language that such an appropriation is obligatory—that by it the trustees are compellable to

allow a portion of the fund for the use of the bankrupt or his wife and children, as the will provides that it shall not be obligatory upon them to make any such appropriation, and it is not competent for the court to alter the will or to make a new one for the decedent." And in affirming the decision of the lower court, Justice Miller, speaking for the supreme court, said that it was not prepared to adopt "the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors."

But in *Re Ashby* [1892] 1 Q. B. (Eng.) 872, 66 L. T. N. S. 253, 40 Week. Rep. 430, 9 Morrell, 77, it was held that where a trustee, in the exercise of a discretion vested in him, paid more money over to the bankrupt beneficiary for his support and maintenance than was necessary for that purpose, the trustee in bankruptcy was entitled to such surplus. The court said: "I am of opinion . . . that although the presence in this settlement of this discretionary power to the trustees does not make the settlement void as against creditors, and may practically, to a great extent, give the bankrupt the advantage of the forfeited estate, or the advantages which he would have gained as the owner of the forfeited estate, yet, inasmuch as the advantages can only be gained at the discretion of the trustees, . . . if the trustees, in the exercise of their discretion, do pay the rents and profits of this estate to the bankrupt in excess of the amount necessary for his mere support, then the trustee in bankruptcy will be able to profits so received. And one cannot help feeling glad that such should be the result, because it would be a monstrous thing if, notwithstanding the bankruptcy, the bankrupt, at the discretion of the trustees, should substantially go on receiving the same income from this estate which he was receiving before the bankruptcy."

And in *Wallace v. Anderson* (1853) 16 Beav. 533, 51 Eng. Reprint, 885, 21

L. T. 17, assignees in bankruptcy of a beneficiary in a trust, the income from which was payable "in such manner, for the maintenance and support, or otherwise for the benefit," of the bankrupt and the issue of his marriage, as the trustees might think proper, were held to be entitled to any surplus over what was necessary for the maintenance of the issue.

And in *Piercy v. Roberts* (1832) 1 Myl. & K. 4, 39 Eng. Reprint, 582, where the trust funds were made payable to the beneficiary according to the judgment and discretion of the trustees, it was held that such discretion was determined by the insolvency of the beneficiary, so that the funds vested in his assignee. The master of the rolls (Sir John Leach) said: "The question is whether this legacy passed to the assignee of the insolvent upon the insolvency of the legatee, or whether it may remain in the hands of the executors, to be applied, at their discretion, for the benefit of the legatee. The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment."

In *Snowdon v. Dales* (1834) 6 Sim. 524, 58 Eng. Reprint, 690, it appeared that a trust was created by deed for the life of the beneficiary, or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, etc., but so that the beneficiary should not have any right or title to such interest other than the trustees should in their discretion think proper, and so that it should not be subject to the beneficiary's debts, with a further provision for his widow and children on his decease, and, after decease of the beneficiary or widow, accumulations should be in trust for his children, or, if none, in trust for another. The beneficiary became bankrupt. It was held that the beneficiary's assignees in bankruptcy were entitled to his life interest, the vice chancellor, Sir L. Shadwell, saying: "It is plain that the grantor did

intend to exclude the assignees; and that object might have been affected if there had been a clear gift over. But the question is whether there is anything in the deed that amounts to a direction that the trustees shall withhold the payment of the interest and accumulate it, during the lifetime of J. D. Hepworth, if they shall think fit. Although the words, 'savings and accumulations,' as they first occur, might bear that construction, yet, taking the whole of the instrument together, I think that the better construction is that those words do not enable the trustees to withhold and accumulate any portion of the interest during the life of J. D. Hepworth. Declare that the plaintiffs are entitled to the bankrupt's life interest in the £800." And see *Holmes v. Penny* (1856) 3 Kay & J. 90, 69 Eng. Reprint, 1035, 26 L. J. Ch. N. S. 179, 3 Jur. N. S. 80, 5 Week. Rep. 132, wherein such a trust was held void as against subsequent creditors represented by a trustee in bankruptcy. But compare *Trappes v. Meredith* (1871) L. R. 7 Ch. (Eng.) 248, 41 L. J. Ch. N. S. 237, 26 L. T. N. S. 5, 20 Week. Rep. 130 (in the Scotch court of sessions (1871) 10 Sc. Sess. Cas. 3d Series, 38, 44 Scot. Jur. 25).

e. Under special statutory regulations.

Even though a trust income can neither be transferred by the bankrupt beneficiary nor levied on or sold under judicial process, it has been held that where the local law, as in New York, provides that where a trust is created to receive the rents and profits of lands, and no valid direction for the accumulation is given, the surplus beyond the sum necessary for the support and education of the beneficiary shall be liable in equity to the claims of creditors, in the same manner as other personal property which cannot be reached by an execution at law—surplus income, on the bankruptcy of the beneficiary, may be claimed by the trustee in bankruptcy as assets of the estate. *Re Baudouine* (1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55, reversed on question of jurisdiction in (1900) 41

C. C. A. 318, 101 Fed. 574, 3 Am. Bankr. Rep. 651; *Re Tiffany* (1904) 133 Fed. 799; *Brown v. Barker* (1902) 68 App. Div. 592, 74 N. Y. Supp. 43, 8 Am. Bankr. Rep. 450; *McNaboe v. Marks* (1906) 51 Misc. 207, 99 N. Y. Supp. 960, 16 Am. Bankr. Rep. 767 (holding that the surplus income from a trust can be reached only by a creditor's bill).

But a contrary conclusion was reached in *Butler v. Baudouine* (1903) 84 App. Div. 215, 82 N. Y. Supp. 773, 16 Am. Bankr. Rep. 238, note, affirmed without opinion in (1903) 177 N. Y. 530, 69 N. E. 1121, it being held that the surplus referred to in the statute could not be reached by the trustee in bankruptcy of the beneficiary of the spendthrift trust. This was upon the ground that the provisions of the statute were only available to judgment creditors who had exhausted their remedies at law, and that the trustee

in bankruptcy was not within that class.

However, subsequent to this decision, and possibly in view thereof, Congress amended the Bankruptcy Act (Act June 25, 1910), by extending to trustees in bankruptcy the powers of a judgment creditor holding an execution duly returned unsatisfied, and it has been held (*Jenks v. Title Guaranty & T. Co.* (1915) 170 App. Div. 880, 156 N. Y. Supp. 478) that, by virtue of the power so conferred, a trustee in bankruptcy may reach the surplus income held by the trustee of a spendthrift trust. And to the same effect is *Re Reynolds* (1917) 243 Fed. 268, holding that the rights of the trustee in bankruptcy in such a case are not by virtue of § 70 of the Bankruptcy Act, but arise under § 47 as amended in 1910, which gives him the right of a judgment creditor.

G. J. C.

J. T. MUSGRAVE, Appt.,

v.

S. C. MUSGRAVE et al.

West Virginia Supreme Court of Appeals — April 18, 1920.

(86 W. Va. 119, 103 S. E. 302.)

Will — devise subject to oil lease — right to royalties.

Where the owner of a tract of land leases the same for oil and gas development, and dies before any operations are conducted thereon under such lease, leaving a will by which he divides said tract of land into several parcels, and devises to each of his children one of such parcels, and the lessee in such oil and gas lease subsequently produces oil or gas from some of such subdivisions, the present owner of each of the subdivisions from which such oil or gas is produced will be entitled to receive the rents and royalties arising from the production from the subdivision owned by him.

[See note on this question beginning on page 588.]

Headnote by RITZ, J.

(Williams, P., and Poffenbarger, J., dissent.)

APPEAL by plaintiff from a decree of the Circuit Court for Monongalia County sustaining a demurrer to a bill filed to compel an accounting for royalties produced from certain oil and gas wells, and for a division thereof among all the heirs at law of plaintiff's deceased father. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. L. C. Musgrave and William T. George for appellant.

Messrs. Glasscock & Glasscock, Cox & Baker, A. B. Fleming, Charles Powell, and Kemble White for appellees.

Ritz, J., delivered the opinion of the court:

On the 7th of March, 1902, John J. Musgrave, being the owner of a tract of about 335 acres of land, executed an oil and gas lease thereon for the term of ten years from its date, and as long thereafter as oil and gas, or either of them, are produced therefrom, and providing further for the delivery of a certain stipulated proportion of the production to the owner of the land as consideration for the lease. In 1895 he made his will devising this land to his several children. By the terms of the will it was cut up into several different tracts, one of which was devised to each of the children. In December, 1903, he departed this life. His will was duly probated, and his children took the parcels of land devised to them by the terms thereof. Up to this time there had been no development for oil or gas upon the tract of land. Sometime after the death of Musgrave the holder of the lease began development upon one of the subdivisions. The well proved to be a producer, and subsequently several other producing wells were drilled on some of the tracts of land. Upon the part of the farm devised to the plaintiff under the will of his father no development was had. He demanded of the lessee that the royalty derived from the wells drilled upon the whole tract of land be divided among all of the heirs of John J. Musgrave, which demand was resisted by the parties upon whose tracts the wells were located, and denied by the lessee. This suit was thereupon brought by J. T. Musgrave, one of the children of John J. Musgrave, against the other heirs at law and the lessee in the oil and gas lease, to compel an accounting for the royalties produced from the wells upon said land, and a division thereof among all of the heirs at

law of John J. Musgrave. From the decree of the circuit court of Monongalia county sustaining a demurrer to the bill, this appeal is prosecuted by the plaintiff.

It will be observed from the above statement that the sole question presented here is whether the plaintiff is entitled to participate in the distribution of royalties arising from wells drilled upon a parcel of land other than the one devised to him, because of the fact that the lease under which the well is drilled was executed before the land was divided, and included the whole tract. The question was before this court in the cases of *Campbell v. Lynch*, 81 W. Va. 374, L.R.A. 1918B, 1070, 94 S. E. 739, and *Pittsburgh & W. V. Gas Co. v. Ankrom*, 83 W. Va. 81, 5 A.L.R. 1157, 97 S. E. 593. In the former case it was held that, where the owner of a large tract of land leased it for oil and gas development, and died before any work was done under the lease, and his heirs at law partitioned the land among them, the result of any development thereafter upon the land inured to the benefit of all the heirs, regardless of the ownership of the subdivision from which the oil or gas was produced. That decision was by a divided court, and subsequently, when practically the same question was presented in the case of *Pittsburgh & W. V. Gas Co. v. Ankrom*, supra, it was held, likewise by a divided court, that the oil produced belonged to the owner of the tract of land upon which the well was located. In that case a bankrupt owned a large tract of land on which existed a valid oil and gas lease. His trustee in bankruptcy cut this up into a number of small tracts, and sold them, without regard to the oil and gas lease subsisting thereon. Thereafter production was had on some of the subdivisions, and it was claimed by the owners of subdivisions upon which no production was had that they were entitled to participate in the royalties, but it was held that such was not the case; that the owners

of the subdivisions upon which the oil was produced were entitled to all of the royalties. The arguments in favor of the respective positions are fully developed in the opinions and dissenting opinions in these two cases.

The contention is made that when the land was divided at the death of Musgrave, in accordance with the provisions of his will, this did not effect a division of the oil and gas, but that this estate was still held in common, notwithstanding the provisions of the will and the devise of respective parcels of the land to the several children. If this contention is sustained, then at the time of Musgrave's death he owned two estates in the same parcel of realty, to wit, the land itself, and another estate termed the royalty thereon, which, according to all the authorities with which we are familiar, cannot exist. As argued in the opinion in the case of *Pittsburgh & W. V. Gas Co. v. Ankrom*, supra, a party cannot have two different estates in the same land. As soon as two outstanding estates in the same tract of land become vested in one owner, the lesser estate becomes merged in the greater. We think the determination of this case depends upon the answer to the question: What did John J. Musgrave own at the time of his death? He was the owner of the whole 335 acres of land, subject only to the right of the lessee in the oil and gas lease to develop the same for oil. It has been repeatedly held by this court that the holder of an oil and gas lease has no vested estate in the oil and gas in place until development has been had upon the land, and oil and gas produced. At his death each of his children took every interest in the parcel of land assigned to him, respectively, that John J. Musgrave had therein. It cannot be doubted that he (John J. Musgrave) was the owner of the oil and gas underlying this tract of land at the time of his death. The lessee had not developed. No oil or gas had been found at that time, and

the only interest that the lessee had in the property was a mere right to go upon it and prospect for oil and gas. The oil and gas underlying the property were owned absolutely by John J. Musgrave. When he devised a particular parcel of this land to one of his children, that one took in that parcel of land all of the interest that John J. Musgrave had therein, including the oil and gas, and all other minerals underlying it. That oil and gas are minerals, and belong to the owner of the land, cannot be denied. They are the property of him upon whose land they are produced. It is true that it is generally believed, and it may be conceded, that these minerals are more or less vagrant in their character. They do not persist in the same position in the earth at all times, but the owner of land has the right to develop the same for the purpose of producing oil and gas, and, if in the course of this development oil or gas from adjacent lands escapes to his premises, it belongs to him; and, vice versa, if oil or gas which at one time underlay his land escapes, and is produced through wells on adjoining

Will—devise
subject to oil
lease—right to
royalties.

lands, it belongs to the proprietor of such land. This is the conclusion reached by the majority of the court in the case of *Pittsburgh & W. V. Gas Co. v. Ankrom*, supra, and after careful consideration we adhere to that conclusion. It would serve no useful purpose to further elaborate the arguments in support of this contention, as they are fully stated in the *Ankrom Case*, and our attention is not called to any further or other reason in justification or condemnation of the conclusion there reached. As shown by the opinion in that case, the conclusion is supported by the decision of the supreme court of Ohio in the case of *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio St. 259, 67 N. E. 494, 22 Mor. Min. Rep. 647; the supreme court of the state of Arkansas in the case of *Osborn v. Arkansas Territorial*

Oil & Gas Co. 103 Ark. 175, 146 S. W. 122; by the appellate court of the state of Indiana in the case of *Fairbanks v. Warrum*, 56 Ind. App. 337, 104 N. E. 983, 1141. Those cases are reviewed in the opinion in the *Ankrom Case*, and we consider it unnecessary to do more than cite them at this time.

Since the decision in that case the supreme court of Oklahoma has had before it this identical question, and in the cases of *Kimbley v. Luckey*, — Okla. —, 179 Pac. 928, and *Pierce Oil Corp. v. Schacht*, 75 Okla. 101, 181 Pac. 731, that court followed the decision of this court in the *Ankrom Case*, supported by the authorities there cited. It is true the supreme court of Pennsylvania has taken the contrary view in the case of *Wettengel v. Gormley*, 160 Pa. 559, 40 Am. St. Rep. 733, 28 Atl. 934, 18 Mor. Min. Rep. 93, and 184 Pa. 354, 39 Atl. 57, 19 Mor. Min. Rep. 213. We could not agree with the conclusion reached by that court at the time of the decision of the *Ankrom Case*, and after a further careful review of the arguments advanced to support it, we are still of the opinion that the same is unsound.

Finding no error in the decree complained of, the same is affirmed.

Miller, J., concurring:

I fully concur in the opinion of the court in this case as prepared by Judge Ritz, and in the principles on which it is founded as more fully elaborated in the prior opinions of the court to which he there refers. The dissenting opinion as prepared by Judge Poffenbarger, it seems to me, is a labored effort in support of the two theories upon which his opinion in *Campbell v. Lynch*, 81 W. Va. 374, L.R.A.1918B, 1070, 94 S. E. 739, was predicated; namely (1) that, by the execution of an oil and gas lease, the lessor thereby raises or creates in himself a separate and distinct estate or entity called a royalty, which he denominates or characterizes an incorporeal hereditament; (2) that royalty is rent, or an issue out of land like rent, and is

governed by the same principles applicable to rent service. The purpose and object of maintaining these two theories is manifestly to support his contention that the oil in place, burdened with the lease previously executed, did not go to the devisees under the will, although it is conceded that the title to the land did go to them; and, secondly, that the royalty thus reserved out of the oil is rent, and the land, being burdened with the lease at the time the devise took effect, must necessarily be apportioned among the devisees as rent issuing out of the land would go in such cases. These two theories are wholly inconsistent. If we accept the one, the other is destroyed, for it is demonstrated by the dissenting opinion that rent can only issue out of land, and not out of an incorporeal hereditament, as this separate entity characterized as royalty is said to be.

In undertaking to maintain these two inconsistent theories, the dissenting opinion, it seems to me, is its own best refutation.

Poffenbarger, J., dissenting:

Regarding the principle applied in *Campbell v. Lynch*, 81 W. Va. 374, L.R.A.1918B, 1070, 94 S. E. 739, as having been finally approved, adopted, and settled as law in this state, I did not reply to the arguments against our conclusion, set forth in the dissenting opinion, by an extension of, or supplement to, the majority opinion. Indeed, the conclusion, in my opinion, stood so firmly upon reason and authority, and seemed to be so clearly incontestable, that I did not anticipate nor expect the numerous assaults made upon it from different sources, nor any change in the attitude of this court respecting it. By way of dissent from the opposite conclusion arrived at in *Pittsburgh & W. V. Gas Co. v. Ankrom*, 83 W. Va. 81, 5 A.L.R. 1157, 97 S. E. 593, I relied upon my opinion in *Campbell v. Lynch*, and refrained from replication to the arguments and contentions set forth in support of the majority view, because I did not see

anything in it indicative of a change of attitude, since Judge Lynch was represented as entertaining the view that the case was distinguishable in its facts from *Campbell v. Lynch*. I am not disposed now, however, to let the decision in the case last named be overruled without a protest and a full disclosure of what I conceive to be fallacies and invocations of inapplicable principles, found in the dissenting opinion in *Campbell v. Lynch*, the majority opinion in *Pittsburgh & W. V. Gas Co. v. Akrom*, and two cases recently decided in Oklahoma.

Judge Ritz's opinions filed here in these several causes and the opinion delivered in *Kimbley v. Luckey*, — Okla. —, 179 Pac. 928, proceed upon the theory that the right of exploration and severance after discovery of oil or gas, vested by the lease, virtually amounts to nothing until after discovery and severance. That theory is contrary to many express decisions. Indeed, I know of no instance, except those mentioned above, in which it has ever been recognized, countenanced, or applied. This court has decided exactly the contrary in cases too numerous to mention. That right has been the subject-matter of many stubborn controversies settled by adjudication here. In every case in which there has been an effort to get rid of a lease by forfeiture or cancellation, in advance of discovery and production, it has been involved. *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; *Bettman v. Harness*, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500; *Wilson v. Reserve Gas Co.* 78 W. Va. 329, 88 S. E. 1075; *Johnson v. Armstrong*, 81 W. Va. 399, 94 S. E. 753.

Our decisions conclusively affirm that, on the discovery and production of oil or gas, the rights of the parties, in substantial respects, go back by relation to the date of the lease. They say the status of the oil and gas and rights respecting them are fixed and determined as of the date of the lease. In *Koen v. Bart-*

lett, 41 W. Va. 559, 31 L.R.A. 128, 56 Am. St. Rep. 884, 23 S. E. 664, 18 Mor. Min. Rep. 289, an owner of land, after having given an oil and gas lease on it, conveyed it in separate parcels to his six children, reserving an estate in the entire tract for his own life. He had previously conveyed away one half of his royalty. This all occurred before discovery or production of oil. Not quite a year after the date of his deeds to his children he conveyed to strangers the other half of the royalty. The plaintiffs in the case claimed the latter half by purchase from the children and the defendants by purchase from the father. This court held that the defendants were entitled to it, as assignees of the life tenant, saying, "A mine lawfully leased to be opened is an 'open mine.'" Although not opened at the date of the lease, nor at the dates of the conveyances to the children, it was treated as if it had been opened before the life estate began, because, and only because, the lease had conferred upon the lessee right and power to open it. The royalty was the only thing in issue, and right to it, as a thing legally separate and distinct from the land and the freehold estate, was determined as of the date of the lease, a date prior to those of discovery and production. This decision was referred to with approval in *Williamson v. Jones*, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 411, 19 Mor. Min. Rep. 19. It was followed in *Alderson v. Alderson*, 46 W. Va. 242, 33 S. E. 228, involving the claim of a life tenant to royalties arising from a lease of coal, made before the life estate began, and under which mines were opened after it began. Notwithstanding these decisions, it is now intimated, if not asserted, that a mining lease confers only rights of exploration and production, and amounts to nothing until after production has actually taken place.

These decisions directly answer and refute the contention that there can be no such thing as a separate

entity called a rent or a royalty, while the lessor owns both it and the land out of which it arises. In *Koen v. Bartlett*, Kerns created a potential royalty. Then he conveyed the land in fee simple to his children, reserving to himself a life estate. The royalty was not mentioned in the deeds to the children. Although the oil was "adhering to and becoming part of the land," in the language of the Ohio court, seized upon with avidity here and in Indiana, Arkansas, and Oklahoma, his conveyances of the fee-simple title to his children did not carry the royalty. About the time oil was discovered, he executed a deed conveying half the royalty to Bartlett and Brand, and they got it. If it was not a separate or separable thing, and was by law immovably and unalterably fixed and annexed to the fee, how did he retain it after the date of his deeds to his children, and then pass it over to strangers? How could the coal royalty created by the lease made by Mary Alderson survive her and go to her husband, life tenant by his curtesy, if it was not distinct from the fee while she held it. Legally it was the same as the income from an open mine before she died, although the mine was not opened until after her death. In common parlance, royalty has a twofold meaning. In some connections it means coal, oil, gas, or money, produced and delivered or deliverable to the lessor. In others it means the right to have the coal, oil, gas, or money. Its distinct and separate character, in the latter and legal sense, has been recognized by this court in cases holding it to be a subject of compulsory partition. *Smith v. Linden Oil Co.* 69 W. Va. 57, 71 S. E. 167; *Peterson v. Hall*, 57 W. Va. 535, 50 S. E. 603, overruling *Zinn v. Zinn*, 54 W. Va. 490, 46 S. E. 202, denying it such status.

If a royalty is not a separate entity, how can its owner assign or convey it? Nobody, so far as I am aware, has yet denied that its owner can validly dispose of it, or that such royalties are bought and sold daily.

How could an owner of land convey or otherwise dispose of an oil royalty out of it, without having first created it by a lease for oil purposes? If a royalty so created and not disposed of by the owner were claimed and withheld by another party, as having been obtained, when, in law and fact its owner had not parted with it, what would the remedy be? Ejectment or unlawful detainer? Neither of these remedies might be available, if appropriate, because the lessor and lessee might both be in possession of the land, and the claimant of the royalty not in possession of it at all. Would it be a bill in equity to remove cloud from the title? How could that be done? To cancel the lease, if possible, would destroy the royalty, not acquire it. It would put an end to the very thing the plaintiff would be endeavoring to obtain by a decree. Under this ruling made in a few words, without any effort to demonstrate its correctness, and wiping out at one fell swoop all of the holdings of this and all other courts in oil-producing states, that oil and gas royalties are virtually rents and should be treated as rents, a lessor suing the lessee for his royalties need not take any notice of the lease or its covenant to pay the royalty in his pleadings. As the royalty is incapable of existence, and cannot be owned separately from the land or be separated from it, while he owns both, he could do no more than allege and prove his title to the land and the actual severance of the oil or gas, or both, by the defendant; and the court would have to allow him the limit of his demand, provided it did not exceed the value of all the mineral taken out. The old way was to sue on the covenant in the lease, creating an obligation to pay royalty and defining the rights of the parties. Royalties of all kinds are treated as rents and sued for, when necessary, as other rents of similar kind. *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961; *McGraw Oil & Gas Co. v. Kennedy*, 65 W.

Va. 595, 28 L.R.A. (N.S.) 959, 64 S. E. 1027; *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915; *Lawson v. Williamson Coal & Coke Co.* 61 W. Va. 669, 57 S. E. 258; *Aye v. Philadelphia Co.* 193 Pa. 451, 74 Am. St. Rep. 696, 44 Atl. 555, 20 Mor. Min. Rep. 177; *Ray v. Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L.R.A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065, 17 Mor. Min. Rep. 374; *Kissick v. Bolton*, 134 Iowa, 650, 112 N. W. 95.

I have never classed an oil royalty as a rent in the technical sense of the term. It may not be. The right given by the lease to sever and take away the oil may be technically a license, or a profit à prendre. Suppose it is. It is nevertheless an incorporeal right arising or issuing out of the land, just as a rent is an incorporeal right issuing out of land. Hence, in point of general nature, the are alike, and therefore at least analogous. That is all that has been claimed or asserted thus far. If a rent is not a legal entity separate and distinct from the land out of which it issues, for many purposes, all lawyers, judges, and writers who have dealt with the subject, including Blackstone, have been wrong. Blackstone says: "Rents are the last species of incorporeal hereditaments." Bk. 2, p. 41. He also says: "An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like, but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. . . . Their existence is merely an idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or heredit-

ament, which produces them." [p. 20.]

The right given the lessee to sever and take away the oil is also an incorporeal hereditament. *Thornton, Oil & Gas*, §§ 52, 64, 67. By every such lease two such hereditaments are created, one vested in the lessee, and the other in the lessor, and both are legally distinct from the land and oil and gas in place. It is possible that, in addition to the incorporeal right vested in the lessee to take out the minerals and another such right to demand and obtain the royalty, vested in the lessor, the lease creates an estate for years in the lessee; for it gives the lessee the use of the surface for mining purposes, to such an extent as is necessary, or as is contracted for. With these academic questions we are not now concerned, however. The only thing I am combating at this stage of the discussion is the assertion that an oil royalty is not a legal entity distinct from the land and its title. It is a right to a share of the oil taken from the land, not the oil when produced, which is only the product or fruit of the right. A right to rent, whether it be a rent service, with right of distraint, in the absence of a contract giving it, and payable partly or all in services, a rent charge to which the right of distraint is not legally incident, but is made so by contract, or a rent seck, to which distraint does not pertain at all, is an incorporeal hereditament, a substantial right capable of passing by inheritance. Tithes, though payable in corn, grass, hops, wood, milk, pigs, and the like, as well as in money, are such rights. Bl. Com. bk. 2, p. 25.

Of course, the royalty is related to the land and the mineral. Every incorporeal thing must be based upon or grow out of a material subject or body. But, as Blackstone says, the incorporeal right and the material subject out of which it grows, or within which it is exercisable, are not one and the same thing, nor is ownership of the incorporeal right merged in the ownership of the sub-

ject as contradistinguished from a right growing out of the subject. If a man having the right to mine, fish, hunt, or pasture his stock on another's land becomes the owner of the land, there is a merger, of course. But, if a man owning land has a right to rent or other compensation for its use by some other person, there is no merger. To hold that there is a merger in such case would make the existence of the collateral right impossible. There could be no such thing as a right to rent accruing from the use of land to the owner of the land. While the rent or royalty grows out of the land, it is a right collateral to the land, created by contract, and, in the absence of a severance, attendant upon the ownership of the land. It is a collateral, legal right owned ordinarily by the owner of the land. It is not a part of his title to the land, or of his estate in the land, and is not an estate in the land. His ownership of the incorporeal right is an estate in that right, not in the land in which he has another and different estate. The owner has in the land what is called an estate in reversion, and it may be after an estate for life, years, or at will. Bl. Com. bk. 2, p. 176. "And hence the usual incidents to reversions are said to be fealty and rent. . . . Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent, by special words; but by a general grant of the reversion the rent will pass with it as incident thereunto, though by the grant of the rent generally the reversion will not pass. The incident passes by the grant of the principal, but not e converso." Bl. Com. bk. 2, p. 176. This is precisely the manner in which oil royalties and lands out of which they issue are handled daily all over this country, and yet a majority of this court, in the face of this common experience, and in the face of this text from the greatest law book ev-

er written, solemnly affirm that an oil royalty is not a distinct legal entity, and that the owner of the minerals, the reversioner, cannot own it separately from the land.

In an effort to sustain the attempt to do away with the legal existence of the royalty by the manifestly inapplicable doctrine of merger or otherwise, the holding in *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915, to the effect that a grant or reservation of the royalties for all time to come carries title to the oil in place, is invoked. That is a perfectly sound proposition. The deed involved in *Updegraff v. Blue Creek Coal & Land Co.* 74 W. Va. 316, 81 S. E. 1050, was construed, improperly, as I think, as reserving all future royalties, not merely the royalty to accrue from the lease then on the land. Nobody, so far as I am advised, has ever claimed a grant or reservation of the royalty provided by a particular lease, limited in time, amounts to or implies a grant of the minerals out of which the royalty is to arise. When the grant, exception, or reservation includes all that may ever arise, it carries the title to the mineral only by necessary implication, not by express words, because it carries the entire beneficial use of the oil. A grant of all rents, issues, and profits of land will include the land itself, for the same reason and in the same way. *Jarman, Wills*, 741; *Weakland v. Cunningham*, 3 Sadler (Pa.) 519, 7 Atl. 148. But that does not argue that the rents, issues, and profits and the land out of which they come are identical or inseparable, nor that they are merged in the land. By disposing of them completely and for all time, and clothing the grantee with the entire beneficial use of the land, by conferring upon him all the rights and uses that can arise out of it and to which it is adaptable, the grantor passes the land itself by necessary implication. Only the royalty provided for by the lease existing at the date of the division of the land is involved here. That lease might

have expired or been surrendered and the royalty thus made fruitless, or it may yet come to an end, leaving oil in the lands. Nobody pretends that any other royalty is involved, and no decision of this court asserts that the grant of a particular royalty will pass title to the mineral. None of the parties to the lease involved here has made any grant or reservation of royalty that we have anything to do with. The land is the only thing that has changed in ownership.

Although here and in practically all other oil-producing states, an oil royalty is often called rent and treated as rent, and the relation between the lessor and the lessee as that of landlord and tenant after discovery and production of oil, the cases holding the contrary of the doctrine enunciated and applied in *Campbell v. Lynch* are interpreted as having treated the royalty as pay for the oil taken out. Manifestly it is that, but it is just as clearly something more than that. Besides paying for the oil taken out, it holds the lease on all of the land and oil included within its boundaries. It maintains the lessee's right to carry his operations to every part of the tract, and precludes operation or mining on any part of it by the owner and everybody else except assignees of the lessee. How, then, can it be said to be only pay for the oil taken out? A full and true definition of anything must accord fully with its nature and characteristics. "A definition is a description of a thing by its properties or a conception by its attributes." Webster. As a royalty does more in law than pay for the oil taken out, a description of it calling it pay for oil taken out is true as far as it goes, but it stops short of revelation or narration of its complete nature and character. Any intelligent layman on the street knows it does more than that; and no lawyer can maintain his client's case in any court, upon the proposition that the royalty only pays for the oil taken out. He could not do so here, unless we are ready

to overrule *Harness v. Eastern Oil Co.* 49 W. Va. 232, 38 S. E. 662, and *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A.(N.S.) 848, 76 S. E. 961, both of which distinctly hold the royalty from one well anywhere on the lease sustains the lessee's right over all the leased land. It is so held everywhere in Ohio, Indiana, Arkansas, and Oklahoma, whose courts seem to say it only pays for the oil taken out.

A note found in 31 *Harvard L. Rev.* 882, saying at page 886, "although the reasoning in *Campbell v. Lynch* does not correspond to the true nature of these royalties, the result reached by the court is sound," argues that a royalty is not a rent, and cites Ohio, Indiana, and Arkansas cases as holding it to be only pay for the oil taken out. The editor's failure to analyze that proposition in his note may be attributable to an impression made upon his mind by the text he quotes from Kent's *Commentaries*, saying rent must issue out of lands, and cannot issue out of a mere privilege or easement, and from Coke upon *Littleton*, saying it cannot be granted out of "a piscary, common, advowson, and such like incorporeal hereditaments." Of course not. But the royalty does not come out of the privilege granted by the lease. It is compensation for the privilege, if the lease creates only a privilege in the lessee. The privilege is an incorporeal hereditament exercisable in the land, and the royalty is an incorporeal hereditament issuing out of the land and compensating the owner for its use or for the incorporeal right. The definitions quoted would preclude the lessee from creating a rent out of his incorporeal right, but they no more preclude the landowner from taking a rent for the burden put upon his minerals by the granted right than they would preclude him from taking a rent to compensate him for an agricultural lease. The one issues out of the land as truly and clearly as the other.

The theory that royalty is only

pay for the oil taken out seems to rest partially upon the view that the lessee's right is a license to go upon the land and take the oil and pay for it. That view is wholly untenable. His right is everywhere held to be assignable; wherefore it must necessarily be either an estate in the land or an hereditament. No mere license is assignable. *Power v. Tazewells*, 25 Gratt. 786; *Hodgson v. Perkins*, 84 Va. 706, 5 S. E. 710, 16 Mor. Min. Rep. 116; *Barksdale v. Hairston*, 81 Va. 764; *Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co.* 134 N. Y. 435, 31 N. E. 874; *Ruggles v. Lesure*, 24 Pick. 187; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248, 9 Mor. Min. Rep. 332; *Pearson v. Hartman*, 100 Pa. 84; *Howes v. Ball*, 7 Barn. & C. 481, 108 Eng. Reprint, 802, Mann. & R. 288, 6 L. J. K. B. 106, 31 Rev. Reports, 256, 25 Cyc. 644. It can neither be assigned, sold, conveyed, devised, nor inherited. *Washb. Real Prop.* § 842; 17 R. C. L. p. 575. An oil lease can be. An unexecuted license is always revocable, even though money may have been expended on the faith of it. 25 Cyc. 646, citing many cases sustaining the text; *Washb. Real Prop.* § 841; 17 R. C. L. p. 576. A license carried into execution merely justifies the acts done under it up to the date of revocation. *Washb. Real Prop.* § 839. Payment of a valuable consideration for a license does not render it irrevocable. 25 Cyc. 649. A license coupled with an interest or annexed to a grant is not revocable, because it is part and parcel of the interest or grant. 25 Cyc. 649; 17 R. C. L. p. 576. Licenses executed by large expenditures of money, and relied upon in important alterations of conditions, are converted into grants or contracts of sale and cease to be revocable, because they become more than mere licenses. 17 R. C. L. p. 579; 25 Cyc. 647. The better opinion is that a parol license is revocable under all circumstances, however great the resulting injury. *Pifer v. Brown*, 43 W. Va. 412, 49

L.R.A. 497; 27 S. E. 399, 25 Cyc. 647.

"It is an ancient and well-settled doctrine of the common law that a mere license, whether by deed or by parol, is revocable at pleasure, unless coupled with an interest or grant, or unless it is executed, or according to the rule in many jurisdictions, unless, by reason of expenditures made by the licensee on the strength of the license, it would be otherwise inequitable to permit the licensor to effect a revocation." 17 R. C. L. p. 576.

The clearest and best statement of the nature, elements, and qualities of a license I have found is given by Alderson, B., in *Wood v. Leadbitter*, 13 Mees. & W. 838, 153 Eng. Reprint, 351, 16 Eng. Rul. Cas. 49, from which I quote: "In the course of his judgment the Chief Justice says (*Vaughan*, 351): 'A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm himself, as to the actions of eating, firing my wood, and warming himself, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property.' Now, attending to this passage, in conjunction with the title 'License' in

Brooke's Abridgment, from which, and particularly from ¶ 15, it appears that a license is in its nature revocable, we have before us the whole principle of the law on this subject. A mere license is revocable; but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may further be observed that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a valid grant, and is therefore revocable. Thus a license by A to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be, as put by Chief Justice Vaughan, a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land; and, supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on the lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the

construction of the deed, whether it amounted to a grant of the watercourse, and, if it did, then the license would be irrevocable."

Now, if the right conferred by an oil and gas lease carried title to the oil and gas in place, it would also give an irrevocable license to enter upon the land and sever it and take it away. In that case, it would be a license annexed to the grant or coupled with an interest. But, if the oil and gas are not granted by the lease, the license to enter and take it away is revocable, although created by the deed called the lease. But it makes no grant of the oil and gas. By all of our decisions and by the weight of authority everywhere, it is held that the lease passes no title to the oil and gas in place. My opponents in this controversy all admit that the oil and gas belong to the lessor, and build their structure upon that proposition.

As the right of the lessee in an oil lease is exclusive, whereas a license is generally not (*Power v. Tazewells*, 25 Gratt. 786), and is assignable, devisable, heritable, and irrevocable, it is clearly not a license. It is manifestly more than a license. It is at least an incorporeal hereditament, and, according to almost uniform holdings, it is a conditional estate for years in the oil and gas sands and strata of the land, and in so much of the surface as is necessary to the operation of the wells, or as is included in the contract between the lessor and the lessee. If it is a profit à prendre, as suggested in *Harvard L. Rev.* it is a right in the nature of an estate in the land. "A right of profit à prendre when in gross is an inheritable and assignable interest, partaking of the nature of an estate in the land itself." *Jones, Easements*, § 52, citing many English and American cases sustaining the text. And it is an incorporeal hereditament, not a mere license. *Id.* § 49. It is a right collateral to and based upon the land, not an estate in the land. In that right, as contradistinguished from the land and its title, there

may be an assignable and inheritable estate for life, for years, or for any definite or indefinite term. *Id.* § 52. Hence, a grant of any part of the land to which it relates, or in which it is exercisable, is not essential to its creation, although, in the exercise thereof, portions of the land are taken or consumed. If it is exclusive, extends to all of the minerals of a certain kind or certain kinds, and gives an estate in fee simple in the right, it is equivalent to a grant of the minerals, for it passes the whole beneficial interest therein, just as a grant of all rents, issues, and profits of land in fee simple or forever is equivalent to a grant of the land. *Higgins v. Round Bottom Coal & Coke Co.* 63 W. Va. 218, 59 S. E. 1064. It passes the title by construction only, upon the theory of necessary implication. But, if it is granted only for life or for years, in terms or by construction, it is not the equivalent of a grant of the minerals in place. *State v. South Penn Oil Co.* 42 W. Va. 80, 24 S. E. 688.

If the right conferred by such a lease is only an incorporeal hereditament, as contradistinguished from an estate for years in the oil-and-gas-bearing strata of the land, the royalty is nevertheless so much like rent that it is always regarded and treated as rent. Of a lease of land for the making of brick out of its soil, Lord Chief Justice Denman said, in *Reg. v. Westbrook*, 10 Q. B. 178, 116 Eng. Reprint, 69, 22 Eng. Rul. Cas. 623: "We come, then, to the bare objection that the royalty is paid, not for the renewing produce of the land, but for several portions of the land itself, mixed up with foreign matter. The expense of this, however, must, of course, have been cast off before the royalty itself was fixed. That was a sum which, after all such expenses paid, the occupier could afford to render to the landlord. When the case is thus laid bare, there is no distinction between it and that of the lessee of coal mines, of clay pits, of slate quarries. In all these the occupa-

tion is only valuable by the removal of portions of the soil; and, whether the occupation is paid for in money or kind, is fixed beforehand by the contract, or measured afterwards by the actual produce, it is equally in substance a rent. It is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows. This would not admit of an argument in an agricultural lease, where the tenant was to pay a certain portion of the produce; that would be admitted to be in all respects a rent service, with every incident to such a rent; and in *Daniel v. Gracie*, 6 Q. B. 145, 115 Eng. Reprint, 56, 13 L. J. Q. B. N. S. 309, 8 Jur. 708, we held the same with regard to a marl pit and brick mine, as the parties termed it, where the render was of so much per cubic yard of the marl dug, and so much per thousand of the bricks made."

In *Rex v. Mirfield*, 10 East, 219, 103 Eng. Reprint, 758, Lord Chief Justice Ellenborough treated a return for salable underwood, payable every twenty-one years, and on the cutting of the underwood, as rent, although the right to cut it may have been and probably was only an incorporeal hereditament, and not an estate in the land. In *Daniel v. Gracie*, *supra*, referred to in *Reg. v. Westbrook*, the nature of the return or compensation came up in a technical way, on the right of distraint for rent; and Lord Denman so recognized it, saying: "And the question is whether, in this case, rent is reserved for which a distress lies. That land was the subject of demise was, we believe, hardly questioned in the argument. Indeed, from the nature of the thing, the work in the mines or pits could not be prosecuted by the plaintiff at all, without taking land in proportion to the extent of the operation."

The action was in replevin by the lessee against the lessor, and based upon the theory that the plaintiff was not the tenant of the defendant, and the compensation he was to pay

was not rent; wherefore his goods were not liable to distress, and had been wrongfully taken. Upon the theory that he was a tenant and his goods liable to distress, a verdict for the defendant was permitted to stand. In the opinion there is a quotation from Lord Coke saying: "And the rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, etc., or other profit that lieth in render, office, attendance, and such like, as in payment of money."

In *Rowls v. Gells*, Cowp. pt. 2, p. 451, 98 Eng. Reprint, 1182, the royalty of lead mines was payable in kind, and Lord Mansfield said: "But, as such obligatory payment is in respect of the land, the landowner ought not to receive it clearer or neater than any other part of his estate."

Note that he says it is "payment in respect of the land." Then it issued out of the land, and comes within the essential and basic requirement of rent, although the mining right compensated for by it may not have been an estate in the land or the minerals. See also *Rex v. St. Agnes*, 3 T. R. 481, 100 Eng. Reprint, 688. On the same principle a return or compensation for right to fish in a pond or to hunt on land may be a rent, although all authority says it is not an estate in the land, and is only an incorporeal right. Our decisions and the courts everywhere say the delay or commutation money paid by a lessee in an oil lease, while his right in the land extends only to exploration or hunting for oil instead of game, is rent. *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95, 19 Mor. Min. Rep. 326; *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114; *Smith v. South Penn Oil Co.* 59 W. Va. 204, 53 S. E. 152.

Our decisions are not definite and positive in terms as to the character of the lessee's right under an oil and gas lease. Perhaps in no instance has there been necessity for an accurate definition of it until the inquiry now under consideration arose. In *State v. South Penn Oil*

Co. 42 W. Va. 80, 24 S. E. 688, it was necessary to determine its character for purposes of taxation, and it was there held not to be title to the oil and gas in place. The court called it, in its inception—that is, before discovery—a privilege, liberty, or license to dig and remove the minerals. It is further said that, after discovery and by production, the lessee acquired no estate either in land or minerals, but only "the right, for a limited period, to work the land for oil." By all authority that right to work the land for oil has a legal status. Being more than a mere license, as shown, it must be either an incorporeal right to dig and take away the oil, or an estate in the land, either absolute or conditional, and it may be either. In neither case would it carry title to the oil in place, unless it amounted to a grant in fee. It could be an estate in the oil or the land for years, without vesting title to the oil in place in the lessee. A mere tenant of any kind does not take title to the land, nor, unless he has a freehold, is it assessed to him for taxation. Later cases declare the lessee's right to produce oil, after discovery, is a vested right. *Lowther Oil Co. v. Miller-Sibley Oil Co.* 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. W. 433, 22 Mor. Min. Rep. 656; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315. But they do not define the right in terms. They leave it a nameless right. But it is defined by the treatment accorded it in many decisions here and elsewhere. It may be terminated by abandonment or surrender as an estate for years may be terminated. *Sult v. A. Hochstetter Oil Co.* 63 W. Va. 317, 61 S. E. 307; *Henne v. South Penn Oil Co.* 52 W. Va. 192, 43 S. E. 147; *Steelsmith v. Gartlan*, *supra*; *Parish Fork Oil Co. v. Bridgewater Gas*

Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145. While an easement, one form of incorporeal hereditament, may be lost by abandonment, it requires much stronger evidence and a more conclusive state of facts to make out loss or extinguishment of such a right than in the case of an estate for years. Mere nonuser of right to dig ore from the land of another, continuing over a period of forty years, has been held not to have wrought an abandonment of it. *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176. The cesser of use must be accompanied by acts clearly indicating intent to abandon the right. *Jones, Easements*, § 863. Mere failure to prosecute the work of mining under our oil leases, after discovery of oil, amounts to an abandonment of the lease. *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961; *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220; *Lowther Oil Co. v. Miller-Sibley Oil Co.* 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 606; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; *Henne v. South Penn Oil Co.* 52 W. Va. 192, 43 S. E. 147.

The stress sometimes laid upon the holding that, until discovery of oil, the lessee has only an inchoate or contingent right of exploration, does not signify much when the relation between the lessor and lessee is examined in the light of the law of estates and of landlord and tenant, and the incompleteness of the right fits into that law perfectly. There may be a grant of an estate for years and yet no relation of landlord and tenant, no tenancy, although one is contemplated and provided for. However definite and complete the contract, there is no tenancy until the grantee enters upon the land and begins the work or use for which it was demised to him.

16 A.L.R.—37.

Tiffany, Land. & T. p. 290, § 37. The purpose of an oil lease is production of oil. When that begins, there is, according to our decisions and the weight of authority, a tenancy on the part of the lessee. *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, 17 Mor. Min. Rep. 543; *McNish v. Stone*, 152 Pa. 457, note; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961; *Ammons v. Toothman*, 59 W. Va. 165, 115 Am. St. Rep. 908, 53 S. E. 13. In *Glasgow v. Chartiers Oil Co.* 152 Pa. 48, 25 Atl. 232, 17 Mor. Min. Rep. 523, the court defined the relation of the parties in these words: "If he [the lessee] explores and finds oil or gas, the relation of landlord and tenant or vendor and vendee is established, and the tenant would be under an implied obligation to operate for the common good of both parties, and pay the rent or royalty reserved."

Since both here and in Pennsylvania it is held that the title to the oil does not pass by the lease, the relation must be that of landlord and tenant, when production starts. For most, if not all, purposes, there are only three classes of rights men may have in lands owned by others, licenses, incorporeal hereditaments, and estates. Prior to production, there is a binding contract between the parties, just as in any other case of a lease under which possession has not been taken, a contract contemplating and providing for a tenancy. Under an agricultural lease, the lessee could go upon the property and inspect it, and no doubt perform other acts, without establishing the relation of landlord and tenant. So, here, the lessee does certain acts that must be done before it can be established. That does not signify any weakness or infirmity in his contract nor argue anything against a tenancy yielding rent, when he has discovered oil and commenced production. The beginning of the relation requires preparation different from, and more extensive than, that preceding establishment of the relation under an

agricultural lease. The lease, the contract, grants an estate for years in the land in both instances, and carries certain licenses or preliminary privileges, which the grantee exercises. Under the oil lease this preliminary license, made irrevocable by its annexation to the grant, is often continued over a long period of time, by payment of delay rental; but that does not change its legal character. It is a privilege, irrevocable license, or incorporeal hereditament until the production begins, establishing the relation of landlord and tenant. Neither the delay in production, the nature of the preliminary acts, nor the changes of relation alter the character of the contract. What it is at the end it was in the beginning. It then provided for and made possible all that has been done under it. From the moment of its delivery, everything done under it, and every result and consequence emanating from it, including right to royalty, have potential existence, and, when they come into actual being, they go back by relation to that moment for their legal foundation, character, and qualities. Delay of the tenancy and existence of a right of exploration are not at all inconsistent with the theory of a grant of an estate for years in the land. It is not unusual for men to own estates for years, without having actual possession of them. That occurs every time a person leases a house or farm as of a certain date and does not take possession of it until some later date. The oil lease does not postpone right of possession in the lessee. He may enter and drill at once, and, if he should do so on the day of the date of the lease and find oil that day, he is a tenant in the full sense of the term from that very day. Owing to the nature of the property and the purpose of the tenancy, the latter seldom, if ever, begins contemporaneously with the lease. Though legally possible, it is not actually practicable. But the legal possibility proves there may be and is an estate in the lessee from

the beginning. The money rent begins on that date, whether payable in advance or not. When the relation changes to tenancy, the royalty, or rent in kind, is substituted for the money rent. A change in results attends the change in relation, and all these changes occur under the contract and without any change in it. The term begins to run on that date, and ordinarily the oil lease has a term, just as other leases have, and that term is a vital and controlling part of it. *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961; *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595, 28 L.R.A. (N.S.) 959, 64 S. E. 1027; *Ammons v. Toothman*, *supra*.

The operations carried on under an oil lease are not in their nature mere acts done upon the land. They require the use of portions of the surface, and the lease gives right to use every foot of it not expressly excepted or reserved, if necessary. Structures and machinery more elaborate and costly than are commonly used for many other tenancies are necessarily installed, and the occupation of the land, in the event of the discovery of oil in paying quantities, continues longer than is usual and customary under those leases. The fact that the lease carries certain licenses or privileges, both before and after establishment of the relation of landlord and tenant, is not legally inconsistent with the grant of an estate for years in the land, nor with a rental by way of compensation for the term or use of the land. Strictly speaking, a rent cannot issue out of personal property, and, if a rent is reserved in a lease of both land and chattels, the whole rent is considered as issuing from the land. *Farewell v. Dickenson*, 6 Barn. & C. 251, 108 Eng. Reprint, 446, 9 Dowl. & R. 345, 5 L. J. K. B. 154.

Another fact to be observed and having some bearing upon the construction of such leases, and particularly the legal status of the royalty, is the obligation of the lessee to de-

liver the royalty into the pipe line to the credit of the lessor. It is not, in terms, a reservation or exception. In form it is like any other covenant or agreement to pay rent in kind. The only effort to make it anything other than rent found in the English decisions is a suggestion by Lord Cairns in *Gowan v. Christie*, L. R. 2 H. L. Sc. App. Cas. 273, 8 Mor. Min. Rep. 688, that the royalty is an exception from the grant of the mineral. Stated in his own words, the proposition is: "What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land."

But this view was not accepted by the House of Lords. The lord chancellor and Lord Chelmsford put their decisions on the relation of landlord and tenant. The suggestion was adverted to by Lord Chancellor Halsbury in *Greville-Nugent v. McKenzie*, [1900] A. C. 83, but he admitted it was not the law of England, saying: "As I have said, I am not quite certain that if this matter were *res integra*, and if we were sent back 200 or 300 years, one would be quite able absolutely to follow all the reasoning by which that result is arrived at [title of the life tenant to mineral royalties]; but it is immaterial to do so now, because that point has been ascertained and adjudicated upon over and over again and finally in this House."

In Pennsylvania a coal lease is construed as effecting a sale of the coal in place. *Fairchild v. Fairchild*, 6 Sadler (Pa.) 231, 9 Atl. 255. But, as has been shown, oil and gas leases are not, nor are they in this state.

If it can be said that to the grant of an estate for years in the land a license to sever and take out the oil is added or annexed, the royalty would be compensation for both the estate and the license, and it cannot be apportioned between them. Moreover, the estate is the primary subject and the license only an incident of the estate, in legal contemplation, for the license is annexed to

the estate, and not the estate to the license. On its face, and in terms, the contract leases, demises, and lets the land and then declares the purpose of the letting. Literally it grants an estate for years and annexes to it a license to take the oil. The estate prevails over the license in rank, because it is a right of a superior nature, an estate being an interest in the land and irrevocable, while the license, without the estate, would carry no interest in the land and would be revocable at the will of the licensor. To call the royalty rent for the land, the subject-matter of the estate, the principal and superior element of the lease, is therefore both reasonable and accordant with legal principles. To say the license is part and parcel of the estate and that the royalty is the rent stipulated for in respect of the estate is still more so. The preliminary license to explore is treated by the parties as an inclusive right, for there is an agreement to pay periodical rent, which must be complied with, whether the lessee explores or not. It is not compensation for injury to the land occasioned by exploration, nor for occupation of the land in exploration. It is called rent and treated as rent, and the royalty, when produced, takes its place. On the establishment of the relation of landlord and tenant the rent merely changes its form and rate. As already stated, the lease usually provides that the royalty shall be paid in lieu of the money rent which ceases. Since the preliminary license is clearly inclusive, the license to sever is presumptively so, because it is created by the same instrument, and annexed to the same estate, as the other.

The demonstration, conclusive, in my opinion, that an oil royalty is (1) a legal entity separate and distinct from the land and oil in place and their titles, though related to them, whether it is a rent or not, (2) substantially a rent and governed and treated as rent, and (3) technically rent, sustains the major and basic proposition on which the

decision in *Campbell v. Lynch*, 81 W. Va. 374, L.R.A.1918B, 1070, 94 S. E. 739, stands. Being such an entity, it is not the land, oil, nor title to either. It may be owned, held, enjoyed, and assigned by the owner of the land. It is not merged in his title to the land. It is not an estate in the land. It is an incorporeal hereditament whose owner has an estate in it besides and collateral to his estate in his land, whether it is rent or not. If not rent, it is more like rent than anything else conceivable or known to the law and is generally treated as rent, wherefore the principle of analogy requires rights respecting it to be tested by the rules and principles governing rents. It is technically rent payable in kind, and therefore must be governed by those principles and rules, one of which is, as shown in *Campbell v. Lynch*, that, on a division of the land out of which it issues, it must be apportioned among the owners of the parts into which the land is divided in proportion to their values.

The doctrine of apportionment of rents upon a division of the land embraced by a lease is conceded in the opposing opinion. Dissenting opinion in *Campbell v. Lynch*. But it is argued that the rule is applicable only in the case of a general lease, one covering the whole estate in the land. An oil lease is general. It covers every portion of the land leased. The severance authorized pertains only to the oil, and in that sense it is limited to the oil sands or strata. But every other lease is similarly limited. An agricultural lease limits the use and enjoyment of the land to the surface. Nevertheless it embraces all of the land. The reversioner cannot go in and tear up the surface by mining or other operations materially interfering with the tenant's use and enjoyment of the surface, unless he has reserved the right to do so, and the tenant himself cannot open mines, unless the right to do so is vested in him by his lease. The mining lessee has not only the use of the seam or

seams leased, but also of such portions of the surface as are contracted for expressly or impliedly. Obviously there is no merit in this contention. Another argument against its application here proceeds upon an hypothesis that is practically impossible, because it is baldly unreasonable. It supposes a state of facts so manifestly unreasonable that it likely never has occurred and never will. Nobody ever leased solely for corn growing an entire tract of land, only a relatively small portion of which will produce corn, or an entire tract of land to obtain the use of a relatively small portion of it for fruit growing, and bound himself to pay rent for the whole of it. Such a thing is legally possible, however, and, if it should occur, the doctrine of apportionment of rent would most certainly apply. The test of the legal status of the rent is not the use the lessee makes of the leased land. It is what he agrees to pay. *Higgins v. California Petroleum & Asphalt Co.* 109 Cal. 304, 41 Pac. 1087. Even though he should not use the land at all, his agreement to pay rent binds him. A lessee can no more escape payment of rent on the ground of non-use of the land than he can escape payment for a suit of clothes he has bought, by not wearing it. Property of all kinds may be dead-rented and often is. A lessee is bound to pay the rent he contracts to pay, whether he ever becomes a tenant or not. If he agrees to pay rent on an entire tract of land, the rent attends and goes with the reversion in the entire tract, no matter what he rents it for or uses it for, or whether he uses it at all; and, when the reversion is divided, the rent is divided, unless there is a special agreement to the contrary. But a man desiring land only for corn growing, out of a large tract partly adapted to that use and partly unfit for it, would lease only the suitable part, and a man desiring land out of the tract for fruit growing would lease only the part adapted to that use. If, after a corn lease has been

put upon one part and a fruit lease upon the other, the land should be so divided as to give one party all of the corn land and the other all of the fruit land, there would be no apportionment, of course. But, if it should be so divided as to give each a portion of each leased part, both rents would have to be apportioned. Another practically impossible case is stated, for illustration, in respect of timber. Nobody in this country leases land for timber cutting. The deed always grants the trees in some form, either expressly or by necessary implication, conditionally or absolutely. *Adkins v. Huff*, 58 W. Va. 645, 3 L.R.A. (N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246. The deed or contract never takes the form of a lease nor contains any provision for compensation that can be reasonably assimilated to rent. But it is said the owner of the purpart on which the mining is done may be prejudiced and injured in this; that, while the lease is in force, oil may be taken from his land only, and operations may not be extended to the other parts, so as to give him a share in any royalty arising from them. This argument also supposes a case excluded by the theory of every lease as well as by experience in the oil business. When oil or gas is discovered within the bounds of the lease, the lessee has a motive for full development of the whole lease and production of all the mineral in it, and his failure to produce all of it, when it happens, if ever, is purely accidental. He omits some of it because he does not find it, or because he errs in judgment as to its quantity. Ordinarily a lease is abandoned, if at all, before any mineral is taken out, and all of the parts released from its burden. But the possible prejudice applies in all kinds of leases. Under an agricultural lease, one part of the land may be subjected to a greater burden by the tenant than others. He may practically exhaust its fertility, and render it useless for years. Surely there can be no merit in such argument. Here again I repeat that

the contract, not the use of the land, fixes the status of the rent. *Higgins v. California Petroleum & Asphalt Co.* cited.

The reiterated fact that the owners of the several parts take respectively, all the title and estate the ancestor, testator, or bankrupt had in his part, argues nothing against the principles or conclusions underlying the decision in *Campbell v. Lynch*. They do get it. They get the legal title to the oil and gas as well as the land. But they take it subject to a burden, an encumbrance, just as in the case of a division of a tract of land, encumbered by an agricultural lease. They get all of the title and estate in the land, but in that they get only the reversion, for that is all their predecessor had. Being assignees of the reversion, they are, by all authority except the unsound decisions in this class of cases, entitled to the rent which was legally attached and annexed to the reversion, while he held it, and legally went with it to them; it not having been detached therefrom by any agreement. It was a right, an incorporeal hereditament, legally attached to the land and collateral to the title, constituting one of the incidents of title or ownership, and accompanying it into whosoever hands it might go, unless reserved or detached by a reservation or assignment thereof. In none of these cases had it been so detached. "The rent may be granted away, reserving the reversion; and the reversion may be granted away reserving the rent, by special words; but by a general grant of the reversion the rent will pass with it as incident thereto." *Bl. Com. bk. 2, p. 176*. The admission in the dissenting opinion in *Campbell v. Lynch* that rent arising under a general lease is apportionable in the event of a division of the land necessarily admits this doctrine, and also that a rent is a legal entity distinct from, but collateral and incidental to, the land. Hence this whole controversy narrows down to a single issue, namely,

whether the royalty in an oil and gas lease is technically or substantially a rent. That it is there cannot be the slightest doubt.

For the most part the decision in *Kimbley v. Luckey*, — Okla. —, 179 Pac. 928, is predicated upon Ohio, Indiana, and Arkansas precedents, the dissenting opinion in *Campbell v. Lynch*, and the decision in *Pittsburgh & W. V. Gas Co. v. Ankrom*, the fallacies and unsoundness of which, I think, I have fully and clearly demonstrated. It admits the doctrine of apportionment of rents, but attempts to exclude it on two grounds: (1) Lack of provision for it in the contract; and (2) inapplicability to tenancies under oil and gas leases in that state. The first ground of exclusion is baldly and obviously unsound. To effect apportionment, in case of division of the land, no contract therefor is necessary or required in any jurisdiction. The law makes the apportionment as a legal result of the division, in the absence of an agreement excluding it. An agreement is required not to apply the doctrine, but to prevent its application. It was not provided for by contract in any of the cases cited in *Campbell v. Lynch*. Read this ancient law: "A proportionable part of the rent passes immediately with the reversion, and the tenant is not prejudiced by the remedies which follow the right, because it is in his power, and it is his duty, to prevent the several suits and distresses by a punctual payment." 1 Thom. Coke, 366, note 369, quoted in *Reed v. Ward*, 22 Pa. 144.

See also *Bank of Pennsylvania v. Wise*, 3 Watts, 404.

Read also this modern law: "So, in case of a transfer of the reversion in a part of the premises, the transfer carries with it a proportionate part of the rent; such a transfer in no sense constitutes a wrong to the tenant, and therefore the law will apportion the rent." 16 R. C. L. p. 916, citing, among other well-considered cases sustaining the text, *Swint v. McCalmont Oil Co.* 184 Pa.

202, 63 Am. St. Rep. 791, 38 Atl. 1021, involving an oil royalty, and L.R.A.1915C, note, p. 223.

The other ground upon which the Oklahoma court excludes application of the common-law doctrine is, I submit, equally baseless. It is that that court knows, as a matter of common knowledge, that it has been the general, if not universal, custom in that state, from the first discovery of oil and gas, for the royalty to be paid the owner of the lands on which the wells were located, and from which production was had. If the relation of landlord and tenant exists between the lessor and lessee, as clearly it does, no such custom, however long continued, can change the law applicable to that relation. And, even though the royalty be not strictly and technically rent, it is more like rent than anything else legally conceivable, and is generally treated as rent, wherefore the principle of analogy, which courts universally apply in doubtful cases, obligates courts and judges so to regard and treat it. In *Rennell v. Lincoln*, 3 Bing. 224, 266, 130 Eng. Reprint, 499, Best, Ch. J., said: "I endeavored to find other cases from which I could safely reason by analogy to that now to be decided."

In *Morris v. Clarkson*, 3 Swanst. 559, 561, 36 Eng. Reprint, 974, Sir Wm. Grant, M. R., said: "It is necessary, therefore, to proceed upon principle and decisions in analogous cases."

On legal demands, we apply the Statute of Limitations in equity by analogy. *Thompson v. Whitaker Iron Co.* 41 W. Va. 574, 23 S. E. 795; *Smith v. Wehrle*, 41 W. Va. 270, 23 S. E. 712; *Wilson v. Harper*, 25 W. Va. 179. I have no doubt there are thousands of instances noted in the books in which the principle has been recognized and followed. Here is the closest and strongest analogy possible; wherefore it is binding upon the courts and citizens alike. But how does the Oklahoma court judicially know what it assumes to know, if it be true? We judicially know oil development of noticeable

proportion in Oklahoma does not date back beyond the year 1900, for it is an historical fact. It has existed in this state at least three times as long, and we are not judicially advised of any such general or uniform custom. No authority is cited for the proposition that a court can take judicial notice of such transactions, if they have occurred, and I seriously doubt the existence of such authority. They are neither historical nor scientific facts, nor general usages and customs of trade or conduct. They are mere isolated transactions between individuals in dealings in property that may be handled in a variety of ways. Moreover, I do not understand that custom or usage makes law in the general sense of the term, unless it is ancient. It may become a part of a contract by actual or presumptive adoption, but the decision is not put upon the ground that the particular contract was made with reference to any general or particular custom. To be a law, a custom must have existed for so long a time that "the memory of man runneth not to the contrary." 1 Bl. Com. pp. 76, 77; *Ulmer v. Farnsworth*, 80 Me. 500, 15 Atl. 65, 17 Mor. Min. Rep. 134; *Freary v. Cooke*, 14 Mass. 488. Fifteen or twenty years will not suffice. As this supposed custom cannot have the force of law, the decision could have no other foundation than the opinion of the court as to what the law of the subject is, as determined by legal principles and the analogies of the law; and in them it has no foundation, as has been clearly demonstrated.

Lastly, it is argued in the Oklahoma case that the owner of the part of the land from which oil is not produced is not entitled to any portion of the royalty, because it cannot be assumed that there is any oil in it. For the purposes of every oil and gas lease, in contests over rights under them, it must be assumed that there are oil and gas under every part of the land embraced in the lease, until the contrary has

been shown. The parties to the lease assume its existence, and contract with one another, upon that assumption as a basis. Having done so, they cannot deny the truth of the fact, and courts must take the contract as they made it and bound themselves by it. I have no doubt the Oklahoma trial courts have so treated and enforced such leases, nor that they have been sustained in such action by the court of last resort. When a trespasser enters upon such a lease, and begins drilling for oil or gas, an injunction at the suit of the lessee lies to restrain him, without proof of the existence of the minerals in the land. *Trees v. Eclipse Oil Co.* 47 W. Va. 107, 34 S. E. 933, 20 Mor. Min. Rep. 260; *Eclipse Oil Co. v. South Penn Oil Co.* 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; *Bettman v. Harness*, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500. A mere trespass is not enjoinable. The injunction must go to prevent the taking out of oil, working irreparable injury to the lessee.

"There seems no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive, against all who seal it, of everything admitted in it." *Hoke v. Hoke*, 3 W. Va. 561; *Point Pleasant v. Greenlee*, 63 W. Va. 207, 129 Am. St. Rep. 971, 60 S. E. 601; *Monteith's Case*, 15 Gratt. 172.

I have already quoted authority holding that the lessee has no legal ground of objection to apportionment on account of the slight inconvenience it may occasion him. Nor, in case he has paid all of the royalty to one of the parties, is there any danger of liability to others for their shares. After the division, the parties entitled to the rent have a joint or joint and several demand against the lessee for it. *Kitchen v. Buckley*, 1 Lev. 109, 83 Eng. Reprint, 322; *Midgley v. Lovelace*, Carth. 289, Holt, 74, 90 Eng. Reprint, 771, 939, 12 Mod. 45, 88 Eng. Reprint, 1155. This is not said by way of decision, for the question is not be-

fore us, but the observation is germane. A demand of that nature may be discharged by payment of the whole amount thereof to any one of those entitled to it. *Hatfield v. Cabell County Ct.* 75 W. Va. 595, 84 S. E. 335; *Allen v. South Penn Oil Co.* 72 W. Va. 155, 77 S. E. 905.

The opinion in *Pittsburgh & West Virginia Gas Co. v. Ankrom* admits the hardships resulting from the application of the doctrine of that case. It is also admitted in the opinion delivered in *Lynch v. Davis*, 79 W. Va. 437, 442, L.R.A.1917F, 566, 92 S. E. 427. I here state what I have been reluctant to mention, although it has been apparent all the time, namely, that the construction opens wide the door to the rankest kind of imposition. The lessee can drill on any one of the parts he may see fit to select, and he may make his location depend upon what he can get the owner of one of the parts to concede to him, by way of inducement. He can delay and bargain with the different parties until he obtains a bonus or reward in money or a share of the royalty, for drilling on his part, and in consideration of his draining the oil from the other parts through the wells on that part. He may dicker with one owner so as to obtain the royalty in his part or a share of it, and thus drain the other parts for his own benefit. There would be no fraud in such a transaction, if, properly construed, the lease permits it, as a majority of the courts say it does. It would be legally justifiable, under their construction, and yet in many instances it would be ruinous to all of the parties save one of the owners and the lessee. The tract may be small and rich in oil. In many instances highly productive wells are put down on neighboring or adjoining town lots. A single well located on one of the five parts into which a 5 or 10 acre lot may be divided will take out all the oil under all of the parts, to the enrichment of the lessee and the owner of that part and the utter deprivation of the owners of the

other parts of what legally as well as morally belongs to them. It is suggested in the *Oklahoma* case that the injured parties in such case might have legal remedies for their protection. They would not, unless some court could find a way to split a single lease into two or more leases, against the will of the lessee and in violation of the terms and legal effect of his lease. I know of no principle upon which that can be done. His contract, as made, obligates him to take out the oil with reasonable diligence and protect only the exterior boundary lines of the tract of land embraced in his lease. Can any court impose upon him the further obligation of protection of a dozen interior division lines? He has done nothing to alter the character of his contract. The addition of such an obligation cannot be founded upon any conduct of his, for he is proceeding to do just what he contracted to do—take out the oil with due diligence and protect the exterior lines. When and how did any court ever obtain authority to make new contracts for men, or to alter them according to its notion of what they should be? I predict that no court will ever hold that any such additional obligation can be imposed.

The doctrine of *Campbell v. Lynch* and *Lynch v. Davis* exposes the lessee to no possible danger, gives him all he is legally or morally entitled to, and imposes no burden upon him that he would not have been under if no division of the land had occurred. Why he should be dissatisfied with it, and stubbornly and relentlessly resist it upon all occasions, I am unable to understand, unless he has somewhere endeavored to avail himself of the unconscionable advantage for which the other construction opens the way, and fears his hold upon it may be broken. That is the only way in which he can lose anything, under the construction for which I contend, and what he would so lose he has no moral right to.

Respecting Judge Miller's
Opinion.

In his opinion concurring with Judge Ritz, Judge Miller wholly misapprehends the propositions laid down and the conclusions drawn from them in the foregoing opinion. The most diligent search and the closest scrutiny by the most astute mortal on earth will not reveal a statement nor an intimation therein "that the oil in place, burdened with the lease previously executed, did not go to the devisees under the will." I very emphatically said they did. I quote this from my opinion: "They [the owners of the several parts] do get it. They get the legal title to the oil and gas as well as the land. But they take it subject to a burden, an encumbrance, just as in the case of a division of a tract of land, encumbered by an agricultural lease."

Is that not plain, distinct, and emphatic?

Laboring under this misapprehension, he endeavors to run my ultimate conclusion down to some sort of a vaguely indicated absurdity. Having stated what I did not say and the exact contrary of what I did say, he asserts one of my purposes is to support the contention "that the royalty thus reserved out of the oil is rent." I have not said the royalty was reserved in any such way, nor that it was "reserved" at all, nor that, legally speaking, it is a share of the oil, or oil at all. It is the right to demand and have from the lessee, first, money, until production, and then oil in lieu of money; the right being an intangible thing, like the right to have a promise or agreement performed, and being further what the law terms an incorporeal hereditament. As to the oil to be delivered in satisfaction of the right, like money paid in discharge of a debt, it exists before production, as well as after. In legal contemplation, it is not the oil either in place or after severance. I have plainly and distinctly said so in the opinion. Quoting again, I take this from it:

"It [an oil royalty] is a right to a share of the oil taken from the land, not the oil when produced, which is only the product or fruit of the right." And I predicated that assertion on Blackstone's language, saying: "An incorporeal hereditament is a right issuing out of a thing corporate. . . . It is not the thing corporate itself, . . . but something collateral thereto. . . . And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced and the thing or hereditament which produces them."

The two basic propositions of my position, as set forth in *Campbell v. Lynch* and in my dissenting opinion in this case, are that the lease vests: (1) In the lessee either an estate for years in the land, in consideration of rental to be paid first in money and then in oil, which does not include nor carry title to the land or oil, or an incorporeal hereditament, the right to take out the oil, in consideration of rental or quasi rental to be paid in money and then in oil, which does not include nor carry title to the land or the oil; and (2) in the lessor another incorporeal hereditament, the right to demand and have from the lessee the rental or quasi rental called royalty, from time to time, as it shall become due and payable. No intelligent reading of the two opinions, or either of them, will fail to disclose these two propositions, nor will it disclose anything inconsistent with either of them, unless it be a possibly inaccurate statement in the former opinion (81 W. Va. 379, L.R.A.1918B, 1070, 94 S. E. 741), saying the royalty is "the fruit of a burden upon the title created by a covenant running with the land." What I intended to say was that it was the consideration for the burden and the fruit or product of the incorporeal right to demand and receive it. Production makes the lessee's estate for years, or incorporeal right to take the oil, whichever it may be, and the lessor's incorporeal right to

have a share of it, each bear and yield its fruit or product, like a tree or vine. Neither of these rights is the oil itself, in place or out of place, and neither issues out of the other. They are separate and distinct, though related, rights, and each pertains to the land, the former being a right to do things on the land and take away part of it, and the other a right of compensation to the owner of the land, for the use and occupation thereof allowed by the lease for the exercise of the other right upon and in the land. I have repeatedly declared with emphasis that neither of these rights is the land, the oil in place or out of place, nor the title to either the land or oil, or any part of either of them. If the former is an estate for years, as I have demonstrated it is, the royalty is strictly and technically rent. If the former is only an incorporeal right exercisable upon and in the land and all of it, if the lessee sees fit to use all of it, then the royalty is substantially rent, quasi rent, the practical equivalent of rent, and governed by rules and principles of the law of rent, because they better apply to it, more nearly fit it in all respects, than any other rules and principles to be found in all the realm of the law. Being so treated, it is no part of the land or oil, or the title to either of them, and yet, by all law, it is a separate and distinct legal entity.

My admission that a rent cannot issue out of an incorporeal hereditament was and is accompanied by an explicit declaration that the royalty provided by an oil lease does not issue or come out of the right granted to the lessee, his incorporeal hereditament, if it is one, and not an estate for years in the land, nor out of such estate, if his right is such. In proof of this, I again quote from what I have said: "But the royalty does not come out of the privilege granted by the lease. It is compensation for the privilege, if the lease creates only a privilege in the lessee. The privilege is an incorporeal hereditament exercisable

in the land, and the royalty is an incorporeal hereditament issuing out of the land and compensating the owner for its use, or for the incorporeal right."

In the face of this plain statement, how can my learned associate complacently say, with any degree of consistency, that the theories I apply are self-contradictory, or intimate that I have said the royalty issues out of the incorporeal right, or is part of the oil or identical with the oil? If he does not mean what he says and intends to say, my theories, or one of them, are legally impossible, he has not indicated which one he regards as being impossible, nor given us any authority for his opposing position other than a few decisions of other courts, which have never attempted to disprove either of them, and his own mere ipse dixit; while I have fully and clearly demonstrated and proved the soundness and perfect consistency of both theories, the separate and distinct characters of the two rights, and the issuance of the royalty out of the land, within the legal meaning of the word "issue," as used in this connection by the best and most highly respected authorities to be found in English and American jurisprudence. I have not merely made an assertion and called upon my opponents to accept it or prove it untrue.

Recurring to Judge Miller's false premise, arising from misinterpretation of what I have said, which is flatly contradicted by what I have said, I renew my effort to enlighten him as to what my position respecting the status of the royalty was at the date of transition of the title to the land and oil from the testator to the devisees. The oil in place, title and all, went to the devisees by will. But it was not the royalty and did not include the royalty. They collectively took all the right, title, and interest in the land the testator had. But that did not include the royalty. They did get the royalty, which was a separate entity, as a legal consequence and result of the

acquisition of the title to the land and oil, just as a man, by legal consequence, gets the interest on a debt past due in the absence of a contract stipulating for it. It passed to them as an incident of their ownership of the land and oil. Before the will took effect, it was held by the testator as an incident of his ownership of the same land and oil. In neither case was it title to the land or oil, in whole or in part, nor included in the title. It was a collateral right based upon contract, intangible as many other rights evidenced by notes, bonds, contracts, and covenants in deeds are, and just as firmly embedded in law as they, and it attended and accompanied the ownership of the land, whether in the hands of its creator or his alienee, unless detached from it by contract. Without that the devisees did not get all the rights of the testator in, attendant upon, and annexed to the land. Without it, they got his encumbered title, but not an important collateral right which the law annexes to the title, unless it is reserved or detached by contract, as an offset to, or compensation for, the encumbrance. In the testator's hands, this incorporeal right, be it strictly rent or not, was an entirety as well as an entity, and was not divided among the devisees by the will, for the will does not mention it. But, as each devisee obtained a portion of the entire land out of which it issues and to the title of which it is legally annexed, the law apportioned it among them, as it does in every other case of contractual, judicial, or testamentary division of a tract of land encumbered by a lease and yielding an entire rent. It was in his hands an intangible, contractual right, called an incorporeal hereditament because it is intangible, issuing out of his land because the contract related to it, and made it yield him a return for its use and occupation by the other party to the contract, or, more accurately speaking, conferred upon him the right to make it yield such return, for it entitled him to the return in money or

oil, whether the lessee used the land or not. It stood upon the contract, not the title nor the use of the land. On this point, as well as in reply to arguments against my position, I quote the following from *Higgins v. California Petroleum & Asphalt Co.* 109 Cal. 304, 41 Pac. 1087: "The fact that, prior to the commencement of this action, the lessee had elected to mine only in that part of the 'deposit' lying within the Ashley tract, detracts nothing from the right of Higgins to demand his proper share of the royalty, nor from the obligation of defendant to pay it. The royalty of 50 cents on each ton of rock mined was, by the terms of the lease, to be paid to the lessors, not to the individual lessor from whose land the rock may have been mined. The lease does not restrict the mining to any particular part of the deposit at any time. . . . The royalty per ton of rock mined is but a mode of estimating the rent to be paid for the right to occupy exclusively the whole premises demised, and to mine any part, or all parts thereof, at any time during the term at the election of the lessee."

In laying down the unjust and oppressive rule to which a majority of this court are about to commit themselves, the Ohio, Indiana, and some other courts have ignored the legal basis of that well-considered decision awarding a just and equitable result, and have substituted for it considerations of mere expediency and hypertechnical assumptions that do not bear the application of legal tests. In all other similar cases the contract is allowed to control and define the rights of the parties. Here these courts set it aside and substitute their own creations for it.

That, while a man owns land, he cannot also own a right collateral to the land, created by a contract relating to his land, is a new doctrine to me. There was a time, we are told, when men did not or could not have any notion whatever of a promise or agreement as the foundation of a civil right or obligation enforceable

by any sort of legal procedure. Sale and exchange were known to the law only as completed transactions, leaving no outstanding duty to be enforced. In the case of a loan the lender claimed, not what had been promised him, but the very thing he had loaned. 2 Pollock & M. History of Eng. Laws, p. 185. To find a trace of this primitive legal infirmity, in modern jurisprudence, evidenced by the line of decisions upon which a majority of this court now rely for their position, is truly amazing.

Every rent is created by a contract, express or implied. It is a right given by the contract, not money or property produced by the right, although that is often called rent. According to all authority, a rent so created "issues out of the land," not out of the lessee's estate in the land. "Rent is a return or compensation for the possession of some corporeal inheritance. A certain profit, either in money, provisions, or labor, issuing out of lands and tenements, in return for their use." Bouvier's Law Dict. Substantially the same definition is found in 2 Kent, Comm. 460. It is the compensation received by the owner of the soil from the occupant thereof. Lombard v. Boyden, 5 Allen, 254; Bledsoe v. Nixon, 69 N. C. 89, 12 Am. Rep. 642; Fisk v. Brayman, 21 R. I. 195, 42 Atl.

878; Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74; Parsell v. Stryker, 41 N. Y. 483; Otis v. Conway, 114 N. Y. 13, 20 N. E. 628; Payn v. Beal, 4 Denio, 412; Van Wicklen v. Paulson, 14 Barb. 655; Words & Phrases, 1st and 2d series. This definition applies to the many thousands of instances in which leases have granted an estate for years and the lessee has agreed to pay rent. In all of them the rent is deemed to issue out of the land, not out of the estate granted. It is compensation for the use of the land. That is what is meant by its "issuing out of land." The royalty in an oil lease is just as clearly compensation for the use of the land as the rent payable under an industrial, mercantile, or agricultural lease; wherefore it, too, obviously issues out of the land, within the legal meaning of the terms. No authority says it issues out of the estate or other right granted, and I have not said so. The terms of the definition requiring it to "issue out of land" are satisfied, when the right, rent, comes to the owner of the land in return or compensation for some estate granted out of his land or some right granted by him, to use his land.

I am authorized to say that Williams, P., concurs in all I have said on this subject.

ANNOTATION.

Respective rights of owners of different parcels into which land subject to an oil and gas lease has been subdivided.

This note supplements the note appended to Pittsburgh & West Virginia Gas Co. v. Ankrom, 5 A.L.R. 1162.

When a court undertakes to apply settled principles of law to a new state of facts, it becomes very essential that the proper perspective be adopted, otherwise the real principle applicable may be overlooked. Such a situation is apparently presented in the reported case (MUSGRAVE v. MUSGRAVE, ante, 564). Both the majority

and minority opinions are based upon the question of the character of the lessor's estate created in land by a lease thereof for development for oil and gas, prior to development. This question, however, is not of great importance so far as concerns the matter of the rights inter se, of different owners of distinct portions of a tract of land which, at the time they acquired title, was subject to an oil and gas lease. Of course, the lease con-

stitutes a lien or claim against the title to the land; that the lessor also had some intangible right of questionable value under this lease is clear; that is, the lease created for him something of value, an asset in addition to his title to the land, which he already had. This, however, is not an estate in the land itself. Although a subsequent purchaser of the land, or of a portion of it, subject to the lease, takes the land burdened with the lease, he is also entitled to its benefits, since it relates to a subject-matter which passed with the land, unless expressly reserved. The fallacy of the majority's view in this regard may be demonstrated by carefully considering or weighing the reasoning upon which it is based. Thus, it is said that, if the contention that the division of the land among the devisees operated to divide the oil and gas is sustained, then it follows that the testator, at the time of his death, had two estates in the same parcel of realty, to wit, the land itself, and another estate in the royalty. And the assertion is made that the theory of two estates is fallacious, because a party cannot have two estates in the same parcel of land; since, as soon as two outstanding estates in the same tract of land become vested in one owner, the lesser estate becomes merged in the greater. Hence the court concludes that the determination of the case depends upon the answer to the question, What did the testator own at the time of his death?

In this reasoning the court has completed a circle, but it is no nearer a solution of the problem. Originally the testator had the absolute title to the tract of land in question; therefore, no progress is made by holding that, by the lease or contract in question, the lessor created another estate in the land, which, at the very instant of its creation, merged in the greater estate he then had; for his estate was complete in the first instance, and this lease or contract could not create another estate to add to or merge into it.

For example, the owner of land, by a contract or an agreement to cut and

convert standing timber into lumber, does not thereby create for himself another estate in the land, although the contract may be of considerable value to him as owner, depending, of course, upon how favorable the contract is; he has, however, as suggested, created for his benefit something of value, an asset.

Had there been no lease of the land in question, it is clear that each devisee would have been vested with the testator's title to the land, including any minerals therein; but the lease operated as an encumbrance upon the land to which the devisee took subject. The right to the royalties created by the lease, however, being an asset of indefinite value to the testator, passed upon his death to his estate, subject, however, to the royalties being equitably apportioned among the devisees, if any subsequently accrued, taking into consideration their proportionate ownership of the tract as a whole, covered by the lease, and the fact that the lease was an encumbrance placed upon the land subsequently to the execution of the devise. See note in 5 A.L.R. 488, as bearing upon the right of the devisee, to exoneration of land devised to him from a lien or charge placed thereon by the testator.

No case other than the reported case (*MUSGRAVE v. MUSGRAVE*, ante, 564) has apparently passed upon the precise question under consideration subsequently to the note referred to, and which is supplemented by this note. In *Pierce Oil Corp. v. Schacht* (1919) 75 Okla. 101, 181 Pac. 731, however, while involving the question as to the right of the purchaser of part of a tract of land subject to an oil and gas lease, to forfeit the lease to the portion of the tract purchased by him for the failure of the lessee to develop such portion, where development was made upon another portion of the tract covered by the lease, the court referred with approval to its former decision in *Kimbley v. Luckey* (1919) —Okla. —, 179 Pac. 928, referred to in the note in 5 A.L.R. 1162, and said that the plaintiffs (the subsequent purchasers from the les-

sor of a portion of the tract), having become the owner of 40 acres of said premises, became entitled to whatever delay money in the nature of rentals or advance royalties were due, for their portion of the premises; but as soon as the premises were developed, and oil and gas produced in paying quantities, then they were not entitled to receive any of the royalties received from either said gas or oil wells, unless the same were upon their premises, nor were they entitled to re-

ceive any rental or advance royalty thereafter for none would be due or payable under the lease.

In this connection, it is to be noted that this annotation does not include cases which pass upon the right of a subsequent purchaser of a portion of a tract of land which is subject to an oil or gas lease, as to the lessee, but only covers the right as between the different holders of the several and distinct tracts of land which is covered by a single lease. A. G. S.

J. S. HATCHER et al., Copartners Doing Business as Hatcher & Snyder,
Appts.,
v.

BARLOW FERGUSON, Respt.

Idaho Supreme Court—April 2, 1921.

(33 Idaho, 639, 198 Pac. 680.)

Sale — guaranty of transportation — f. o. b.

1. Held, in this case, that the respondent's contract to deliver lambs at Ketchum "f. o. b. cars" placed upon him no obligation to guarantee their shipment to a particular market.

[See note on this question beginning on page 597.]

— compliance — delivery.

2. Under the facts of this case, held, that delivery of lambs on board cars billed to Shoshone, Idaho, without cost to the appellants, was a compliance with respondent's contract.

— refusal of carrier to accept — effect.

3. The refusal of the railroad company to bill lambs to an eastern market did not justify appellants' refusal to receive such lambs when loaded on cars, even though they could at that time be billed only to Shoshone, Idaho.

Headnotes by DUNN, J.

(Lee, J., dissents.)

APPEAL by plaintiffs from a judgment of the District Court for Lincoln County (Bothwell, J.) in favor of defendant in an action brought to recover the alleged difference between the contract price of certain lambs and the market value thereof, and the amount paid by plaintiffs on a contract for their delivery. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Pierce, Critchlow, & Barrette and W. G. Bissell for appellants.

Mr. J. G. Hedrick, for respondent:

The prima facie effect of the phrase "f. o. b.," when unmodified, is to cast the duty upon the purchaser

of furnishing or designating the cars or other vehicles by which the goods are to be shipped.

Baltimore & L. R. Co. v. Steel Rail Supply Co. 59 C. C. A. 419, 123 Fed. 655; Evanston Elevator & Coal Co. v.

Castner, 133 Fed. 409; Davis v. Alpha Portland Cement Co. 134 Fed. 274, affirmed in 73 C. C. A. 388, 142 Fed. 74; Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Consolidated Coal Co. v. Jones & A. Co. 120 Ill. App. 139; Kunkle v. Mitchell, 56 Pa. 100; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Lozes v. Segura Sugar Co. 52 La. Ann. 1844, 28 So. 249; Vredenburg v. Baton Rouge Sugar Co. 52 La. Ann. 1666, 28 So. 122; Dwight v. Eckert, 117 Pa. 490, 12 Atl. 32; 35 Cyc. 197; Graham v. United States (1913) 231 U. S. 474, 58 L. ed. 319, 34 Sup. Ct. Rep. 148, affirming (1911) 110 C. C. A. 465, 188 Fed. 651.

Where the buyer refuses to accept the goods, he thereby loses all his rights under the contract.

Clifton v. Willson, 47 Mont. 305, 132 Pac. 424.

Messrs. Paul S. Haddock and Barlow Ferguson also for respondent.

Dunn, J., delivered the opinion of the court:

This action was brought by the plaintiff against the defendant for \$3,979.40, alleged to be the difference, on the 1st day of September, 1916, between the contract price of 4,140 lambs and the market value thereof on said date, and also for the sum of \$2,070, theretofore paid defendant by plaintiffs on the following contract:

Sheep Bill of Sale.

June 17, 1916.

This is to certify that I have this day sold to Hatcher & Snyder not less than 6,400 head of unshorn lambs out of my flocks, 15 days' notice, sellers option at the price of 8 cents per pound to be delivered f. o. b. cars at Ketchum between the 1st day of August, 1916, and the 1st day of September, 1916. Said lambs to be free of body wrinkles, from scab, and all other diseases. I further agree that I will not top my herds before making delivery of this contract. At time delivery is made the lambs to be in good merchantable condition, to have dry fleeces, and the minimum weight of any lamb on this sale shall not be less than 60 pounds after the same

has been in a dry corral without feed and water for at least twelve hours.

Received on this bill of sale, as part payment, the sum of \$3,200 dollars, balance to be paid when delivery is completed. — old ewes (shell to be thrown out) at — per —. — cull lambs (nothing under 40 pounds) at — per —. Both subject to conditions named in contract above.

Barlow Ferguson.

A similar action was brought at the same time by the same plaintiffs on the same kind of contract against J. W. Newman for \$3,584.10, which plaintiffs alleged to be the difference on September 1, 1916, between the contract price of 4,404 lambs and the market value thereof on said date, and also for the sum of \$2,202, theretofore advanced to defendant Newman by plaintiffs on said lambs. The cases were tried together before the same jury, and separate verdicts returned in favor of the defendants. Judgment was entered thereon, and the plaintiffs have appealed.

The appellants have specified twenty-five errors, the first and second of which are that the verdict is not sustained by sufficient evidence, or any evidence, and that the verdict and judgment are contrary to the law. All the others are based upon the giving or refusing of certain instructions by the court. It will not be necessary to examine these alleged errors singly, for the issue to be determined by this court is conceded by counsel on both sides to be limited to the question whether or not there was delivery of the lambs as provided for by the contract. Incidental to and bearing upon the question of delivery is the construction of the expression, "f. o. b. cars," as used in the contract, and also the question whether the respondent had a right under the contract to demand payment in cash, as he is alleged by the appellants to have done.

The sole question to be deter-

mined by the jury in this case was whether the respondent had complied with his contract in delivering to the appellants at Ketchum, Idaho, f. o. b. cars, on August 31, 1916, the remaining 4,140 head of lambs covered by the contract set up in the complaint. As to the meaning of the expression "f. o. b. cars," the court instructed the jury as follows: "The court instructs the jury that the abbreviation 'f. o. b.' as used in the contract dated June 17, 1916, and read to you in evidence in this case, means 'free on board,' and indicates that the property purchased shall be delivered on board the cars without expense to the buyer at the point designated in the contract."

Bouvier's Law Dictionary defines "free on board" as "a phrase applied to the sale of goods, which denotes that the seller has contracted for their delivery on the vessel, car, etc., without cost to the buyer for packing, portage, cartage, and the like."

The instruction given by the court substantially conforms to the definition last above quoted, and correctly states the law so far as this contract is concerned.

There was little conflict in the evidence, and we are of the opinion that the instructions given by the court sufficiently covered the case to enable the jury to clearly understand the issue, and to decide it according to the evidence, and a careful examination of the record convinces us that their conclusion was correct. We have examined the other instructions given to the jury, as well as those requested by appellants and refused, and we are of the opinion that there was no reversible error committed by the court, either in the giving or refusing of instructions.

Much attention has been paid by counsel in their briefs to a discussion of the question as to whose duty it was, under this contract, to obtain the cars for the shipment of the lambs, but we are of the opinion that no such question arises in

this case. It appears that cars for the shipment of the lambs were furnished at the request of the respondent. No default in that regard is charged, so it is immaterial whose duty it was to furnish them.

The respondent was at Ketchum in person when the lambs were delivered there, and was present at the loading of the cars. The appellants were represented by Otto J. Hatcher and James R. Hatcher, son and nephew, respectively, of one of appellants. These agents were in communication with the appellants at Denver, Colorado, and numerous telegrams passed back and forth between them and their principals on August 30th and 31st. The only difficulty in the way of an amicable handling of the lambs was the fact that on August 30th, when the lambs were about ready to be loaded, word came to the railroad agent at Ketchum that, owing to an embargo which had that day been placed on shipments east, no live stock would be received by the railroad company for shipment to any point, unless delivery at destination could be made on or before noon September 2d. This embargo was due to a threatened strike of the railroad employees all over the system. The question then arose between the respondent and the agents of the appellants whether the appellants would receive the lambs that were then about to be loaded on the cars. It was the desire of the appellants that shipment should be made to some eastern market, probably Chicago, and both the respondent and the appellants' agents appear to have made every possible effort to induce the railroad company to accept shipment of the lambs to such eastern market, but without avail. The appellants' agents assisted in and superintended most of the loading, apparently undecided whether the lambs would finally be accepted or not. It appears from the testimony of some witnesses that at one time the respondent was advised by Otto J. Hatcher, who was in charge of the

appellants' interests, that he would accept the lambs notwithstanding the embargo, but later, when they were almost completely loaded on the cars, according to his own testimony, he announced to the respondent that he would not accept them.

It is undisputed that at Ketchum there was no supply of feed to be had by which it would be possible to keep the lambs any length of time, so that when it was determined that they could not be shipped to an eastern market, it became necessary that they should be taken from Ketchum to some point at which feed could be had for them, for at that time it was unknown, either to appellants or respondent, how long the embargo would continue. In making shipment from Ketchum, the only place to which the railroad company would bill the lambs was Shoshone, Idaho, and in order to get the privilege of loading them on the cars, respondent was compelled to bill them to that point. We are unable to see, however, how the appellants were prejudiced by this contract made by the respondent with the railroad company. Their agents had apparently exerted every possible effort to have the lambs shipped to some point further east, but without success. If appellants had accepted the lambs,

Sale-guaranty
of transportation—*f. o. b.*

they could have done nothing with them but ship them to Shoshone. Their inability to ship beyond that point could not by any means have been legally charged to respondent.

The aim of appellants in this case has been to show that the contract imposed upon the respondent the burden of billing the lambs to an Eastern market, and that in the absence of such billing delivery according to contract was not possible, but we think no such construction can fairly be placed upon said contract. There is in the contract nothing that would warrant this construction, and the evidence shows no agreement outside of the contract by which the respondent

16 A.L.R.—38.

was to become in any sense responsible for the destination of the lambs. When he loaded them on the cars at Ketchum without expense to the buyer he discharged the obligation of his contract, and the fact that the buyers were unable, on account of the embargo, to ship farther than Shoshone, was not sufficient reason for them to refuse to accept the lambs and pay for them.

—compliance—
delivery.

—refusal of
carrier to accept
—effect.

The appellants also complain because of the refusal of the defendant to accept in payment for said lambs a draft on Hatcher & Snyder at Denver. Their claim is that, at the time of the previous shipment of a part of the lambs included in the contract, payment was made by means of such a draft, and that, if respondent intended at this time to refuse payment in the same manner, it was his duty to give them timely notice in order that cash might be provided at the remote point of Ketchum. Under all the circumstances surrounding this transaction, we think the appellants have no ground to complain of this action of the respondent. The situation at the time of the delivery of these lambs at Ketchum was quite extraordinary, and it is not strange that, after the controversy arose over the acceptance of the lambs, the respondent should be somewhat doubtful as to the propriety of delivering 4,000 head of lambs to the appellants, with nothing more certain in the way of payment than a draft on appellants. The evidence shows, however, that the respondent did not stand upon a demand for cash alone.

On the evening of August 30th. J. R. Hatcher, one of appellants' agents, wired W. A. Snyder, one of the appellants, as follows: "Ferguson requests that you have bank wire him that draft amounting to sixty thousand will be honored."

Instead of having his bank wire Ferguson that it would honor drafts

on appellants amounting to \$60,000, Snyder himself on the same day wired this reply to Ferguson: "I will pay all drafts drawn on me by Otto J. Hatcher, and if you doubt my responsibility kindly wire United States National or Hamilton National Bank of this city."

The request of the defendant that he be given the bank's assurance that the draft on plaintiffs for \$60,000 would be honored was perfectly reasonable under the circumstances, and it is no reflection upon the financial responsibility of Mr. Snyder to say that the respondent in such a situation had a right to reject Mr. Snyder's personal assurance that he would pay, and to insist upon a guaranty from Mr. Snyder's bank. In the absence of the guaranty that respondent asked as to the payment of the draft on appellants, we think he was fully warranted in refusing to accept anything in payment except cash.

A careful examination of the record in this case convinces us that there was not only sufficient evidence to warrant the verdict and judgment, but that a verdict and judgment in favor of the appellants would have been clearly against the evidence, which abundantly establishes the fact that delivery was made by the respondent to the appellants according to the terms of the contract set out in the complaint, and that appellants refused to accept.

The appellants contend that it was the duty of the respondent on September 2d, after the embargo had been lifted, to deliver these lambs according to the terms of the contract, but the appellants had had their opportunity to accept them; they had defaulted by absolutely refusing to accept them when they were tendered; and they have no right now to complain because the respondent, after having been compelled to take the risk of holding them indefinitely during the existence of the embargo, refused to deliver them after the embargo was lifted. At the time of the refusal of

appellants to accept the lambs according to the terms of the contract, they knew that it was easily possible that, before these lambs could be shipped to market, the respondent might be compelled to expend in their care a sum far in excess of the amount of the deposit that he held. Knowing these facts, appellants refused to perform their part of the contract and to assume the burden of caring for the lambs during the embargo, a burden which clearly belonged to them, and not to the respondent.

The judgment is affirmed, with costs to the respondent.

Rice, Ch. J., and Budge and McCarthy, JJ., concur.

Lee, J., dissenting.

I cannot concur in the majority opinion. As stated therein, the material facts are not in controversy, and are substantially as follows: On June 17, 1916, respondent contracted to sell to appellants not less than 6,400 head of unshorn lambs out of his flocks, fifteen days' notice, seller's option, at 8 cents per pound, to be delivered f. o. b. cars at Hill City or Ketchum, Idaho, between August 1 and September 1, 1916, and received an advance payment on the purchase price of \$3,250, balance to be paid on delivery. On August 24th respondent delivered to appellants 2,260 head of these lambs at Ketchum, and, having notified appellants that he would deliver the remainder on August 31st, he drove them to the stockyards at Ketchum for that purpose. Appellants, by their agents Otto and James Hatcher, were there to receive these lambs at that time and place. For both shipments respondent had ordered cars from the railroad company, he understanding that the lambs had been purchased for shipment to an eastern market. However, when this last shipment was ready for delivery on August 31st, the railroad company, because of a threatened strike, refused to accept the shipment or deliver cars to respondent unless he would sign an

agreement to unload the lambs at Shoshone, the connecting way station on the main line, a short distance from the point of loading, which agreement he signed, and without which he could not have obtained the cars. Respondent now insists that this was a delivery under the terms of his contract, which gave him the option to deliver f. o. b. at Ketchum at any time during the month of August. That is, respondent contends, and the majority opinion sustains such contention, that he could, under the terms of this agreement, select the only day in the month in which cars could not be obtained for a through shipment of these lambs to market, and that appellants' failure or refusal to accept them under these conditions worked a forfeiture of all of appellants' rights under the contract of purchase, and gave to respondent the right to retain the advance payment made on them in June of \$2,070, and the loss of the advancement in price, amounting in all to approximately \$6,000.

Respondent, when the contract was entered into, and also when the first shipment was made, had accepted checks or drafts drawn upon appellants at Denver; but about the time that these lambs were loaded upon cars he informed the young men representing the appellants that, unless they would immediately accept these lambs, with this conditional bill of lading, which required they be almost immediately unloaded, and pay him in cash, or what he regarded as its equivalent, he would cancel the contract of purchase, forfeit the advance payment, and keep the lambs, and that he had a lawful right to do so. Respondent was a lawyer of many years' experience in active practice. It should also be borne in mind that this transaction took place at a way station in the interior, where there were no banking facilities for handling a transaction of this magnitude, which, together with the Newman purchase of like nature, and which respondent was transacting, re-

quired approximately \$60,000. Appellants, through their agents, succeeded in getting this amount placed in a bank at Hailey on August 31st. In imposing this condition, respondent may have been within the terms of his contract in demanding payment in cash only, but it is so out of the ordinary, in a transaction of this kind, for a seller, who has had previous similar transactions with the buyer, and has accepted his check or drafts, to demand cash under these conditions, that it evinces a purpose to prevent purchasers from carrying out their part of the agreement, so that the seller may claim a forfeiture.

The threatened railroad strike did not occur, and the carrier resumed shipment on September 2d, at which time appellants again endeavored to secure a delivery of these lambs, which had been shipped to and unloaded at Gooding. Respondent refused delivery, retained the advance payments made in June, and deprived the appellants of the profits arising by reason of the advanced prices then prevailing.

The authorities are not in entire harmony as to whether it is the duty of the buyer or seller to furnish cars under a contract of this kind; but this is not material in this case, because in the former shipment and in this one the seller actually did apply for and secure the cars, and all the authorities hold that, where an agreement is not definite in this particular, that meaning will be given to it by the courts which the parties themselves have given it. *District of Columbia v. Gallaher*, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; *Davis v. Alpha Portland Cement Co.* 73 C. C. A. 388, 142 Fed. 74; *Vermont Street M. E. Church v. Brose*, 104 Ill. 209; *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, 45 N. E. 126.

Respondent claims that because these lambs were cut out of his herds and the remainder had been turned back upon the summer range, and because of the insufficiency of feed for these lambs at

Ketchum, he was compelled to accept these cars and agree to remove the lambs from the cars at a station a few miles beyond, and insist on appellants' acceptance of the delivery upon the terms he imposed. This appears to me to be a thinly disguised camouflage to justify his forfeiture of the payments made in June on the purchase price, and the enhanced value of these lambs, which, with his shipment and that of his son-in-law, Newman, for whom he was also acting, amounts to approximately \$12,000. They were fully equipped for caring for sheep on the range, and Ketchum is near one of the most fertile irrigated regions in the state, so that respondent was not forced to this arbitrary course of action. The record shows that the appellants were engaged exclusively in buying and shipping f. o. b. cars for eastern markets, and were not equipped for handling stock of this kind, or feeding or caring for them except in transit to the markets.

Under the facts disclosed by this record, the action of respondent in declaring this contract forfeited, under all the circumstances, is so contrary to my conception of a fair standard of business integrity that I am unable to approve it, and I do not think that a correct rule of law applied to these facts would permit him to forfeit this contract. It seems to me that it is a reproach to the law, and a reflection upon the administration of justice, to permit the seller to thus confiscate the property of a purchaser who has been ready, willing, and able to meet all the conditions of his contract of purchase, and who is prevented from doing so by shipping conditions imposed by the carrier, and which are entirely beyond his control. Neither party to this transaction was at fault for the refusal of the railroad company to accept these lambs for through shipment, and neither should be permitted to take advantage of the other by reason of such refusal on the part of the railroad company.

The majority opinion is to the effect that a vendor of live stock purchased for shipment to the market has complied with his agreement to deliver such stock f. o. b. cars when he delivers it upon cars, under an embargo of the carrier that requires such stock to be almost immediately unloaded and removed from such cars at a near-by way station. The rule is not applicable to the unusual conditions that existed in this case. No authorities are cited in its support, and I think that none can be found.

"The phrase 'f. o. b. cars,' when used in a contract between a buyer and a seller of commercial commodities, where the use of a common carrier is necessary, means that the seller will secure the cars, load them, and do whatever may be required to accomplish the consignment and shipment of the goods to the buyer, free of expense." *Hurst v. Altamont Mfg. Co.* 73 Kan. 422, 6 L.R.A. (N.S.) 928, 117 Am. St. Rep. 525, 85 Pac. 551, 9 Ann. Cas. 549; *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Hunter Bros. Mill. Co. v. Kramer Bros.* 71 Kan. 468, 80 Pac. 963; *Culp v. Sandoval*, 22 N. M. 71, L.R.A. 1917A, 1157, 159 Pac. 956; *Vogt v. Schienebeck*, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 106 N. W. 820, 2 Ann. Cas. 814; 2 Words & P. 2d Series, 658-660.

For the foregoing reasons and upon the authorities cited, this judgment should be reversed.

A petition for rehearing having been filed, *Rice, Ch. J.*, on June 27, 1921, handed down the following additional opinion:

Under the contract in this case, by which it was agreed that the lambs should be delivered f. o. b. cars at Ketchum, the carrier by which they were to be transported became the agent of the buyer to accept delivery. *Griffin v. Edward Eiler Lumber Co.* 122 Miss. 265, 84 So. 225. It may be conceded that a reasonable construction of such con-

tract requires the property to be loaded, without expense to the buyer upon cars suitable for transportation. The contract, however, did not designate or contain any intimation as to the final destination of the shipment. The most that can be said is that it is reasonable to assume that it was understood by both parties that the intention was to ship to some eastern market. But where the contract provides for delivery f. o. b. cars, without any further provision as to transportation to a designated destination, the buyer and not the seller fixes the destination, and the buyer assumes the risk of refusal on the part of the carrier to bill the property to the destination which he desires. When the seller enters into a contract with the carrier for shipment to a particular destination, he does so at the re-

quest of the buyer, and in designating the destination acts as the buyer's agent. He has done his duty when he demands of the carrier a shipping contract to the destination requested by the buyer. If any loss results from the refusal of the carrier to make a contract to deliver at the desired destination, the loss must be borne by the buyer and not by the seller.

So far as a claim for forfeiture is concerned, we understand the law to be that the buyer cannot recover the price paid, but will forfeit his advance payments if he wrongfully refuses to carry out the contract of sale, or wrongfully refuses to receive the goods when tendered. 35 Cyc. 605.

The petition for rehearing is denied.

Budge, McCarthy, and Dunn JJ., concur.

ANNOTATION.

What amounts to delivery f. o. b.

- I. Scope of note, 597.
- II. Generally, 597.
- III. Illustrations, 599.

I. Scope of note.

There is a clear distinction between what constitutes a "delivery f. o. b.," which is the question discussed in this annotation, and what constitutes a delivery to the buyer under a contract of sale. Whether a delivery to a carrier is a delivery to the buyer is not affected by the fact that the delivery is pursuant to an "f. o. b." contract, and accordingly that question, and the great number of questions on the law of sales which are dependent thereon, are strictly excluded.

II. Generally.

An agreement to deliver f. o. b. is construed broadly to mean that the seller, at his own expense, shall place the goods contracted for on the car or vessel which is to carry them, on account of the buyer, to a designated place, whether that is the initial point of shipment, or place of final destina-

tion; and that the buyer shall be free from all the expenses and risks attending such a delivery.

United States.—Nash v. Towne (1867) 5 Wall. 689, 18 L. ed. 527; United States Smelting Co. v. American Galvanizing Co. (1916) 236 Fed. 596; Brooks-Scanlon Co. v. Illinois C. R. Co. (1919) 168 C. C. A. 319, 257 Fed. 235.

Alabama.—Sheffield Furnace Co. v. Hull Coal & Coke Co. (1893) 101 Ala. 446, 14 So. 672; Capehart v. Furman Farm Improv. Co. (1893) 103 Ala. 671, 49 Am. St. Rep. 60, 16 So. 627; Elliott v. Howison (1906) 146 Ala. 568, 40 So. 1018.

California.—J. K. Armsby Co. v. Blum (1902) 137 Cal. 552, 70 Pac. 669; Whitaker v. Dunlap-Morgan Co. (1919) — Cal. App. —, 186 Pac. 181; Hackfeld v. Castle (1921) — Cal. —, 198 Pac. 1041.

Idaho.—See the reported case (HATCHER v. FERGUSON, ante, 590).

Illinois.—Knapp Electrical Works v. New York Insulated Wire Co.

(1895) 157 Ill. 456, 42 N. E. 147; Consolidated Coal Co. v. Jones & A. Co. (1905) 120 Ill. App. 139; Harman v. Washington Fuel Co. (1907) 228 Ill. 298, 81 N. E. 1017.

Kansas.—Hunter Bros. Mill. Co. v. Kramer (1905) 71 Kan. 468, 80 Pac. 963; Hurst v. Altamont Mfg. Co. (1906) 73 Kan. 422, 6 L.R.A.(N.S.) 928, 117 Am. St. Rep. 525, 85 Pac. 551, 9 Ann. Cas. 549.

Maryland.—Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. (1903) 97 Md. 1, 62 L.R.A. 795, 54 Atl. 634.

New York.—Silberman v. Clark (1884) 96 N. Y. 522.

Rhode Island.—Hobart v. Littlefield (1881) 13 R. I. 341.

South Dakota.—Manganese Steel Safe Co. v. First State Bank (1910) 25 S. D. 119, 125 N. W. 572.

Texas.—Russell & Co. v. F. W. Heitman & Co. (1905) — Tex. Civ. App. —, 86 S. W. 75; Lee v. Gilchrist Cotton Oil Co. (1919) — Tex. Civ. App. —, 215 S. W. 977.

Wisconsin.—Vogt v. Schienebeck (1904) 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 Ann. Cas. 814; Chandler Lumber Co. v. Radke (1908) 136 Wis. 495, 22 L.R.A.(N.S.) 713, 118 N. W. 185.

England.—Ex parte Rosevear China Clay Co. (1879) L. R. 11 Ch. Div. 565, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144; Stock v. Inglis (1884) 12 L. R. Q. B. Div. 573, 53 L. J. Q. B. N. S. 356, 51 L. T. N. S. 449, 5 Asp. Mar. L. Cas. 294.

Thus, in *Whitaker v. Dunlap-Morgan Co.* (Cal.) *supra*, the court said: "The meaning of these words [f. o. b.] is that the seller is to put the goods on board at his own expense, on account of the person for whom they are shipped."

"The abbreviation 'f. o. b.' has a well-defined business meaning, and, as applied to the sale of merchandise destined for shipment, is a term used to indicate that it will be placed on a car or vessel free of expense to the purchaser." *Manganese Steel Safe Co. v. First State Bank* (S. D.) *supra*.

"The ordinary meaning of delivery

'f. o. b. cars' is that the vendor is to be at the expense of hauling, loading, etc., or is to pay the freight to the named place." *United States Smelting Co. v. American Galvanizing Co.* (1916) 236 Fed. 596.

Where the phrase "f. o. b." is used in a contract between a buyer and seller of commercial commodities, necessitating the use of a common carrier, it means that the seller will, at his own expense, do all that may be essential to accomplish the loading and consignment of the goods to the buyer, including the procuring of cars on which to load the goods for shipment. *Hurst v. Altamont Mfg. Co.* (1906) 73 Kan. 422, 6 L.R.A.(N.S.) 928, 117 Am. St. Rep. 525, 85 Pac. 551, 9 Ann. Cas. 549.

In *Sheffield Furnace Co. v. Hull Coal & Coke Co.* (1893) 101 Ala. 446, 14 So. 672, the words "free on board" were held to mean that the buyer shall be free from all expense attending the shipment and transportation of the goods to the point named. If the words relate to the initial point of transportation, the buyer is entitled to shipment at that place free from all expense incident to loading the cars, together with any other expense incurred in the premises up to and including the loading of the cars, while, if the provision relates to the point of final destination, it imports that the seller is to pay all costs and charges up to that point, and the buyer is entitled to receive the consignment free of all such costs and charges.

In *Consolidated Coal Co. v. Jones & A. Co.* (1905) 120 Ill. App. 139, affirmed in (1908) 232 Ill. 326, 83 N. E. 851, the expression "f. o. b." was said to mean "free on board," and to denote that the seller agreed to deliver the goods sold on board the cars, "without cost to the buyer for packing, portage, carting and the like."

In *Nash v. Towne* (1867) 5 Wall. (U. S.) 689, 18 L. ed. 527, the phrase "free on board the steamer," was held to mean that the sellers should deliver the goods sold on board the steamer without charge to the buyers.

The meaning of the phrase "f. o. b." and its consequent effect may be

agreed on by the parties to the contract. *Brooks-Scanlon Co. v. Illinois C. R. Co.* (1919) 168 C. C. A. 319, 257 Fed. 235, wherein it was held that, while the expression "f. o. b." means that the delivery is to be made without a charge for prior transportation service, yet it may occur that the application of the facts to the expression is a matter of doubt and controversy, so that the meaning of the phrase is a proper subject for determination between the parties; and in such case, an understanding having been arrived at, it would not be in conflict with the effect of the expression, but would define its application.

In some jurisdictions it is held that judicial notice will be taken of the fact that the phrase "f. o. b.," when used in a contract of sale, means that the seller will, without expense to the buyer, deliver the subject of the sale on cars at the designated place. Thus, in *Sheffield Furnace Co. v. Hull Coal & Coke Co.* (Ala.) *supra*, it was held that courts judicially know that the abbreviation "f. o. b.," used in a contract of sale, where the property sold is to be transported, means that delivery is to be made "free on board" the cars at the point designated in the contract. See also *Capehart v. Furman Farm Improv. Co.* (1893) 103 Ala. 671, 49 Am. St. Rep. 60, 16 So. 627. So, in *Vogt v. Schienebeck* (1904) 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 Ann. Cas. 814, it was held that the courts will take judicial notice that the term "f. o. b. cars" at the place of shipment, when used in an agreement to sell property to another, means that the seller will, without expense to the buyer, deliver the subject of the sale on cars at the place named. Likewise, in *Hunter Bros. Mill. Co. v. Kramer Bros.* (1905) 71 Kan. 468, 80 Pac. 963, the court inclined to the view that, in contracts providing for delivery "f. o. b.," judicial knowledge may be taken of the meaning of the words.

III. Illustrations.

It is held in the reported case (*HATCHER v. FERGUSON*, ante, 590) that there is a compliance with the

terms of a contract to deliver certain live stock f. o. b. cars at a certain place, when the live stock is delivered on board cars at that place without cost to the buyer, though, by reason of a temporary embargo, the carrier refuses to bill them to an eastern market, as the buyer desires.

In *Edmunds v. Cochrane* (1920) — Mo. App. —, 226 S. W. 1007, it appeared that a contract for the sale of potatoes provided for a delivery f. o. b. at points in New Jersey, and that the buyers desired the potatoes for use in Kansas City. The sellers shipped the potatoes from points in New Jersey to their own order at a point in Pennsylvania, and, on arrival there, reconsigned them to the buyers at Kansas City. It was held that, in the absence of proof that a technical delivery in New Jersey was desired, there was a sufficient compliance with the terms of the contract on the part of the sellers to deliver f. o. b. in New Jersey.

In *Stock v. Inglis* (1884) L. R. 12 Q. B. Div. (Eng.) 573, 53 L. J. Q. B. N. S. 356, 51 L. T. N. S. 449, 5 Asp. Mar. L. Cas. 294, it was held that, if the goods dealt with by the contract are specific goods, the words "free on board," according to the general understanding of merchants, mean more than that the seller is to put them on board at his expense; they mean that he is to put them on board at his expense "on account of" the person for whom they are shipped. See also *Ex parte Rosevear China Clay Co.* (1879) L. R. 11 Ch. Div. (Eng.) 565, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144.

Where a contract provides that the seller shall deliver the goods in question "free on board cars" at the point of destination, there is no such delivery when the buyer is compelled to pay the freight in order to obtain possession of the goods. *Chandler Lumber Co. v. Radke* (1908) 136 Wis. 495, 22 L.R.A.(N.S.) 713, 118 N. W. 185.

In *Silberman v. Clark* (1884) 96 N. Y. 522, it was held that, under a contract for the sale of steel rails "f. o. b. continental port," the cost of placing

the goods on board the vessel which was to carry the rails from the continental port to their destination was to be borne by the seller.

In *Farmers' Cotton Oil Co. v. T. H. Brooke & Co.* (1914) 14 Ga. App. 778, 82 S. E. 372, the contract involved provided for the sale of goods "f. o. b. cars" at the place of shipment, and contained no reservation of any right on the part of the buyer to designate, before shipment, the particular carrier to which delivery should be made. It was held that a delivery to any carrier in the city from which the agreed shipment was to be made constituted a sufficient compliance with the provision in the contract fixing delivery "f. o. b. cars," and that the delivery was sufficient, whether the cars were placed on a regularly used spur or sidetrack of the carrier, or on the main line, or at the depot of the carrier at the place of shipment.

Where a contract of sale provides merely for the sale of goods "f. o. b.," without designation of place, the phrase means delivery on board cars at the usual place of shipping goods of the kind sold, from the locality in which the seller resides. *Adams v. Janes* (1910) 83 Vt. 334, 75 Atl. 799.

Similarly, where an agreement to sell provides no place for delivery of the goods, merely stating that they are to be delivered f. o. b. cars, it will be inferred that they are to be delivered at the nearest place for shipment by railroad. *W. C. Biggers & Co. v. Hammer* (1918) — Tex. Civ. App. —, 204 S. W. 493. See also *Kirchman v. Tuffli Bros. Pig Iron & Coke Co.* (1909) 92 Ark. 111, 122 S. W. 239.

In *Burton & Beard v. Nacogdoches Crate & Lumber Co.* (1913) — Tex. Civ. App. —, 161 S. W. 25, the expression, "at 6½ cents f. o. b." a certain place, was held not to imply necessarily that the goods were to be delivered f. o. b. at that place, but merely indicated that the price was to be as stated, with the freight to that place allowed.

Likewise, in *Pond Creek Mill & Ele-*

vator Co. v. Clark (1920) — C. C. A. —, 270 Fed. 482, it was held that, where the term "f. o. b." at a given point is used in a contract in connection with the price of the goods, it does not mean that the seller is actually to deliver the goods at the indicated point, and has no reference to delivery, but indicates that, wheresoever the goods may be shipped, the seller will either pay freight to the designated point, or, if the goods are not shipped there, will deduct, or permit the buyer to deduct, from the fixed price an amount equivalent to the freight on such a shipment to the point indicated.

So, in *Barnett & R. Co. v. Fall* (1910) 62 Tex. Civ. App. 391, 181 S. W. 644, it was held that, while an agreement to sell goods f. o. b. cars at a designated place will ordinarily be regarded as an agreement to deliver the goods at the designated place, the meaning of the term depends on the connection in which it is used; and, if the meaning of the contract is doubtful, the construction placed on it by the parties will be adopted.

In *Liondale Mercantile Co. v. Gerber* (1921) 197 App. Div. 345, 188 N. Y. Supp. 825, where the place of business of both buyer and seller was in New York city, a contract reading, "Delivery at New York: when called for," was construed to give the buyer the option to designate the place of delivery within the city, whether to himself, at his place of business, or to a carrier, for transportation elsewhere, or otherwise; the words, "when called for," being intended to obligate the seller to hold the goods until the defendant desired delivery thereof, and gave notice of the place where he desired delivery to be made. The appellate court rejected the theory of the trial court, that there was no obligation on the part of the seller to deliver any of the goods until the buyer called at the former's place of business, and was there prepared to receive delivery thereof.
L. F. C.

MATTIE A. TUTTLE, Respt.,
v.
PACIFIC MUTUAL LIFE INSURANCE COMPANY, Appt.

Montana Supreme Court — June 25, 1920.

(58 Mont. 121, 190 Pac. 993.)

Insurance — accident — death — necessity of proof — ignorance of claimant.

1. That the beneficiary of the holder of an accident insurance policy, who becomes convinced of his death after his disappearance, does not know the exact facts concerning the manner of his death, does not warrant failure to comply with a provision of the policy that claimant must deliver to the company immediate written notice of the accident with full particulars.

[See note on this question beginning on page 609.]

— notice to local agent — sufficiency.

2. Informal notice of accidental death to a local agent of insurer does not meet the requirement of the policy that immediate notice be given to the insurer at its home office.

— waiver by agent — validity.

3. An insured cannot claim a waiver by a local agent where the policy provides that no waiver shall be valid unless in writing at the home office, signed by president and secretary.

[See 14 R. C. L. 1161.]

Evidence — burden of proof — claim under insurance policy.

4. The burden of proof is upon the claimant under an accident policy to show that insured was dead through injuries sustained by external, violent, and accidental means, and that the death was within the specified time of the accident, where the policy provides indemnity only in case of such loss.

[See 14 R. C. L. 1437.]

Definition — accident.

5. The word "accident" in accident insurance policies means an event which takes place without one's foresight or expectation.

[See 14 R. C. L. 1238.]

Evidence — sufficiency — death by accidental means.

6. Proof that the remains of the holder of an accident insurance policy, who left a hunting camp in a snowstorm, were found about 2 miles from the camp at a point which he would have had to walk about 5 miles to reach, without anything to show the cause of death, does not show that it was by external, violent, and accidental means within the meaning of the policy.

Appeal — unsupported judgment — reversal.

7. A judgment cannot be sustained if without evidence to support it.

APPEAL by defendant from a judgment of the District Court for Jefferson County (Smith, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy.
Reversed.

The facts are stated in the opinion of the court.

Messrs. Day & Mapes, for appellant:

The burden of proof was upon the plaintiff to show, not only the disappearance or even the death of the assured, but also that the death was caused by violent, accidental, and external means, independently of any other cause, within ninety days of the injury.

Price v. Occidental L. Ins. Co. 169 Cal. 800, 147 Pac. 1175; Rock v. Travelers' Ins. Co. 172 Cal. 462, L.R.A. 1916E, 1196, 156 Pac. 1029; Vernon v. Iowa State Traveling Men's Asso. 158 Iowa, 597, 138 N. W. 696; Schmohl v. Travelers' Ins. Co. — Mo. App. —, 177 S. W. 1108; Wilkinson v. Aetna L. Ins. Co. 240 Ill. 205, 25 L.R.A.(N.S.) 1256, 180 Am. St. Rep. 269, 88 N. E.

550; *Wright v. Order of United Commercial Travelers*, 188 Mo. App. 457, 174 S. W. 833; *Laessig v. Travelers' Protective Asso.* 169 Mo. 272, 69 S. W. 469; *Smith v. Travelers Ins. Co.* 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607; *Pledger v. Business Men's Acci. Asso.* — Tex. Civ. App. —, 197 S. W. 889.

The natural inference to be drawn from the facts surrounding the disappearance of assured is that he came to his death through exposure to the inclemency of the weather. But the exposure was voluntary, and no evidence was offered of any accident in connection with it.

Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 121 Eng. Reprint, 521, 30 L. J. Q. B. N. S. 77, 4 L. T. N. S. 15, 7 Jur. N. S. 367, 9 Week. Rep. 342; *Dozier v. Fidelity & C. Co.* 13 L.R.A. 114, 46 Fed. 446; *Elsev v. Fidelity & C. Co.* — Ind. App. —, 109 N. E. 413; *Schmid v. Indiana Travelers' Acci. Asso.* 42 Ind. App. 483, 85 N. E. 1032; *Stone v. Fidelity & C. Co.* 133 Tenn. 672, L.R.A.1916D, 536, 182 S. W. 252, Ann. Cas. 1917A, 86; *Morse v. Commercial Travelers' Eastern Acci. Asso.* 212 Mass. 140, 40 L.R.A. (N.S.) 135, 98 N. E. 599.

The requirement of the policy that immediate notice shall be given is not a condition subsequent, as it has been sometimes called.

Hatch v. United States Casualty Co. 197 Mass. 101, 14 L.R.A. (N.S.) 503, 83 N. E. 398, 25 Am. St. Rep. 332, 14 Ann. Cas. 290.

The term "immediate" has frequently been construed to mean a reasonable time under the circumstances of the particular case, of which the jury are the judges. Where the facts are not in dispute it is a question of law for the court.

Foster v. Fidelity & C. Co. 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69; *Travelers' Ins. Co. v. Myers & Co.* 62 Ohio St. 539, 49 L.R.A. 760, 57 N. E. 458.

Where a life insurance policy makes a condition precedent to recovery thereon that proofs of death be furnished in accordance with the policy, and there is a failure to furnish such proof and no waiver is shown, there can be no recovery on the policy.

Metropolitan L. Ins. Co. v. Wagner, 50 Tex. Civ. App. 233, 109 S. W. 1120.

Where the policy contains a provision against waiver by an agent, it is both notice to and agreement by the

policyholder that no agent of the company has authority to waive the condition.

Travelers' Ins. Co. v. Myers, supra; *Collins v. Metropolitan L. Ins. Co.* 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092.

Failure to give notice of loss within a reasonable time, as required by the terms of the policy, is not waived by the subsequent denial of all liability on the ground that the loss is not covered by the policy.

Ætna L. Ins. Co. v. Fitzgerald, 165 Ind. 317, 1 L.R.A. (N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 262, 6 Ann. Cas. 551.

In order to constitute a waiver of proof of death, there must be a denial of liability upon other grounds than failure to make proof before the time has expired within which proofs of death might be made within the terms of the policy.

Burlington Ins. Co. v. Ross, 48 Kan. 228, 29 Pac. 469; *State Ins. Co. v. School Dist.* 66 Kan. 77, 71 Pac. 272; *Continental Ins. Co. v. Chance*, 48 Okla. 324, 150 Pac. 114; *Employer's Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. App. 232, 35 S. W. 869; *Aronson v. Frankfort Acci. & Plate Glass Ins. Co.* 9 Cal. App. 473, 99 Pac. 537.

Messrs. D. M. Kelly and J. E. Kelly for respondent.

Matthews, J., delivered the opinion of the court:

This action was brought by plaintiff on an accident policy carried by her son, Ora Tuttle. The case was tried to the court sitting without a jury, and resulted in a judgment in favor of the plaintiff for the amount of the policy.

The undisputed facts are as follows: In 1908 Ora Tuttle was insured by defendant company "against the effects of bodily injuries sustained during the term of this policy and caused solely by *external, violent, and accidental means*."

And if death shall result from such injuries within ninety days, independently of all other causes, the company will pay the principal sum of \$1,500." The policy was in full force and effect throughout the year 1910. In November of that year, Ora Tuttle, his brother, R. S. Tuttle, and three other young men,

went into the park district in Galatin county on a hunting trip, and established a camp at Grayling. On the morning of the 21st Ora Tuttle left camp alone on the trail of an elk; it was then snowing hard, and a man could not be distinguished at a hundred yards. The storm continued throughout the day and night, the temperature remaining slightly below the freezing point, not cold enough to freeze a person out in the storm. The next day was fairly pleasant, but squally, and 10 to 12 inches of snow had then fallen. The second day a heavy storm broke, and continued for 8 or 10 days, and the snow then appeared to be several feet deep. On leaving camp, Tuttle took with him a rifle, an automatic pistol, and provisions sufficient for the day. As night approached and he did not return, his companions instituted a search for him, building signal fires and discharging their rifles, but without receiving any response. The search was continued until the following February, but no trace of the missing man was found. On October 2 or 3, 1913, his remains were found in a small park about 2 miles from the location of the camp. A small canyon intervened, necessitating a detour, requiring one to travel approximately 5 miles from the camp to the place where the remains were found. R. S. Tuttle identified the clothing and shoes as those of Ora Tuttle. His watch was still in the vest pocket and his automatic in the trousers pocket; the rifle was nowhere in the vicinity. Only the larger bones of the body remained; most of these were with the clothing. The skull, however, was found in a shallow gulch some 30 feet distant, and the shoes Tuttle had worn were found near the skull. There was no cliff or other point from which deceased could have fallen to his death. The remains were taken to Whitehall, and on the 9th day of October, 1913, were buried.

The plaintiff testified that, shortly after the disappearance of Ora Tuttle, she had a conversation with

the local agent of the company, and that "I asked him if the boy was dead if I would have to write the company for proofs—for blanks anyway. He said, No, he would attend to that himself. And then I asked him if I would have to keep his payments up. He said, No, I would not have to do that. He assured me that he did not think the boy was dead; that he thought he would come home after a little."

On June 19, 1911, Ike E. O. Pace, Esq., an attorney at Whitehall, notified the company by letter of the disappearance of Tuttle and of the search made for his remains, and closed with the statement: "There is no doubt, however, that the young man is dead, and probably was either accidentally shot, or received some serious fall, or was attacked by some wild animal, which accident resulted in his death."

On October 20, 1913, plaintiff notified the local agent in writing of the finding of the body, and requested instruction as to what was required of her as to "proof and statement." The letter was forwarded to and answered by the head office, to the effect that the last policy carried by Ora Tuttle was in 1910, and that "the conditions of it are such that it would appear that no claim exists thereunder." The plaintiff replied, reciting her conversation in 1910 with the local agent, and stating that she would be glad to hear further from the company. Thereafter, on January 30, 1914, J. L. Wines, Esq., an attorney, took the matter up with the company, and was advised in writing: "It appears impossible to show the manner of such death. Such being the fact, it is impossible to determine whether the case falls within the terms of the policy, said policy being one of limited liability. Furthermore, it appears from an examination of the files that the provisions of the contract in regard to giving notice and submitting proofs have not been complied with. You will, of course, understand that the action of the company in writing

you as above is not to be construed as a waiver or impairment of any defense which it may have to any action upon the policy."

The amended complaint alleges that "Ora Tuttle came to his death by bodily injuries sustained, caused by external, violent, and accidental means, and resulting in his death and disability, independent of all other causes."

It then recites the facts, substantially as hereinbefore stated. It then alleges the conversation with the local agent and the subsequent writing of the letter referred to above, with the contents, but continuing, "And asking him if he would look after the matter, as he said he would." This latter request does not, however, appear in the letter which was introduced in evidence. The complaint then alleges the notice of June 19, 1911, and, after stating the contents, avers that plaintiff "at the same time requested that proper blanks be forwarded to her to make the necessary written affirmative proof of death."

The letter, also introduced in evidence, does not contain the request quoted above from the complaint.

The complaint further alleges that notice of death was given and liability denied within the 120 days, as required by the policy, "after ascertaining the fact of death," that defendant failed, neglected, and refused to furnish the blanks, and plaintiff was unable, therefore, to furnish the proof required, and was thereby excused from furnishing other proof than that submitted, and that defendant waived any advantage that it might have claimed by reason of the failure of plaintiff.

The defendant demurred to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action, pointing out the failure to state in what manner the injuries were sustained, or that they were caused by external, violent, and accidental means; that the complaint shows a failure to give the required notices,

and does not state facts sufficient to constitute a waiver. The demurrer was overruled, and defendant answered, and thereafter the cause was tried to the court sitting without a jury. The plaintiff having rested, defendant moved the court to find the issues in its favor, which motion was denied. The defendant introduced no evidence, and the court made its findings, to the effect that Ora Tuttle came to his death by external, violent, and accidental means on or about the 22d day of November, 1910, at which time he was insured in defendant company, and that plaintiff was his beneficiary; that the facts did not come to the knowledge of plaintiff until October, 1913, and in the interim plaintiff did not know the actual fate of Ora Tuttle, or that he was in fact dead; that after the discovery of his death, and within the time provided in the policy, plaintiff duly notified defendant of the death; that the amount of the policy was due and payable January 30, 1914, at which time defendant refused payment. The court thereupon recited its conclusions of law that the plaintiff was entitled to a judgment, and entered judgment accordingly. The appeal is from the judgment.

The specifications of error herein are that the court erred in (1) overruling the demurrer to the amended complaint; (2) refusing to grant the motion to find the issues for defendant; (3) finding that Ora Tuttle came to his death by external, violent, and accidental means on or about November 22, 1910; and (4) finding, as a conclusion of law, that plaintiff was entitled to judgment.

1. In overruling the demurrer the court evidently considered the general allegations of the complaint sufficient, to be thereafter aided by proof of specific facts, and disregarded the recitation of evidence as surplusage. The case was thereafter tried, and all the facts concerning the death of Tuttle that could possibly be developed were brought out. No good purpose could possibly be developed were

and we are of the opinion that the matter should be disposed of on its merits. We will therefore pass, without deciding, the question of the correctness of the court's ruling on the demurrer.

2. The motion to find the issues in favor of the defendant is based on the ground of alleged insufficiency of the evidence to establish (a) that death resulted from injuries sustained, caused solely by external, violent, and accidental means; (b) that immediate written notice of the accident was given in accordance with the terms of the contract; or (c) that written affirmative proof of death by such means was made within the time required by the terms of the contract; or (d) that there was a waiver of such conditions by the company. The grounds designated (a), (b), and (c) are so closely allied that they will be considered together.

The policy here under consideration contains the following provisions:

"6. The claimant must deliver to the company at its home office in Los Angeles, California, immediate written notice of any accident, with full particulars and name and address of insured, and deliver to the company at its said home office written affirmative proof of such injuries or death and whether said injuries or death were caused by external, violent, and accidental means within the terms of this policy; and so furnish such proof as to death . . . within 120 days from time of accident; or no claim shall arise or be valid."

"9. No alteration or waiver of the conditions or provisions of this policy or said application shall be valid unless in writing at the company's home office and signed by the president or vice president and also the secretary or assistant secretary; nor shall notice to or knowledge of any person of anything not written in said application be held to effect a waiver or estoppel upon the company, or affect the provisions of this contract."

While, in this state, "time is never considered as of the essence of a contract, unless by its terms expressly so provided" (Rev. Codes, § 5047), and "any succinct and intelligent statement, giving the information called for by the stipulation in the policy, whether verified or not, or whether by eyewitness or not, is sufficient to put the insurer upon inquiry, to determine whether he is liable" (Da Rin v. Casualty Co. of America, 41 Mont. 175, 27 L.R.A. (N.S.) 1164, 137 Am. St. Rep. 709, 108 Pac. 649) under the above-quoted provision "6," some notice, "with full particulars and the name and address of insured," should have been given to the company at its "home office." And while the beneficiary did not know, immediately after the accident, the exact facts concerning the manner in which insured had met his death, she was, within a reasonable time after his disappearance, fully convinced of his death, and, under the terms of the contract, either she, or someone acting in her behalf, should have given the required notice to the company at its home office.

In the absence of proof that the facts related were communicated to the home office, notice to the local agent during the informal conversation held shortly after the disappearance of Ora Tuttle could not, under any circumstances, be held to meet the requirement of the contract that immediate notice be given to the "company at its home office." As was said in Hatch v. United States Casualty Co. 197 Mass. 101, 14 L.R.A. (N.S.) 503, 125 Am. St. Rep. 332, 83 N. E. 398, 14 Ann. Cas. 290: "The promise to insure is not absolute, but conditional. The condition is that the notice, whatever it may be and by whomsoever or whenever given, shall be given. It is a condition precedent to the creation of liability or to the life of the promise; or, to put it per-

Insurance—
accident—death
—necessity of
proof—ignorance
of claimant.

—notice to local
agent—suffi-
ciency.

haps in a better way, the giving of the notice is one of the essentials of the cause of action. . . . If it be said, as it sometimes is, that such a defense is purely technical, the answer (if one is needed) is that the provision for notice is of the essence of the contract, that it is manifestly an important provision for the protection of the insurer against fraudulent claims, and also against those which, although made in good faith, are not valid. It is a provision which tends to the elucidation of the truth when a claim for indemnity is made. It was one to which the insured agreed, and it is not unreasonable."

The giving of the notice of the accident, and the forwarding of affirmative proof of death, are two separate and distinct obligations. Under the circumstances of this case, the latter obligation could not be met until after the discovery of the body and a determination of the cause of death, if it was then possible; but the fact of the accident, if any, with its attendant circumstances, was known to plaintiff within a few days after the disappearance, but no notice thereof was given until June 19, 1911, nearly seven months thereafter.

In the case of *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69, it was held that, where the beneficiary satisfied herself after investigation that her son's death was accidental, but did not give notice until twenty-nine days thereafter, she did not bring herself within the requirement of "immediate notice."

There is a class of cases which holds that the time within which notice must be given does not begin to run until the discovery of the facts upon which the claim is based. *Trippe v. Provident Fund Soc.* 140 N. Y. 23, 22 L.R.A. 432, 37 Am. St. Rep. 529, 35 N. E. 316; *Munz v. Standard Life & Acci. Ins. Co.* 26 Utah, 69, 62 L.R.A. 485, 99 Am. St. Rep. 830, 72 Pac. 182; *Jennings v. Brotherhood Acci. Co.* 44 Colo. 68, 18 L.R.A.(N.S.) 109, 13 Am. St. Rep. 109, 96 Pac. 982. But these

cases are of little assistance here; for leaving out the question of death, with which this preliminary notice is not concerned, the facts relating to the accident, if any, were known to plaintiff at the time she was notified of the loss of her son in a storm.

The plaintiff contends that she was not required to give notice until after the establishment of the fact that the assured was dead. If this were true, no such notice as is required by the terms of the contract was ever given, as it would exclude the letter of June 19, 1911, which contained the only written notice furnished the company at any time, attempting a recital of the facts. There is no evidence of a compliance with the requirement of written affirmative proof of death; the letter of October 20, 1913, written to the local agent, but forwarded to the home office, goes no further than to state that the "remains of my son Ora Tuttle have been found." What communication was made by Attorney Wines is not disclosed, and appears to have been made orally, while the stipulation in the contract is that it be made in writing, and was made more than three months after the discovery of the body.

As to waiver, the insurer and the insured mutually agreed that "no waiver . . . shall be valid unless in writing at the home office and signed by the president or vice president, and also the secretary or assistant secretary."

Where the policy contains a provision against waiver by an agent, it is both notice to and agreement by the policyholder that no agent of ^{-waiver by} ~~agent—validity.~~ the company has authority to waive the condition. *Collins v. Metropolitan L. Ins. Co.* 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092; *Travelers' Ins. Co. v. Myers & Co.* 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458.

Three letters, admittedly coming from the home office, were introduced, and the material parts of their contents have been heretofore

quoted. No one of these letters is signed as provided for in the policy; but we shall not pass upon the question as to whether such requirement is reasonable or not, as, in our opinion, nothing contained in the letters could constitute a waiver, even though signed.

3. The first ground mentioned in the motion for findings in favor of the defendant, and the third and fourth assignments of error, are based on the lack of evidence to establish death by external, violent, and accidental means. The evidence, heretofore quoted, establishes the fact of death, but the manner in which the insured met his death is left entirely to conjecture. The policy on which the action was brought is not an ordinary life insurance policy, but an accident policy, in which the liability of the company is specifically limited to insurance "against the effect of bodily injuries sustained during the term of the policy, and caused solely by external, violent, and accidental means," and, under the terms of which, "if death shall result from such injuries within ninety days, independent of all other causes, the company will pay the principal sum of \$1,500." The burden of proof was upon the plaintiff to show, not only the death of the insured, but

**Evidence—
burden of proof
—claim under
insurance
policy.**

also that the death was caused by injuries sustained by the insured by external, violent, and

accidental means, and resulted within ninety days after the injury. In other words, the plaintiff must not only show death, but death resulting from accident within the meaning of the policy. *Price v. Occidental L. Ins. Co.* 169 Cal. 800, 147 Pac. 1175; *Rock v. Travelers' Ins. Co.* 172 Cal. 463, L.R.A.1916E, 1196, 156 Pac. 1029; *Vernon v. Iowa State Traveling Men's Asso.* 158 Iowa, 597, 138 N. W. 696; *Wilkinson v. Aetna L. Ins. Co.* 240 Ill. 205, 25 L.R.A. (N.S.) 1256, 130 Am. St. Rep. 269, 88 N. E. 550; *Wright v. Order of United Commercial Travelers*, 188 Mo. App. 457; 174 S. W. 833;

Laessig v. Travelers' Protective Asso. 169 Mo. 272, 69 S. W. 469; *Hatch v. United States Casualty Co.* 197 Mass. 101, 104, 14 L.R.A. (N.S.) 503, 125 Am. St. Rep. 332, 83 N. E. 398, 14 Ann. Cas. 290; *Smith v. Travelers' Ins. Co.* 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607.

In the case of *Laessig v. Travelers' Protective Asso.* 169 Mo. 272, 69 S. W. 469, the court said: "The proof of accidental death is the essential prerequisite and condition precedent to a right to recover on an accident insurance policy. This is the distinguishing feature between accident policies and ordinary life policies. In the latter, to make out a prima facie case, it is only necessary for the plaintiff to show the contract after the death, . . . whereas, in the former, the condition precedent to a recovery is not simply the natural death, but the death from accident. Hence, in suits upon accident policies, the burden of proof is upon the plaintiff (subject to the limitation that it is not presumed as a matter of law that the deceased took his own life or was murdered) to show that the death was caused by external violence and by accidental means. This is exactly what the policy or contract itself provides. And this is the rule laid down by Mr. Justice Harlan, in the Supreme Court of the United States, in *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360. . . . As mere proof of injury in a damage case will not entitle plaintiff to recover, but negligence of the defendant must be shown, so in a suit upon an accident policy mere proof of injury or death will not entitle the plaintiff to recover, but the injury or death must be shown to be due to an accidental cause."

There is a clear distinction between accidental death and death by accidental means; the latter only is covered by the policy. Thus, in *Smith v. Travelers' Ins. Co.* supra, we find the rule stated as follows: "It is not sufficient that the death, or the illness that caused the death, may have been an accidental result

of the external cause, but that cause itself must have been, not only external and violent, but also accidental [citing a long list of authorities]."

The word "accident," in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental.

**Definition—
accident.**

Death resulting from voluntary physical exertion, or from intentional acts of the insured, is not accidental, nor is disease or death caused by the vicissitudes of climate or atmosphere the result of an accident; but where, in the act which precedes an injury, something unforeseen or unusual occurs which produces the injury, the injury results through accident.

In *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & El. 478, 121 Eng. Reprint, 521, the court says: "We cannot think disease produced by the action of a known cause can be considered as accidental. Thus, disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climatic or atmospheric influences, cannot, we think, properly be said to be accidental unless . . . brought about by circumstances which may give it the character of accident."

Respondent cites a number of cases in support of the contention that the circumstances in this case supply this element. But in each of these cases there is shown the element of accident. For example, in *N. W. Commercial Travelers' Assn. v. London Guarantee & Acci. Co.* 10 Manitoba L. R. 537, the death of the insured by freezing was found to have been caused by prolonged exposure, *due to the breaking down of the conveyance in which he was riding.*

In *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945, it was held that a drowning, caused by a temporary trouble to which the insured was not sub-

ject, but which was entirely unusual and uncommon, whereby he fell into the water, was "accidental."

In *United States Mut. Acci. Assn. v. Hubbell*, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544, 3 Am. Neg. Rep. 591, drowning while crossing a ford which insured had safely crossed on previous occasions, and which was entered only with the apprehension of getting wet, was held to be "accidental."

It will be noted, however, that in each of the cases the "accidental means" which brought about the death were shown. Here the only evidence is that the insured left camp in a heavy snowstorm, following the trail of an elk; he had been reared in the mountains; the weather was not cold enough to freeze a man, and the storm did not increase in violence. The body was found but 2 miles from camp, though insured would have had to walk 5 miles in order to reach the spot, a distance which could not have exhausted a strong young man; there was no place from which insured could have fallen to his death. The rifle he carried on leaving camp was not with the remains, and the automatic was still in his pocket. At the time the body was found it could not, of course, be ascertained whether there had been any marks on it. While there is no presumption that a man found dead has been murdered, or has committed suicide, as was stated in *Laessig v. Travelers' Protective Assn.* supra, it is equally true that no presumption can be indulged in that insured met death by external, violent, and accidental means.

The insured having contracted that the company should be liable only in case of death from injuries caused solely by external, violent, and accidental means, the burden of proving that the case is within the terms of the policy rested upon plaintiff, and this burden, in our opinion, was not sustained. Conjectural causes of death, which do

**Evidence—
sufficiency—
death by
accidental
means.**

not fall within the terms of the policy, as that insured died of heart failure or apoplexy, are as reasonable, under the evidence adduced, as those which fall within those terms.

While we are mindful of the rule that this court will not disturb the findings of the trial court where there is substantial evidence to support them, in this case there is no evidence to support the finding "that Ora

Appeal—un-
supported
judgment—
reversal.

Tuttle came to his death by external, violent, and accidental means on or about the 22d day of November, 1910."

The judgment of the District Court of Jefferson County is therefore reversed, and the cause remanded to the trial court, with the direction to enter judgment in favor of the defendant.

Reversed and remanded.

Brantly, Ch. J., and Holloway, Hurly, and Cooper, JJ., concur.

ANNOTATION.

Time for giving notice of accident or making proof of death in case of disappearance of insured.

It is commonly provided in accident insurance policies that "immediate" notice shall be given to the insurer of an accidental injury to the insured. The reported case (*TUTTLE v. PACIFIC MUT. L. INS. Co.* ante, 601), and the only other case applying such a provision to the disappearance of the insured, agree that in such a case the term "immediate" means as soon as reasonably may be, after knowledge of the fact comes to the person charged with the duty of giving the notice. In the reported case (*TUTTLE v. PACIFIC MUT. L. INS. Co.*) it is held that the notice must be given within a reasonable time after the fact of the disappearance of the insured is known. But in *Kentzler v. American Mut. Acci. Asso.* (1894) 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002, a different view was taken, and it was held that a notice given within a reasonable time after the finding of the body of the insured, and more than six months after his disappearance, satisfied a requirement that the notice should be given "immediately after the accident occurs." The court said: "What is the object of giving such notice of the accident, injury, or death? In case of an injury or disability not resulting in death, such notice affords the association an opportunity to ascertain the exact condition of the person, and apply the most effectual remedy. But in case of death there can be no remedy, and the only object of the notice is to secure evidence of identity. What is

meant by giving notice 'immediately after the accident occurs'? Does it mean, in the language of Webster, 'in an immediate manner; without intervention of anything; . . . without interval of time; without delay; instantly'? If the contract is to be thus literally construed, compliance by the beneficiary would seldom be possible. But courts, looking at the substance of contracts and statutes, have, during the last two centuries, repeatedly declared that 'the word "immediately," although in strictness it excludes all meantimes, yet, to make good the deeds and intents of parties, it shall be construed "such convenient time as is reasonably requisite for doing the thing."' 9 Am. & Eng. Enc. Law, 981, citing numerous English and American cases in support of the proposition. The same language is quoted approvingly by Ryan, Ch. J., speaking for the whole court, in construing the words 'immediate delivery,' as used in § 2310, Rev. Stat., in *Richardson v. End* (1877) 43 Wis. 318. *Stevens v. Breen* (1890) 75 Wis. 599, 44 N. W. 645. Applying this rule to the case at bar, the word 'immediately' must be construed to mean such convenient time as was reasonably requisite for doing the thing required. That is to say, upon the discovery of the death, notice thereof was to be given in such convenient time as was reasonably requisite for doing so under the circumstances mentioned."

With respect to the requirement of

a policy of life or accident insurance that proof of death shall be given within a stated time after the death of the insured, it has been held that, in case of the disappearance of the insured, the time limited for making proof of death runs from the finding of the body, whereby the fact of death is first ascertained. *Kentzler v. American Mut. Acci. Asso.* (Wis.) *supra*. And see the reported case (*TUTTLE v. PACIFIC MUT. L. INS. CO.*).

Where the body of the insured is not found, and the fact of death is established only by the presumption arising from seven years of unexplained absence, it has been held that, in the absence of a requirement of the policy as to the time of making proof of death, the proof may be made within a reasonable time after the expiration of the seven years. *Behlmer v. Grand Lodge, A. O. U. W.* (1909) 109 Minn. 305, 26 L.R.A. (N.S.) 305, 123 N. W. 1071. In that case it appeared that, about one year after the disappearance of the insured, the beneficiary, being satisfied in her own mind that the insured was dead, ceased to pay assessments. In a suit brought after the expiration of seven years the jury found that the insured died while the policy was in force. It was held that these facts did not deprive the beneficiary of the right to wait until the legal presumption of death was complete before making proof of death, the court saying: "Much may be said on both sides of the question; but a majority of the court are of opinion that respondent was not restricted to the evidence available to her at the time she stopped making payments on the certificate, July 28, 1902, for the reason that, while such evidence seems to have satisfied her that her husband was dead, yet there was then no known evidence by which his death could have been legally established. An attempted proof of his death before the expiration of the seven years would have been necessarily insufficient; a nullity. A party is not bound to do a useless thing. The certificate did not require the proofs to be filed within any particular time, and hence

a reasonable time, in view of all the circumstances of the case, was a compliance with the contract. In an ordinary case of death, where the proofs to establish it are available, there is no reason for the application of the rule of evidence growing out of the presumption of death after seven years' disappearance, and in such case the beneficiary would be bound to furnish the proofs within a reasonable time, which might be a few days, weeks, or months, according to the circumstances; but in a case where there is no positive evidence, and death can only be established with the aid of the presumption after the period of seven years has elapsed, why should the beneficiary be required to make out a case from proofs which are necessarily incomplete?"

Under similar facts in *Harrison v. Masonic Mut. Ben. Soc.* (1898) 59 Kan. 29, 51 Pac. 893, the court was apparently of the opinion that the duty to make proof of death accrued at the time when the payment of assessments was stopped, saying: "It is contended that it was impossible for the plaintiffs to furnish due proofs of the death of James Harrison until aided by the presumption arising from his unexplained absence for seven years; and that this is a sufficient excuse for the delay of the plaintiffs in presenting their proof. It is said that the court held that the testimony established the fact of Harrison's death in 1883, and that, while there was evidence to uphold a finding to that effect, the jury were not bound to so find, but might have fixed the time of his death at a later date. It is true that there is nothing in the testimony indicating the exact time or manner of the death of James Harrison; but it is distinctly averred in the amended petition that he came to his death in 1883. It was essential to the plaintiffs' case that this fact should be established, for if the death occurred at a later time, the policy became void by reason of non-payment of assessments." It was held in that case that a delay of more than ten years in making proof of death prevented a recovery on the policy.

L. B.

E. CLEMENS HORST COMPANY
v.
INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

California Supreme Court (In Banc)—October 20, 1920.

(— Cal. —, 193 Pac. 105.)

Workmen's compensation — serious misconduct in maintaining unguarded shaft.

1. The maintenance of an unguarded rapidly revolving shaft immediately over and in close proximity to a conveyer belt carrying vegetables from a parer to a slicer, at which women are stationed to care for any vegetables not properly peeled and keep the belt and slicer free from clogging, is serious misconduct on the part of the employer, which, under the Workmen's Compensation Act will render him liable for extra damages to an employee injured by contact with the shaft.

[See note on this question beginning on page 620.]

Definition — serious misconduct.

2. Serious misconduct of an employer which, under the Workmen's Compensation Act, will render him liable for extra damages to an injured employee, is conduct which the employer either knows, or ought to have known if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees.

Workmen's compensation — when injury is wilful.

3. To render the act of an employer in leaving rapidly revolving shafting unguarded, when so located that employees are likely to be caught in it and injured, wilful, so that the employer is liable under the Workmen's Compensation Act for extra damages to an injured employee, it is sufficient if it appears that the circumstances surrounding the act are such as evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of.

[See 28 R. C. L. 789.]

— who is executive or managing officer.

4. Under statutes making a corporation liable in extra damages for injury to an employee which is caused by the wilful misconduct of an executive or managing officer, it is sufficient if the misconduct is that of a person in the corporation's employ, either elected or appointed, who is invested with the general conduct and control at a particular place of the business of the corporation.

— superintendent as managing officer.

5. The superintendent of a plant who is intrusted with its operations is an executive or managing officer within the meaning of the Workmen's Compensation Act, rendering a corporation liable in extra damages for injury to an employee through the wilful misconduct of an executive or managing officer.

Master and servant — negligence with respect to revolving shaft.

6. The superintendent of a factory may be found guilty of wilful misconduct in leaving a rapidly revolving shaft unguarded, in close proximity to where workers were required to stand in the performance of their work, where he was familiar with the situation and could not have failed to observe the danger had he turned his attention to it.

Workmen's compensation — constitutionality of statute authorizing extra compensation for wilful injury.

7. Where the schedule of compensation provided by the Workmen's Compensation Act covers only a portion of the loss caused by the accident, the legislature may, under a constitutional provision authorizing the creation of liability on the part of employers to compensate their employees for injury, confer upon the industrial accident commission authority to add to the amount provided by the schedule in case the accident is caused by the wilful misconduct of the employer, an amount which does not exceed the full loss inflicted.

APPLICATION for a writ of certiorari to review an award of the Industrial Commission to claimant in a proceeding by her under the Workmen's Compensation Act to recover compensation for injuries sustained while in the employ of petitioner. *Award affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edward C. Harrison, Maurice E. Harrison and Arthur W. Bolton, for petitioner:

Section 6 (b) of the Compensation Act is unconstitutional.

Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Worswick Street Paving Co. v. Industrial Acci. Commission, 181 Cal. 550, 185 Pac. 953; Flickinger v. Industrial Acci. Commission, 181 Cal. 425, 184 Pac. 851; Pacific Gas & E. Co. v. Industrial Acci. Commission, 180 Cal. 497, 181 Pac. 788, 19 N. C. C. A. 298; Miller & Lux v. Industrial Acci. Commission, 32 Cal. App. 250, 162 Pac. 651; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1.

There was no proof of serious and wilful misconduct on the part of an executive or managing officer of the petitioner.

Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466; Fidelity & D. Co. v. Industrial Acci. Commission, 171 Cal. 728, L.R.A.1916D, 903, 154 Pac. 834; Hyman Bros. Co. v. Industrial Acci. Commission, 180 Cal. 423, 181 Pac. 784; Johnson v. Marshall Sons & Co. [1906] A. C. 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times L. R. 565, 5 Ann. Cas. 630; Beckles's Case, 230 Mass. 272, 119 N. E. 653, 17 N. C. C. A. 434; Riley's Case, 227 Mass. 55, 116 N. E. 259; Burn's Case, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787, 5 N. C. C. A. 635; Burke v. Chandler Shipbuilding Co. 5 I. A. C. Dec. 237; Butt v. Hampton Co. 5 I. A. C. Dec. 159; Lucky v. Hammond Lumber Co. 6 Industrial Acci. Com. Dec. 3; Nicholson v. S. F. O. T. R. Co. 6 Industrial Acci. Com. Dec. 10.

Messrs. A. E. Graupner and Warren H. Pillsbury, for respondent commission:

The finding of the commission that the injury was caused by serious and wilful misconduct on the part of the employer is sustained by the evidence.

Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466; Fidelity & D. Co. v. Industrial Acci. Commission, 171 Cal. 728, L.R.A. 1916D, 903, 154 Pac. 834;

Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Leishman v. Union Iron Works, 148 Cal. 274, 3 L.R.A.(N.S.) 500, 113 Am. St. Rep. 243, 83 Pac. 30; Tedford v. Los Angeles Electric Co. 134 Cal. 76, 54 L.R.A. 85, 66 Pac. 76; Shea v. Pacific Power Co. 145 Cal. 680, 79 Pac. 373; Wall v. Marshutz, 138 Cal. 522, 71 Pac. 692; Fogarty v. Southern P. Co. 151 Cal. 795, 91 Pac. 650; Kimbol v. Industrial Acci. Commission, 173 Cal. 351, L.R.A.1917B, 595, 160 Pac. 150, Ann. Cas. 1917E, 312.

Section 6 (b) of the Workmen's Compensation Act is constitutional.

Brenner v. Heruben, 170 Wis. 565, 176 N. W. 228; United States Fidelity & G. Co. v. Wickline, 103 Neb. 21, 6 A.L.R. 1267, 170 N. W. 193, 18 N. C. C. A. 664; Fassig v. State, 95 Ohio St. 232, 116 N. E. 104, 13 N. C. C. A. 845; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1; Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959.

Lawlor, J., delivered the opinion of the court:

This cause is before us on a writ of certiorari issued upon the application of petitioner, E. Clemens Horst Company, a corporation, to review an award made on October 24, 1919, by the respondent industrial accident commission in favor of respondent Mrs. La Verne Hamilton as compensation for injuries sustained by her on June 7, 1919, while in petitioner's employ. The sum of \$8.89, payable weekly in advance, was awarded to her against the Ocean Accident & Guarantee Corporation, petitioner's insurance carrier, as "a temporary total disability indemnity," and one half of that sum, \$4.45, also payable weekly in advance, was awarded her against petitioner as additional compensation by reason of the fact, as found

by the commission, that her injuries were occasioned by petitioner's "serious and wilful misconduct."

The said insurance carrier is not a party to this proceeding, and the only question presented is as to the validity of the award of additional compensation against the petitioner. The latter's contentions are: (1) That § 6(b) of the Workmen's Compensation Act (Stat. 1917, p. 834) is unconstitutional; and (2) "that even if this section were valid, there is no evidence of 'serious and wilful misconduct' . . . on the part of an executive or managing officer' of the petitioner corporation, and that therefore the commission was without jurisdiction to make the award."

At the date of the accident Mrs. Hamilton was employed in petitioner's vegetable drying plant near Wheatland, Yuba county, which had been built about three months before. E. Clemens Horst was petitioner's president and general manager. George E. Miller was general superintendent of petitioner's ranches. It appears that he was not a director or stockholder of petitioner. T. L. Conrad was superintendent of the plant at Wheatland, and was neither a director nor a stockholder of petitioner. When Mrs. Hamilton was injured she was working on a small platform raised about 2 feet from the floor of the plant. It was her duty to watch a conveyer belt which passed in front of her, and upon which potatoes were being carried from a peeling machine to a "slicer" about 2 feet to her left, and to pick out and pare those potatoes which had not been properly treated by the peeling machine. Directly over, and parallel to the conveyer belt, and about 5½ feet above the platform on which she was standing, was a rapidly revolving shaft which operated the various machines in the plant. This shaft was protected by a board on the side nearest the employee, but was unprotected below. The accident occurred under these circumstances: About 8 P. M. the mouth

of the "slicer" at Mrs. Hamilton's left became clogged. Leaning over the belt and under the shaft, she reached out to clear the potatoes away from the "slicer." In this position her hair was caught by the shaft and pulled from her head, so that she was completely scalped. It is admitted by petitioner that "the accident happened in the course of her employment, and no question is made of her right to recover compensation."

1. We shall first consider petitioner's claim that the finding that the injury was caused by the employer's serious and wilful misconduct is not supported by the evidence. Section 6(b) of the Workmen's Compensation Act (Stat. 1917, p. 834; Deering's General Laws, Consol. Supp. 1917-1919, Act 2143c, p. 1392), as it stood at the time of the accident, read in part: "Where the employee is injured by reason of . . . serious and wilful misconduct . . . on the part of an executive or managing officer . . . [of a corporation], the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increased one half: . . . Provided, however, that said increase of award shall in no event exceed twenty-five hundred dollars."

The commission has found on this point:

"(8) That at the time of said injury, the employer was a corporation. That the employer by its executive and managing officers constructed said plant and placed therein the transmission shafting upon which applicant was injured, parallel to and directly over the belt upon which applicant worked, at a height on a level with her eyes and without any guard or protection on the under side thereof. That applicant's work required her to bend forward with her head beneath said shafting, and it was necessary for her to stoop to do so. That her hair was thereby brought into close proximity to the unguarded portion of said shafting, which was at all

times revolving rapidly. That said shafting was, at all times herein mentioned, maintained in said condition by said employer through its executive and managing officers and by said Miller and Conrad. That said construction and maintenance were, and each of them was, a direct and open violation of the provisions of §§ 33, 34, 35, and 36 of the Workmen's Compensation, Insurance, and Safety Act of 1917. That the duty owed by said employer and its executive and managing officers to employees, under the said provisions, cannot be delegated by them, or any of them, so as to free them, or any of them, from responsibility for the violation of said duty, and under the ruling in the case of *Fidelity & D. Co. v. Industrial Acci. Commission*, 171 Cal. 728, L.R.A.1916D, 903, 154 Pac. 834, constituted serious and wilful misconduct on the part of said employer. That said serious and wilful misconduct was the proximate cause of said injury.

"That said construction and maintenance were further in violation of General Safety Order No. 6(a) of the Industrial Accident Commission, then in full force and effect, which provides that: ' . . . All transmission shafting, either horizontal or vertical, in workrooms . . . and located within 7 feet of the floor or platform, must be guarded.'

"That said violation of said safety order constituted serious and wilful misconduct on the part of the executive and managing officers of said corporation, and of said corporation, and was the proximate cause of said injury.

"That therefore applicant is entitled to have her compensation for said injury increased one half under § 6(b) of said act, said increase to be paid by said employer, and not by said insurance carrier."

The question, then, is: Does the evidence sustain this finding?

Mrs. Hamilton testified that she had been engaged in this particular work for ten days prior to the acci-

dent; that on the day in question two foremen had told her "to watch to see that it [the belt] didn't stop up at the end," where it dumped the potatoes into the "slicer;" that she could not reach that end of the belt without stooping under the shaft; that when she commenced to work at this plant she had been told "the general nature of the work, but not just what I was to do;" that she had not seen any signs on the premises warning employees against approaching the machinery; and that she had not "tried to take potatoes out of the slicer" except on the occasion when she was injured.

Mrs. Daisy Cope testified that she had been working on the same belt as Mrs. Hamilton; that the revolving shaft which caused the latter's injuries was "right over the belt" on a level with her eyes; that no one had called her attention to any danger signs in the plant, and that she had seen none; that prior to the accident she herself had felt the suction from the revolving shaft tugging at her hair, but had not spoken about it to her fellow employees; that she had not been warned "to look out for the shaft;" that "the shaft is right over the belt, and if you are not careful you would raise up under it;" that the board protecting the shaft on the side nearest her was "right even" with her head; that there was sufficient distance between the shaft and the belt at the point where the witness worked so that her hair would not become entangled in the shaft unless she leaned over the belt, but that the belt ran "upward" as it approached Mrs. Hamilton's position, "and it was closer to the shaft there, than it was where I was."

Mrs. A. M. Parker stated that at the time the applicant was injured she was "forelady, overseeing the work;" that she had not instructed Mrs. Hamilton "to be careful about the machinery in any way;" that she did not remember seeing any warning signs in the plant; that the "slicer" frequently became clogged; that she did not know whose duty it

was to clear the machine in such cases, but that the "day boss" had told Mrs. Hamilton to do so; that in order to do so she would have to lean over the belt so that her head "came right under the shaft;" that within a few days after this accident the shaft was boxed in; that she (the witness) had a pole which she often used to clear potatoes from the "slicer," but that this was not generally known among the employees, and that "the most of the time I used it was after she got hurt;" and that the pole was not located so that Mrs. Hamilton could use it. When recalled by petitioner, she admitted that no instructions had been given to anyone except to the applicant to clear the "slicer," and stated that she herself had not been told to do it until after Mrs. Hamilton was injured, but that during the ten days prior to the accident she frequently used the pole to keep the mouth of the machine clear.

Mrs. Marion Sherman, who was working about 5 feet from Mrs. Hamilton when the latter was hurt, testified that she had not been instructed as to whose duty it was to keep the "slicer" clear, but that "anyone who was working on that end of the belt, right there, they was to keep the potatoes moving;" that she, too, had noticed the effect of the shaft on her hair when she stood erect; that the shaft was about 2½ feet above the belt; and that anyone working in front of the belt would naturally stoop under the shaft in order to reach the mouth of the "slicer."

T. L. Conrad, testifying for petitioner, stated that he was "fairly familiar" with conditions at the plant; that the distance between the shaft and the platform on which Mrs. Hamilton was working was about 5½ feet; that after the accident the shafting was boxed in at his direction; that one Boyd was the night foreman at the plant under him; that the "slicer" occasionally became clogged; that it was Mrs. Parker's duty to keep it clear,

and not the duty of an employee stationed where Mrs. Hamilton was; that he did not know whether or not his foremen, who were "supposed to instruct these employees when they went to work about their duties," had given these or other instructions; that "we had signs up in regard to the safety of the machinery;" that, so far as he knew, Horst himself had no knowledge of the dangerous position of the shaft; that the surface of the shafting was smooth; that he had never seen "any woman, working in the same position Mrs. Hamilton was, cleaning the slicer;" that "she had no business there," clearing the mouth of the machine; and that a woman working "below" Mrs. Hamilton on another belt had been instructed by him, and by the foreman, to keep the "slicer" from becoming clogged. On cross-examination he stated that prior to the accident he had frequently noticed the position of the shaft; that he had been on the platform where Mrs. Hamilton worked, and had seen that the shaft was "open underneath and on the back," although there were two boards "in front;" that he had never called the attention of Horst or Miller to the position of the shaft; that he had never told any other foreman "to cover it up or box it in;" that he thought Horst was in the East, and had not been in the plant before the accident; and that he himself had considered the plant "as ready to run and absolutely safe."

George E. Miller, also a witness for petitioner, testified that he had inspected the Wheatland plant "simply, in a general way, by going through it and seeing it in operation. The instruction to the builders at the time it was built was to house in everything they considered dangerous. . . . I know that we didn't consider it was necessary to inclose shafts where the shaft was over the belt, so that one would have no business to be in there. Of course, there are dangerous places in any plant or any machine when

you get in that dangerous position, but we didn't consider it was necessary to put boards underneath the shaft where the shaft was back of or over the conveyer." He further testified that the plant had not been built from plans or specifications, but from general instructions; that he had never made a special survey of the plant; that he frequently visited the various ranches under his supervision, and "had them make changes wherever I thought they were necessary;" that he had seen the revolving shaft, but had not noticed there was no guard underneath it; and that "the handling of the plant and operation of it" were left to Conrad.

Horst testified that he had given Miller instructions "to look out for the safety" of the employees; that no report had been made to him as to any dangerous conditions in this plant; that he knew practically nothing of the exact condition of the works other than as he was advised by Miller and Conrad; that prior to the injury his attention had not been called to this shafting, although on many occasions he had been through the plant "in a casual way;" and that his custom was to give Miller "general instructions," and "leave it up to his judgment to see that the work is carried out." As to Miller's powers as superintendent, he stated, "He has got no authority except what authority I gave him."

Miss Viva Jessup, who worked next to Mrs. Hamilton, stated that she had not known of any instructions being given to anyone as to the cleaning of the "slicer;" that she did not remember seeing any "safety signs" in the building; and that she had never heard anyone say that the shaft was in a dangerous position.

Subdivision (2) (c) of § 1 of the English Workmen's Compensation Act of 1906 (Stat. 6 Edw. VII. chap. 58) provided that if the injury to an employee "is attributable to the serious and wilful misconduct of that workman, any compensation

. . . shall, unless the injury results in death or serious and permanent disablement, be disallowed." In discussing what is meant by "serious and wilful misconduct," Bevan, in his *Workmen's Compensation*, page 394, considers separately the terms "serious" and "wilful," and we think our consideration of the evidence may properly be thus divided.

The first question presented is, then, Was the commission justified in finding that the petitioner was guilty of "serious misconduct"? There is no statutory definition of this term. In this connection we may again quote from Bevan, page 401: "To constitute 'serious misconduct,' then, it is probable that the legislature intended to signify conduct that an average workman, in being guilty of, either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow workmen's safety."

In our opinion the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employee. "Serious misconduct" of an employer must therefore be taken to mean conduct which the employer either knew, or ought to

**Definition—
serious
misconduct.**

have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. It seems clear that, according to this test, the commission

was amply warranted in finding that the maintenance of the improperly protected shafting, immediately over, and in close proximity to, the conveyer belt, was such serious misconduct. Mrs. Hamilton's testimony that she had been instructed to keep the belt and the "slicer" clear is uncontroverted, and it

**Workmen's
compensation—
serious mis-
conduct in
maintaining
unguarded
shaft.**

(— Ocl. —, 198 Pac. 105.)

plainly appears from the testimony of the other employees that, in order to do so, it was natural that she should lean over the belt, thereby bringing her head in dangerous proximity to the revolving shaft. Mrs. Sherman testified that it was the custom in the plant for the employee who worked in Mrs. Hamilton's position to "keep the potatoes moving," and she and Mrs. Cope stated that they had frequently felt the suction of the revolving shaft tugging at their hair. From the evidence which we have summarized we cannot hold that the commission was not justified in finding that the place at which the employee was required to work was unsafe. Under the evidence the finding of serious misconduct implies that the conditions of the employment were patently unsafe. If this be true, we know of no rule under which petitioner may claim that, passing for the time being the question of the penalty, it is not primarily liable for resulting injuries. It is so well settled as to require no citation of authority that petitioner was charged with the duty of maintaining a safe place for its employees to work, and we do not think it can be said the evidence is insufficient to establish serious misconduct, in that petitioner's officers knew, or ought to have known, if they had turned their minds to consider the matter, of the conditions under which Mrs. Hamilton was required to work.

Next, as to whether such serious misconduct was "wilful." It has frequently been said that wilful misconduct involves the knowledge of the person that the thing which he is doing is wrong. *Lewis v. Great Western R. Co.* L. R. 3 Q. B. Div. 195, 47 L. J. Q. B. N. S. 131, 37 L. T. N. S. 774, 26 Week. Rep. 255; *Burns's Case*, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787, 5 N. C. C. A. 635; *Riley's Case*, 227 Mass. 55, 116 N. E. 259; *Beckles's Case*, 230 Mass. 272, 119 N. E. 653, 17 N. C. C. A. 434. Conceding that knowledge is required, it seems to us that, in order to prove the requi-

site knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surround- ^{-when injury is wilful.} ing the act of commission or omission are such as "evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807. See also, *Pittsburgh, C. C. & St. L. R. Co. v. Judd*, 10 Ind. App. 213, 37 N. E. 775. According to the findings, the failure to guard the shafting was in direct violation of a general safety order of the commission. It is not contended that the making of this regulation was not within the power of the commission, and, by §§ 48 and 49 of the Workmen's Compensation Act, such orders "are conclusively presumed to be reasonable and lawful." In the face of the evidence it cannot be held that the finding that petitioner was guilty of serious and wilful misconduct in maintaining the unguarded shafting is without support.

It only remains to consider in this connection whether such misconduct was that "of an executive or managing officer" of petitioner. It is to be noted that § 12, subdivision (b), of the Act of 1913 (Stat. 1913, p. 283), specified that the wilful misconduct of a corporate employer which should entitle an injured employee, at his option, either to claim compensation under the act or to sue at law for damages, must be that of an elective officer. This provision was repealed by the Act of 1917, supra, and under the corresponding section of that statute—the section here under consideration—the wilful misconduct which entitles the injured employee to additional compensation is that of an executive or managing officer of a corporation. It is significant that in this section it is not prescribed that such misconduct be that of an elective officer, and it is to be deemed

that in enacting the Act of 1917 the legislature was fully advised of the changes being made in the language of the corresponding provisions of the Act of 1913. Under the prior statute an injured employee, in order to recover for the wilful misconduct of his corporate employer, was required to bring home such misconduct to an elective officer. Under the 1917 statute, however, the legislature has seen fit to require that a corporation shall be liable for the wilful misconduct of an executive or managing officer, and has not specified that the officer shall be an elective one. It seems clear, therefore, that the legislature by this section did not use "officer" in its technical, legal sense as one who has been elected, or whose office is provided for by the articles of incorporation, or the by-laws, but that by an "executive or managing officer" was meant a person in the corporations employ, either elected or appointed, who is invested with the general conduct and control at a particular place of the business of a corporation.

—who is executive or managing officer.

Applying this reasoning to the facts herein, it is plain that Conrad was a managing officer of the petitioner, for whose wilful misconduct the company is responsible. The by-laws were not introduced in evidence, and it cannot be determined from the record whether Conrad was elected or appointed as manager of the Wheatland plant. But, as has been shown, Miller testified that the operation of the Wheatland plant was entirely intrusted to Conrad. According to the testimony of Conrad himself, he knew of the position of the shafting, and had been on the platform where the injury was received; that he observed it was "open underneath and on the back;" that he neither remedied the conditions nor reported them to his superiors; that immediately after the accident the shafting was boxed in at his direc-

tion; and that, as superintendent, he was fairly familiar with conditions in the plant. It is not necessary, in order to support the finding, that there be direct evidence that Conrad knew of the dangerous condition of the premises and intentionally failed to remedy it; it is sufficient if the existence of either his knowledge or intention, or both, may be inferred. The commission may have decided that Conrad could not have failed to observe that an operator tending the belt was in perilous proximity to the unguarded shafting. From all the evidence we cannot say the commission may not have inferred that he must have known of the dangerous conditions of the employment. If he did, as matter of law, he would be guilty of wilful misconduct if he failed to take proper precautions to remove the danger. It may be observed that, if Conrad's testimony as to whether he knew of the situation is to be accepted, the conclusion is inevitable that petitioner, in the operation of the plant, failed to place responsibility for the working conditions upon anyone. In any event, we are not prepared to hold that the superintendent of the plant is not to be charged with knowledge of conditions which are in gross violation of prescribed safety regulations, or that under the evidence he is not "an executive or managing officer," within the meaning of the statute.

Master and servant—negligence with respect to revolving shaft.

And it is only necessary to refer to the testimony of the various employees that the unguarded shafting was on a level with Mrs. Hamilton's eyes, that several of the employees themselves had felt the suction from the shaft, that Mrs. Hamilton had been instructed to clean the "slicer," and that in so doing it was to be expected she would lean over the belt and under the shaft, in order to justify the conclusion of the commission that her injuries were due to the dangerous conditions under which she was required to work. It

must be held, therefore, that the evidence is sufficient to sustain the finding that the accident was the result of the "serious and wilful misconduct of an executive or managing officer" of petitioner.

2. We now turn to consider petitioner's claim that § 6(b) is unconstitutional. The Constitution, as it stood at the time the legislation in force on June 7, 1919, was enacted, empowered the legislature to create a liability on the part of employers "to compensate their employees" for any injury received in the course of their employment, "irrespective of the fault of either party." Art. 20, § 21. This language does not authorize the creation of a liability for anything more than compensation. If the 50 per cent to be added in cases where the injury is caused by the wilful misconduct of the employer is given as a penalty on the employer for such misconduct, and not as compensation to the employee for his injury, the provision is not within the power given to the legislature by said section, and if it has no other sanction, it is beyond the legislative power and void.

It would be within the general power of the legislature, under § 1, article 4, to provide that, in any case of injury to an employee from wilful misconduct of the employer, the amount found as the actual damage sustained by the employee should be increased by adding 50 per cent thereto as a penalty for the misconduct and by way of exemplary damages. But that part of the award would not be given as compensation, and the jurisdiction to enforce the liability for the exemplary damages would be in the ordinary court established by § 1, article 6 of the Constitution. That section vests the whole judicial power of the state in the courts there mentioned, except such as may be placed in other tribunals by the subsequent constitutional amendments providing for the giving of special powers of a judicial nature to the railroad commission and to the in-

dustrial accident commission. Art. 12, §§ 22, 23; art. 20, § 21. Section 21, article 20, does not authorize the legislature to commit to the accident commission the enforcement of any liabilities except those created by it against employers to the employees for compensation for injuries. *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 413, 156 Pac. 491, Ann. Cas. 1917E, 390; *Carstens v. Pillsbury*, 172 Cal. 572, 158 Pac. 218. Hence, it does not authorize the giving of jurisdiction to enforce a liability for punitive damages, not given as compensation, but as something over and above compensation for the injury.

But the provision in question is founded upon a different theory. It is obvious from the language of §§ 6 and 9 of the Act of 1917, *supra*, and from the act as a whole, that the ordinary schedule of compensation there established was not considered to be full and complete compensation for the injuries received. The purpose was to take a part of the burden imposed by the injury from the injured employee, and transfer that part to the employer, to be ultimately borne by the community in general as an addition to the cost of production. In *Western Indemnity Co. v. Pillsbury*, 170 Cal. 693, 151 Pac. 398, 10 N. C. A. 1, three of the justices of the court, in upholding the constitutionality of the act, said, with regard to the compensation allowed to employees in addition to medical and surgical expenses, that the indemnity based upon the loss of earnings "covers, not the whole, but only a part or a percentage of such loss. The risk of actual injuries is thus shared by employer and employee." The opinion of the other three justices, upholding the act for somewhat different reasons, confirms the foregoing statement. All presumptions are to be indulged in favor of the validity of an act of the legislature. It is therefore to be assumed the legislature found that the actual injury by

loss of earnings and other elements of damage, not including expenses for costs of treatment and the like, would be at least 50 per cent more than the fixed schedule would come to, and that it was deemed just, if the injury was caused by wilful misconduct of the employer, he should be made to pay a greater proportion

Workmen's compensation—constitutional—statute authorizing extra compensation for wilful injury.

of the burden, and the allowance in such a case should be increased by adding 50 per cent thereto. Thus considered, the additional allowance is

really for additional compensation in the strict sense, and not for exemplary damages. This being the case, the power to enforce it was properly given to the Commission under the provisions of § 21, article 20, of the Constitution.

The award is affirmed.

We concur: Angellotti, Ch. J., Shaw, J.; Olney, J.; Wilbur, J.; Lennon, J.; Sloane, J.

Petition for rehearing denied in banc, November 18, 1920; Angellotti, Ch. J., dissenting.

ANNOTATION.

Workmen's compensation: serious and wilful misconduct of employer warranting increased compensation, or action at law.

As to serious and wilful misconduct of employee as bar to compensation, see annotation in 4 A.L.R. 116.

Provisions are found in some of the workmen's compensation acts which either provide for increased compensation, or give an employee the right to maintain an action at law in case of injury caused by the "misconduct" of the employer, characterized by the terms "wilful," "serious and wilful," "gross negligence," or some variation thereof. In construing such provisions it is held that the misconduct contemplated means something more than mere negligence or carelessness. *McWeeny v. Standard Boiler & Plate Co.* (1914) 210 Fed. 507, 4 N. C. C. A. 919, affirmed in (1914) 134 C. C. A. 169, 218 Fed. 861; *Helme v. Great Western Mill. Co.* (1919) — Cal. App. —, 185 Pac. 510; *Schmidt v. Pursell* (1920) — Cal. App. —, 190 Pac. 846; *E. CLEMENS HORST CO. v. INDUSTRIAL ACCI. COMMISSION* (reported herewith) ante, 611; *Burns's Case* (1914) 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787, 5 N. C. C. A. 635; *Riley's Case* (1917) 227 Mass. 55, 116 N. E. 259; *Beckles's Case* (1918) 230 Mass. 272, 119 N. E. 653, 17 N. C. C. A. 434.

In *Burns's Case* (1914) 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787, 5 N. C. C. A. 635, which was apparently

the first case construing such provisions, it was held that the finding of the industrial accident board was warranted that the injury to an employee was not caused by the "serious and wilful misconduct" of the employer so as to carry double compensation. The specific evidence involved does not appear. The court said, with reference to the meaning of the provision in question: "Serious and wilful misconduct is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something, either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences."

And upon the authority of the *Burns* case a like conclusion was reached in *Sciolo's Case* (1920) 236 Mass. 407, 128 N. E. 666.

And, following the *Burns Case* (Mass.) supra, in *Riley's Case* (1917) 227 Mass. 55, 116 N. E. 259, it was held that the negligence of an employer in furnishing for the use of its employees an elevator so thoroughly out of repair as to be unsafe, and in permitting the use of such elevator, which the superintendent considered was in a dangerous condition, did not rise to the degree of "serious and wilful mis-

conduct" by the employer, or of any person regularly intrusted with and exercising the power of superintendence.

Whether the employer was guilty of "serious and wilful" misconduct, so as to warrant an award of double compensation, is ordinarily a question of fact, but, where all the evidence is reported, the question whether it is sufficient to warrant such conclusion is one of law. *Riley's Case* (Mass.) *supra*.

In *Beckles's Case* (Mass.) *supra*, it was held that the finding of the accident board that the employer's conduct in permitting the elevator, on which an employee was killed, to be maintained and operated in the condition in which it was at the time of the accident, was not "serious and wilful" was not unwarranted as a matter of law, the court stating that the finding of the board that the employer was grossly negligent fell short of a finding that he was guilty of "serious and wilful" misconduct.

In *McWeeny v. Standard Boiler & Plate Co.* (1914) 210 Fed. 507, 4 N. C. C. A. 919, affirmed on other ground in (1914) 184 C. C. A. 169, 218 Fed. 361, where the Ohio Workmen's Compensation Act involved provided that, if an injury resulted from a wilful act, or from the violation of a statute or ordinance enacted for the protection of the life or safety of employees, an injured employee could take the benefits under the Workmen's Compensation Act, or sue in an action of law to recover for his injury, it was held that, to constitute the conduct of the employer or his officer or agent a "wilful act," it must be such recklessness as to evince an utter disregard of consequences which might and probably would follow.

The reported case (*E. CLEMENS HORST CO. v. INDUSTRIAL ACCL. COMMISSION*, ante, 611) holds that serious misconduct of an employer, which, under the Workmen's Compensation Act involved, would render him liable for extra compensation to an injured employee, was conduct which the employer either knew, or ought to have known if he had turned his mind to

the matter, to be conduct likely to jeopardize the safety of his employees; and that to render the act of the employer in leaving rapidly revolving shafting unguarded, when so located that employees were likely to be caught in it and injured, "wilful," it was sufficient if it appeared that the circumstances surrounding the act were such as evinced a reckless disregard for the safety of others and willingness to inflict the injury complained of. And it was held that the maintenance of an unguarded rapidly revolving shaft, immediately over and in close proximity to a conveyor belt carrying vegetables from a parer to a slicer at which women were stationed to care for any vegetables not properly peeled, and keep the belt and slicer free from clogging, would justify a finding that the employer was guilty of serious and wilful misconduct toward an employee injured by contact with the shaft.

In *Schmidt v. Pursell* (1920) — Cal. App. —, 190 Pac. 846, where the Workmen's Compensation Act involved provided that the provisions of the act should be the exclusive remedy against the employer in case of injury to an employee, except that when the injury was caused by the employer's "gross negligence or wilful misconduct, and such act or failure to act, causing such injury, indicated a wilful disregard of the life, limb, or bodily safety of employees," in which case such injured employee might, at his option, either claim compensation under the act, or maintain an action at law for damages, the court found that the employer did not know that the machine on which the employee was injured was dangerous to operate without a safety device, and there was held to have been no wilful disregard of life, limb, or bodily safety on the part of the employer. The court said: "The wilful disregard of the safety of an employee means something more than mere negligence or carelessness. To wilfully disregard the safety of an employee is to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or hav-

ing what in law is equivalent to such actual knowledge. The trial court found that respondents did not know that the machine was dangerous to operate without a safety device, and this finding is not attacked. Such being the case, the wilful disregard of life, limb, or bodily safety, which is a necessary element to recovery in an action of this nature, was not shown."

In *Schmidt v. Pursell* (Cal.) *supra*, which was an action at law for damages, it was also held that a failure of the employer to equip the machine on which an employee was injured with safety devices, immediately upon the oral direction of an employee of the industrial accident commission, did not constitute gross negligence. The court said: "If the violation of a statute in itself does not constitute gross negligence (and there is respectable authority to that effect, though in reserving decision upon that point, in an order denying a hearing after judgment in the district in *Helme v. Great Western Mill. Co.* (1919) — Cal. App. —, 185 Pac. 510, our supreme court has cast some doubt upon the extent of the rule in this state), surely the failure to comply with some general safety order of the industrial accident commission of which the employer may have had no notice, would not constitute gross negligence. Section 66 of the act (Stat. 1913, p. 309), as in effect at the time of the injury, provided that every order of the commission should be admissible as evidence in any prosecution for the violation of certain provisions of the act, and that in every such prosecution they should be conclusively presumed to be reasonable and to fix reasonable and proper standards and requirements for safety. But by this section the orders are conclusively presumed to be reasonable only in prosecutions for violations of the act. The presumption does not apply to an action for damages instituted by an employee under § 12 (b). Furthermore, these orders do not become effective until served upon the employer. Section 59. The record discloses that no service was made of any order upon defendants, other than the oral instruction

given to them by an employee of the industrial accident commission on July 20th. As to this instruction it does not appear what time was given the employers to comply, and the reasonableness of the order having been directly put in issue by the allegations of the complaint of the necessity of equipping the machine with a certain safety device, and the court having found that such was not necessary, it must follow that the finding of the court upon the issue of gross negligence and wilful disregard of the safety of the employee was proper, and that any other finding, under the circumstances, would have had no support in the evidence."

In *Helme v. Great Western Mill. Co.* (1919) — Cal. App. —, 185 Pac. 510, where subdivision b of § 12 of the Workmen's Compensation Act, providing that an injured employee, instead of presenting his claim to the commission, might, at his option, maintain an action at law against his employer to recover damages, where all the three following elements coexisted: (1) When the injury was caused by the employer's gross negligence or wilful misconduct; (2) when the act or failure to act which was the cause of the injury was the personal act or failure to act on the part of the employer himself, or, if a corporation, on the part of an elective officer or officers thereof; and (3) when the act or failure to act, which was the cause of the injury, indicated a wilful disregard of the life, limb, or bodily safety of employees, it was held, in an action in which the cause of the injury was claimed to be a failure to house gears, that to warrant a recovery the plaintiff must allege and prove: (1) That defendant's failure to house the gears was of itself "gross negligence" or "wilful misconduct;" (2) that the failure to house the gears was the personal failure to act on the part of an elective officer or officers of the defendant corporation, as, for example, the director or directors; and (3) that such failure to house the gears indicated a wilful disregard of the life, limb, and bodily safety of employees. The court said: "Unless, by failing to

house the gears, one of the elective officers of defendant thereby failed to comply with a general or special order of the industrial accident commission, or with some safety requirement expressly defined and provided for by the act itself, it cannot successfully be claimed that defendant was guilty of either gross negligence or wilful misconduct. Gross negligence is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there is an entire indifference to the interest and welfare of others. It is that entire want of care that raises a presumption of conscious indifference to consequences. It implies a total disregard of consequences, without the exertion of effort to avoid it. . . . While, in a case of gross negligence, various terms have been used to express the mental state of the actor, the idea attempted to be conveyed seems to be that the act done or omitted to be done was done or omitted wilfully and intentionally. 20 R. C. L. 23. In *Austin v. Chicago, M. & St. P. R. Co.* (1910) 143 Wis. 477, 31 L.R.A.(N.S.) 158, 128 N. W. 265, supra, the Wisconsin supreme court says that gross negligence is not characterized by inadvertence, but by an absence of any care on the part of a person having a duty to perform to avoid inflicting an injury to the personal or property rights of another, by recklessly or wantonly acting or failing to act to avoid doing such injury, evincing such an utter disregard of consequences as to suggest some degree of intent to cause such injury."

And it was held in the *Helme Case* that unless it appeared that the employer consciously violated some order of the commission, or some particular safety provision of the California Workmen's Compensation Act, it was not guilty of "gross" negligence, within the meaning of the provision authorizing the employee to maintain an action at law in case of the employer's gross or wilful misconduct, the court holding that the mere failure to keep gears in a housing, apart from any wilful disregard of some order of the commission, or of some particular

safety provision of the act, did not evince such an utter disregard of consequences as to suggest some degree of intent to cause the injury, or to justify the belief that there was a conscious indifference to consequences.

And it was also held in the *Helme Case* that, in the absence of such general or special orders of the commission, the employer was bound only to use such devices and safeguards as were "reasonably adequate" to render the place of employment safe, and to have its place of employment as free from danger to the life or safety of its employees "as the nature of the employment would reasonably permit," and certain instructions imposing a higher duty on the employer were held erroneous.

And under the same act, in *Brown v. Lemon Cive Ditch Co.* (1918) 36 Cal. App. 94, 171 Pac. 705, it was held, in an action at law by an injured employee, that in order to prevail he must have shown "gross negligence" and "wilful disregard of the life, limb, or bodily safety of the employee" on the part of an executive officer of the defendant corporation, and that his action would be defeated if the accident was due to the contributory negligence of the employee, and an instruction was held not objectionable because it ignored the doctrine of comparative negligence, as such doctrine was not recognized by the Workmen's Compensation Act.

In *Burns v. Swift & Co.* (1914) 186 Ill. App. 460, where the Compensation Act provided that, when an injury to an employee was caused by the "intentional omission of the employer" to comply with the statutory safety regulations, nothing in the act should affect the civil liability of the employer, and further provided that if the employer was a partnership the omission must be by one of the partners, and if a corporation by that of an elective officer thereof, it was held that the word "intentional," in view of the express provision as to corporations should not be construed, as the word "wilful" was construed in the mining act, to mean that the neglect of any mining company, through its manager,

agent, or vice principal, constituted a wilful neglect rendering the employer liable, but that the statute confined the intentional omission to an elective officer of a corporation, and that, unless there was evidence showing an intentional omission of some elective officer of the corporate employer to comply with the statutory safety regulations, the employee's only remedy was under the Compensation Act.

And in *Brimie v. Belden Mfg. Co.* (1919) 287 Ill. 11, 122 N. E. 75, the right to maintain such a civil action was held not to depend, merely upon the plaintiff's proving that his injury was caused by the intentional omission of the employer to properly guard the machinery as provided by the Factory Act, but also upon his proving that the intentional omission was committed by an elective officer or officers of the employer. And to the same effect is *Von Boeckmann v. Corn Products Ref. Co.* (1916) 274 Ill. 605, 113 N. E. 902.

According to the abstract of the decision in *Bogert v. Chalmers & Williams* (1917) 207 Ill. App. 457, the evidence was held sufficient to warrant the finding that defendant's failure to safeguard its machinery was "intentional" within the meaning of the act, where a violation of § 1 of the Health and Safety Act was established, and it appeared that the president of the defendant, the immediate superior of the master mechanic, was in the shop where the dangerous machinery was located, and near it every day, and sometimes three or four times a day, and one of defendant's directors was also there every day.

And in the abstract of the decision in *Varney v. Ajax Forge Co.* (1917) 204 Ill. App. 208, it is stated that where executive officers of a corporation owning a factory and having knowledge of dangerous machinery therein, and of their responsibility as to protecting such machinery, failed to remedy a dangerous condition, such omission of duty was "intentional."

It will be observed that, in the reported case (*E. CLEMENS HORST CO. v. INDUSTRIAL ACCL. COMMISSION*, ante, 611), it was held that, under statutes

making a corporation liable in extra damages for an injury to an employee which was caused by the wilful misconduct of an executive or managing officer, it was sufficient if the misconduct was that of a person in the corporation's employ, either elected or appointed, who was invested with the general conduct and control at a particular place of the business of the corporation; and that the superintendent of a plant who was intrusted with its operations was an executive, or managing officer, within the meaning of the act, and that he might be found guilty of wilful misconduct in leaving a rapidly revolving shaft unguarded in close proximity to where employees were required to stand in the performance of their work, where he was familiar with the situation, and could not have failed to observe the danger had he turned his attention to it.

In *Poirier v. Legrand* (1912) Rap. Jud. Quebec 22 B. R. 193, 9 D. L. R. 269, it was held that under the Workmen's Compensation Act, where an injury results from the "inexcusable fault" of the employer, the injured employee is not deprived of his right to a common-law action for tort.

And it was further held that, in order that there be inexcusable fault of the employer, three elements must exist: (1) The will to do or not to do; (2) knowledge of the danger which may result from the act or omission; and (3) absence of any justifying or explanatory cause. *Poirier v. Legrand* (Quebec) supra.

In the abstract of *Wolff v. Foote Bros. Gear & Mach. Co.* (1917) 207 Ill. App. 311, it is stated that an action by an employee against his employer for damages for personal injuries due to the failure of the employer to guard machinery, in violation of the Factory Act of 1909, is within the exception of the Workmen's Compensation Act, § 3 (*Jones & A. § 5451*), providing that, when the injury to the employee is caused by the intentional omission of the employer to comply with statutory safety regulations, nothing shall affect the civil liability of the employer.

And in *Jenkins v. Carman Mfg. Co.*

(1916) 79 Or. 448, 155 Pac. 703, 11 N. C. C. A. 547, where the act provided that, if injury or death resulted to a workman from the deliberate intention of his employer to produce such injury or death, recovery might be had under the act, and also in an action as if the act had not been passed, it was held

that, by "deliberate intention to produce the injury," the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness, however gross. J. T. W.

GERRARD, Appt.,

v.

MICHAEL CROWE et al., Respts.

English Court of Appeal—November 16, 1920.

([1921] 1 A. C. 395.)

Water — right to embank against flood — injury to neighbor's land — liability.

The appellant and the respondents owned lands upon opposite sides of a river. When the river was in flood and rose higher than its bank some of the flood water used to flow over the respondents' land, ultimately finding its way back to the river. The respondents erected an embankment from a point on their land about half a mile from the river, diagonally to its bank, with the object of protecting their lands behind the embankment. The water flowing over the appellant's land in time of heavy flood was thereby increased. The appellant sued the respondents for damages and an injunction. It was not proved that any flood channel was obstructed, or existed, or that there was any ancient or rightful course for the flood waters across the respondents' land. Held, that the action could not be maintained.

[See note on this question beginning on page 629.]

APPEAL from a judgment of the Court of Appeal of New Zealand (April 17, 1918) reversing a judgment of the Supreme Court (June 16, 1917).

The action was brought by the appellant against the respondents in circumstances which appear from the judgment of their lordships.

The trial judge gave judgment for £10 damages and granted an injunction. The court of appeal reversed the decision and entered judgment for the respondents (see 18 N. Z. L. R. 323).

Present: Viscount Cave, Lord Moulton, and Lord Phillimore.

Tomlin, K. C., and Errington for the appellant.

Romer, K. C., and Northcote for the respondents:

The arguments on behalf of the appellant, and the authorities relied on, appear from the judgment of their lordships; reference was also made to *Chasemore v. Richards* (1859) 7 H. L. Cas. 349, 11 Eng. Reprint, 140, 16 A.L.R.—40.

29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685. The respondents' counsel were not called upon to argue.

The judgment of their Lordships was delivered by

Viscount Cave:

This is an appeal from an order of the court of appeal of New Zealand, reversing a judgment of the supreme court in favor of the ap-

pellant, the plaintiff in the action. The question involved in the appeal is whether the respondents are liable to the appellant in damages by reason of their having constructed an embankment to protect their lands from flood.

The facts of the case, as found by Sim, J., at the trial, are as follows: "The plaintiff is the owner of a farm on the east bank of the Oreti river. The defendants are the owners of certain land on the opposite bank of the river. Part of this land is intersected by a creek known as Hillend creek, which flows into the Oreti river. Before the year 1913, when the river was in flood and rose above its banks some of the flood waters flowed over the western bank at a point on the defendant Michael Crowe's land about half a mile above the junction of the Hillend creek with the river. The waters then flowed in a southwesterly direction across the defendants' lands, and ultimately found their way back into the river bed at some point or points further south and below the plaintiff's farm. About the end of the year 1913, the defendants erected an earthen embankment on their land. It is about 90 chains in length and about 2 feet in height. It begins at a point about half a mile from the western bank of the river, and runs in a southerly direction to a point close to the river bank. The object of the defendants in erecting this embankment was to prevent the flood waters spreading over their land to the west. And that has been its effect. Its effect also has been to increase the volume of water in the river opposite the plaintiff's land, and thus to throw onto that land in times of heavy flood more water than otherwise would have gone there."

The plaintiff accordingly brought this action, alleging that the embankment caused his farm to be flooded to a greater extent than would otherwise have been the case, and claiming damages and a mandatory injunction to compel the de-

fendants to remove their embankment.

The trial judge found as a fact that the plaintiff had failed to prove the existence of any flood channel such as was held to have been obstructed in *Menzies v. Breadalbane* (1828) 3 Bligh, N. R. 414, 4 Eng. Reprint, 1387, and had also failed to prove that there was any ancient and rightful course for the flood waters of the river across the defendants' land, so as to bring the case within the law as laid down by Tindal, Ch. J., in the exchequer chamber, in *Trafford v. Rex*, 8 Bing. 204, 131 Eng. Reprint, 379, and added: "It is clear, I think, from the evidence, that in times of flood the waters of the river did not flow in any defined course, but simply spread over the country in a southwesterly direction, and found their way back to the river at different points to the south of the plaintiff's land."

Notwithstanding these findings, the learned judge, for a reason to be hereafter noticed, gave judgment for the plaintiff; but on appeal that judgment was reversed by the court of appeal, who, by a majority, gave judgment for the defendants, and thereupon this appeal was brought.

The general rule as to the rights of an owner of land on or near a river to protect himself from floods is well settled. In *Farquharson v. Farquharson* (1741) *Morison's Dict.* 12,779; see also 3 Bligh, N. R. 414, 421, the rule was stated as follows: "It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbor by throwing the whole overflow in time of flood upon his ground. But it was found not lawful to use any operation in the *alveus*."

In *Rex v. Sewer Comrs.* (1828) 8 Barn. & C. 355, 360, 108 Eng. Reprint, 1075, it was held that owners of land exposed to the inroads of the sea have a right to erect such works as are necessary for their

own protection, even although they may be prejudicial to others; and Lord Tenterden expressed himself as follows: "But it is contended that this new groin has caused the sea to flow with greater violence against the land of Mr. Cosens, and make a greater inroad upon it, than possibly it might otherwise have done; and that, as the commissioners, acting for the benefit of the level, have occasioned this damage, they must make compensation for it. It may be conceived that such is the effect of the groin; but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several landowners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea may not endeavor to protect himself by erecting a groin, or other reasonable defense, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing."

To the same effect is *Nield v. London & N. W. R. Co.* (1874) L. R. 10 Exch. 4, 44 L. J. Exch. N. S. 15, 23 Week. Rep. 60, 23 Eng. Rul. Cas. 756, and in *Whalley v. Lancashire & Y. R. Co.* L. R. 13 Q. B. Div. 131, 140, Lindley, L. J., said: "It seems to me established by those cases (i. e., *Menzies v. Breadalbane*, and *Nield v. London & N. W. R. Co.* supra,) that if an extraordinary flood is seen to be coming upon land, the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbor may be injured by it."

Later applications of the rule are to be found in *Greyvensteyn v. Hattingh* [1911] A. C. 355, 80 L. J. P. C. N. S. 158, 104 L. T. N. S. 360, 27 Times L. R. 358, 21 Ann. Cas. 643, 2 N. C. C. A. 659, and *Maxey Drainage Bd. v. Great Northern R. Co.* (1912) 106 L. T. N. S. 429, 76 J.

P. 236, 56 Sol. Jo. 275, 10 L. G. R. 248.

It was argued on behalf of the appellants that the right of a landowner to protect himself against floods is conditioned by the maxim, "*sic utere tuo ut alienum non lædas*," and cannot be exercised if, as a consequence of his operations, more water flows onto his neighbor's land, and thereby damage is caused; and reliance was placed on *Menzies v. Breadalbane*, supra; *Rex v. Trafford* (1831) 1 Barn. & Ad. 874, 109 Eng. Reprint, 1011, 9 L. J. Mag. Cas. 66; and *Trafford v. Rex*, 8 Bing. 204, 131 Eng. Reprint, 379, 1 Moore & S. 401, 2 Crompt. & J. 265, 149 Eng. Reprint, 114, 1 L. J. Exch. N. S. 90, and on a dictum of Lord Chelmsford in *Bickett v. Morris* (1866) L. R. 1 H. L. Sc. App. Cas. 47, 56, 12 Jur. N. S. 803, 14 L. T. N. S. 835.

To import such a condition would be directly contrary to the rule as stated in the authorities above cited, and would indeed render those authorities meaningless; for it would surely have been unnecessary to invoke the authority of the courts in order to establish the proposition that a man may erect an embankment on his own land if no damage ensues to others. But in fact the authorities cited are, in their lordships' opinion, insufficient to support the proposition contended for. In *Menzies v. Breadalbane*, there was a regular flood channel which, although dry when the river was low, became filled with water at times of flood; and it is plain that such a channel forms part of the alveus of the river, and cannot be obstructed. In *Rex v. Trafford*, 1 Barn. & Ad. 874, 887, 109 Eng. Reprint, 1016, Lord Tenterden, Ch. J., no doubt, said that "it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another," and appears to have expressed the view that no sound distinction can be drawn between the ordinary course of water flowing in a bounded channel at all

usual seasons, and the extraordinary course which its superabundant quality has been accustomed to take at particular seasons. But on the case being removed into the exchequer chamber on error, the above judgment was reversed and a venire de novo awarded, partly on the ground that it did not appear by the verdict that the course which the flood water had taken was the "ancient and rightful course" which it ought to take, nor whether it had been so carried for such a period of years over the lands of different persons as to constitute a right of watercourse in time of flood, in the direction described by the special verdict. The case is not further reported; and in view of the decision in the exchequer chamber it cannot be relied upon as a safe authority for the contention put forward. *Bickett v. Morris*, L. R. 1 H. L. Sc. App. Cas. 47, 12 Jur. N. S. 803, 14 L. T. N. S. 835, was a case of injury to the alveus; and the sentence quoted from Lord Chelmsford's judgment does not appear to have been necessary for the decision of the case; see on this case *Ewing v. Colquhoun* (1877) L. R. 2 App. Cas. 839, 845, 853. Possibly the dicta relied upon mean no more than this,—that a landowner in protecting his land from the common enemy must use reasonable care and skill and must not do more than is reasonably necessary for that purpose; but, however that may be, they cannot be held to derogate from the express decisions above referred to. In their lordships' opinion, therefore, this contention fails.

A further point, founded on the decision of the trial judge, was taken on behalf of the appellant. It was said that the effect of the respondents' embankment, which was not erected on the bank of the river Oreti, but stood back a little distance on the respondents' property, and left some 14 acres of land unprotected, was to throw the flood water onto those 14 acres, and accordingly that the respondents were liable for the damage caused by its escape; and in support

of this contention *Hurdman v. Northeastern R. Co.* L. R. 3 C. P. Div. 168, 47 L. J. C. P. N. S. 368, 38 L. T. N. S. 339, 26 Week. Rep. 489, and *Whalley v. Lancashire & Y. R. Co.* L. R. 13 Q. B. Div. 131, 53 L. J. Q. B. N. S. 285, 50 L. T. N. S. 472, 32 Week. Rep. 711, 48 J. P. 500, were cited.

It would be strange if a landowner, not being liable for protecting the whole of his land against floods by raising the bank of a river, became liable by reason of the fact that he had set his embankment further back, and so had left a portion of his land unprotected; and it does not appear to their Lordships that this is the law. In *Hurdman v. Northeastern R. Co.* supra, the defendant had erected on his property a mound of earth, which caught the rain naturally and ordinarily falling on his own land and discharged it onto the land of his neighbor. In *Whalley v. Lancashire & Y. R. Co.* supra, the defendants had allowed a pool of water to accumulate on their property, and had subsequently taken active steps to discharge it onto the plaintiff's property. In the present case the defendants neither accumulate water on their own land nor discharge it by active steps onto the plaintiff's land. It is the river—the "common enemy"—which first floods the 14 acres and then carries away the flood; and the injury to the plaintiff is not increased, but is probably diminished, by the fact that the 14 acres are left open and unembanked. There is, in fact, neither *injuria* nor *damnum* proved under this head. This contention, therefore, also fails.

For the above reasons, their lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise his majesty accordingly.

Solicitors for appellant: Collyer-Bristow & Co.

Solicitors for respondents: Mackrell, Maton, Godlee, & Quincey.

Water—right to
embank against
flood—injury to
neighbor's land
—liability.

ANNOTATION.

Right of riparian owner to embank against flood or overflow from stream.

- I. Scope, 629.
- II. General rule, 629.
- III. Necessity of substantial damage to preclude right, 632.
- IV. Distinction between ordinary and extraordinary floods, 634.
- V. Surface-water theory of floods, 636.
- VI. Effect of prior erection of embankment by complainant, 640.
- VII. Cases opposing or limiting general rule, 642.

I. Scope.

This note is confined to the question as to the right of a riparian owner, as such, to construct an embankment along the bank of the stream in order to protect his land in times of high water from being overflowed by the waters of the stream, and the right of a railroad company, a municipal corporation, or a reclamation or improvement district to do so is included only when it is a question of their right by reason of the fact that they are riparian owners, and not when such right is asserted by reason of their public character or statutory authority.

Cases involving the right of owners of land adjoining the sea or lakes are excluded, as are also cases dealing with the acquisition by prescription of the right to embank against flood waters.

The right to deflect the stream, to embank in order to prevent the stream from changing its course, or to protect the shore from encroachment of the water, or to embank against water purposely turned out of the stream, or against flood waters which have previously left the channel or overflowed the stream, is not treated in this note.

II. General rule.

A riparian owner has no right to construct an embankment or barrier along the normal bank of the stream, to protect his land from the overflow thereof, when such embankment or

barrier will cause the waters of the stream, in times of ordinary floods, to damage the lands of other riparian proprietors.

United States.—*Cairo, V. & C. R. Co. v. Brevoort* (1894) 25 L.R.A. 527, 62 Fed. 129.

Alabama.—*Farris v. Dudley* (1884) 78 Ala. 124, 56 Am. Rep. 24.

Georgia.—*O'Connell v. East Tennessee, V. & G. R. Co.* (1891) 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489.

Illinois.—*Burke v. Sanitary Dist.* (1894) 152 Ill. 125, 38 N. E. 670; *Bradbury v. Vandalia Levee & Drainage Dist.* (1908) 236 Ill. 36, 19 L.R.A. (N.S.) 991, 86 N. E. 163, 15 Ann. Cas. 904; *Mauvaisterre Drainage & Levee Dist. v. Wabash R. Co.* (1921) 299 Ill. 299, — A.L.R. —, 132 N. E. 559; *Dickerson v. Goodrich* (1914) 190 Ill. App. 505.

Iowa.—*Keck v. Venghause* (1905) 127 Iowa, 529, 103 N. W. 773, 4 Ann. Cas. 716.

Montana.—*Fordham v. Northern P. R. Co.* (1904) 30 Mont. 421, 66 L.R.A. 556, 104 Am. St. Rep. 729, 76 Pac. 1040.

New York.—*Hartshorn v. Chaddock* (1892) 135 N. Y. 116, 17 L.R.A. 426, 31 N. E. 997; *Ordway v. Canisteo* (1893) 66 Hun, 569, 21 N. Y. Supp. 835.

Texas.—*Ft. Worth Improv. Dist. v. Ft. Worth* (1913) 106 Tex. 148, 48 L.R.A. (N.S.) 994, 158 S. W. 164; *Sullivan v. Dooley* (1903) 31 Tex. Civ. App. 589, 73 S. W. 82; *Way v. Roddy* (1911) — Tex. Civ. App. —, 140 S. W. 1148.

Virginia.—*Burwell v. Hobson* (1855) 12 Gratt. 322, 65 Am. Dec. 247.

West Virginia.—*Cline v. Norfolk & W. R. Co.* (1911) 69 W. Va. 436, 71 S. E. 705.

England.—*Menzies v. Breadalbane* (1828) 3 Bligh, N. R. 414, 4 Eng. Reprint, 1387.

This rule was upheld in *Rex v.*

Trafford (1831) 1 Barn. & Ad. 874, 109 Eng. Reprint, 1011, 9 L. J. Mag. Cas. 66, and upon the reversal of the case in (1832) 2 Crompt. & J. 265, 149 Eng. Reprint, 114, 8 Bing. 204, 131 Eng. Reprint, 379, 1 Moore & S. 401, 1 L. J. Exch. N. S. 90, the appellate court conceded the rule, but held it inapplicable.

And the same rule was recognized in *Cubbins v. Mississippi River Commission* (1916) 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671; *Walters v. Marshalltown* (1909) 145 Iowa, 457, 26 L.R.A.(N.S.) 199, 120 N. W. 1046; *Wilhelm v. Burleyson* (1890) 106 N. C. 381, 11 S. E. 590; and *Bickett v. Morris* (1866) 12 Jur. N. S. (Eng.) 803, L. R. 1 H. L. Sc. App. Cas. 47, 14 L. T. N. S. 835.

Some of the cases state the rule to be that a riparian owner has the right so to embank against the overflow of the stream, provided in so doing he does not cause injury to the lands of others.

Idaho.—*Boise Development Co. v. Idaho Trust & Sav. Bank* (1913) 24 Idaho, 36, 133 Pac. 916.

Kansas.—*Parker v. Atchison* (1897) 58 Kan. 29, 48 Pac. 631.

New York.—*Wallace v. Drew* (1871) 59 Barb. 413, which, after reversal by the general term on the ground that the damages were excessive, was affirmed by the court of appeals upon its reversal of the general term, in (1873) 54 N. Y. 678.

Ohio.—*Crawford v. Rambo* (1886) 44 Ohio St. 279, 7 N. E. 429.

Oklahoma.—*Jefferson v. Hicks* (1909) 23 Okla. 684, 24 L.R.A.(N.S.) 214, 102 Pac. 79.

Texas.—*Knight v. Durham* (1911) — Tex. Civ. App. —, 136 S. W. 591.

Washington.—*Peterson v. Arland* (1914) 79 Wash. 679, 141 Pac. 63.

Wyoming.—*Ladd v. Redle* (1903) 12 Wyo. 362, 75 Pac. 691.

It will be observed, however, that this is practically the same as the foregoing rule to the effect that he cannot embank if it injures others.

In *Burwell v. Hobson* (1855) 12 Gratt. (Va.) 322, 65 Am. Dec. 247, supra, while it was conceded that no one had the right to divert a stream

from its accustomed course to the injury of others, it was contended that this applied only to the ordinary and not the extraordinary flow of the stream, and the court, in this connection, said: "The maxim '*sic utere tuo ut alienum non lædas*' emphatically applies to the case of a riparian proprietor, and is the true legal, as well as moral, measure of his rights. He has no right to divert the stream, or any part of it, from its accustomed course, to the injury of other persons. This is a plain proposition, laid down by all the writers on the subject of water rights, and was not denied by the counsel for the appellee. But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods, by erecting a dike or other obstruction on his own land, though its necessary effect may be to turn the superabundant water onto the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer, nor in any adjudged case, so far as I have seen. The utmost extent to which the authorities seem to go in that direction is that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change of the natural state of the stream, and to prevent its old course from being altered. Angell, *Water-courses*, § 333. But he has no right, for his greater convenience and benefit, to build anything which, in times of ordinary flood, will throw the water on the grounds of another proprietor, so as to overflow and injure them. *Id.* § 334. If, in the case of such an obstruction, it appears that the injury therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, he is liable for the damage. *Id.* § 349. That the supposed distinction does not exist was expressly decided by the court of King's bench in *Rex v. Trafford* (1831) 1 Barn. & Ad. 874, 109 Eng. Reprint, 1011. Tenterden, Ch. J., in delivering the judg-

ment of the court in that case, said: Now it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction.' *Id.* 887. The judgment in that case was reversed in the exchequer chamber. [(1832) 8 Bing. 204, 131 Eng. Reprint, 379, 1 Moore & S. 401, 2 Crompt. & J. 265, 149 Eng. Reprint, 114, 1 L. J. Exch. N. S. 90.] But that court agreed in the principle laid down by the court of King's bench, though it did not discover, upon the special verdict, a finding of sufficient facts to warrant its application to the case. It is often the mutual interest of adjacent riparian proprietors to agree to erect works on their respective lands to protect them against floods, and keep the water at all times in its natural channel. That interest is generally sufficient to bring them to such an agreement. But in the absence of agreement, express or implied, or of any statutory provision on the subject, the law affords no means of compelling the erection of such works, however beneficial they might be to the proprietors or the public, and will not allow one proprietor, by erecting such works on his land, to compel another to erect similar works on his, as a necessary means of defense. Each has the exclusive right to judge and act for himself on this subject, taking care not to injure the property of the other."

And in *Menzies v. Breadalbane* (1828) 3 Bligh. N. R. 414, 4 Eng. Reprint, 1387, the court held that the principle that you could not divert a stream applied as well to the flood channel as to the ordinary channel, saying: "It does not appear to me that there is any solid ground for the dis-

inction. The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel: I am not talking of that which it takes in extraordinary or accidental floods; but the ordinary course of the river in the different seasons of the year must, I apprehend, be subject to the same principle."

It was held in *Crawford v. Rambo* (1836) 44 Ohio St. 279, 7 N. E. 429, that it is the duty of a riparian owner, before erecting an embankment to protect his own land from floods, to exercise, in the first instance, such prudence and care as an ordinarily careful and intelligent man might exercise, as to whether his proposed embankment will cause material injury to the lands of his neighbors at the time of such floods as may reasonably be anticipated at any season of the year, and that he is liable in damages, if his embankment occasions substantial injury to the lands of a neighbor upon the stream, which might have been anticipated by a man of ordinary prudence and intelligence; and that where it appears from its subsequent action, though not at the time of its construction, that the embankment does and will continue at ordinary floods to do injury to his neighbor's lands, it then becomes his duty to abate or so modify it as to avoid such injury, and he is liable in damages for an omission to do so. In discussing the last point, the court said: "But as the effect of a certain embankment, acting upon the waters of a stream when at its flood, cannot be known with certainty by a man of ordinary knowledge and skill until the experiment has been made, it must follow that, when a proprietor constructs an embankment for the benefit of his own land, he should not be held liable for its unforeseen results to his neighbor, if, at the time he constructed it, he exercised the care and skill of an ordinarily skilful and intelligent man. . . . After, however, the occurrence of an ordinary flood has shown the tendency of the embankment at such times to occasion injury to an adjacent proprietor, and that its effect at each recurring flood will be to cause additional injury, the

duty on his part at once arises to obviate the cause of the injury; and if he fails to do so, his liability from such time must, upon principle, be the same as it would have been could he have foreseen the result in the first instance. He cannot, by the exercise of care and diligence in the first instance, acquire the right to continue a nuisance to lands of his neighbor. Care and diligence in constructing the embankment can only exonerate the party building it from such damages as were unforeseen at the time."

A riparian proprietor, whether he be the owner of one or both banks of a running stream of water, has no lawful right to build an embankment along the stream which will, in times of ordinary flood, operate to throw the waters of such stream upon the lands of another proprietor so as to overflow and damage them. *Farris v. Dudley* (1884) 78 Ala. 124, 56 Am. Rep. 24.

And the fact that the builders of such embankment have reclaimed for themselves more land than they have been instrumental in submerging for the party objecting thereto is no excuse for their wrongful act in building such embankment. *Ibid.*

In *Burke v. Sanitary Dist.* (1894) 152 Ill. 125, 38 N. E. 670, the court said that the rule that a riparian owner cannot erect dikes or embankments along the bank of a stream, which will cause, in times of ordinary recurring floods, the land of another to be overflowed to its damage, applied whether the stream was public or private.

But a riparian proprietor may embank against extraordinary floods, even though he thereby causes damage to the lands of other proprietors. *Cubbins v. Mississippi River Commission* (1916) 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671; *Mailhot v. Pugh* (1878) 30 La. Ann. 1359; *Kansas City, M. & B. R. Co. v. Smith* (1895) 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78; *Jones v. George* (1921) — Miss. —, 89 So. 231; *Welty v. Vulgamore* (1901) 24 Ohio C. C. 572, affirmed without opinion in (1902) 67 Ohio St. 529, 67 N. E. 1103; *Smeltzer v. Ford City* (1914) 246 Pa.

560, L.R.A.1915C, 700, 92 Atl. 702; *Chesapeake & O. R. Co. v. Merriweather* (1917) 120 Va. 55, 91 S. E. 92.

The rule permitting riparian proprietors to embank against extraordinary floods is recognized in *O'Connell v. East Tennessee, V. & G. R. Co.* (1891) 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489, and *Wallace v. Drew* (1871) 59 Barb. (N. Y.) 413, which, after reversal by the general term on the ground that the damages were excessive, was affirmed by the court of appeals upon its reversal of the general term in (1873) 54 N. Y. 678.

The entire valley which the Mississippi river traverses may not be regarded as the high-water bed of the river, so that levees may not be erected on its natural banks as a protection against accidental and extraordinary floods without liability to riparian owners whose lands may be damaged by the consequent raising of the flood level. *Cubbins v. Mississippi River Commission* (1916) 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671.

And it was held in *Mailhot v. Pugh* (1878) 30 La. Ann. 1359, that the owner of a plantation on a bayou, endangered by back water from the overflow of the river, who erects, in an exceptional and pressing emergency, levees to protect his land from an extraordinary inundation, is not liable for damages caused thereby to an adjoining owner.

And the mere fact that the water on land overflowed in an extraordinary flood was somewhat deeper, remained longer, and flowed with stronger current than it would have done except for a railroad embankment, does not show any injury by reason of the embankment, where the crops must have been covered with water long before any water was diverted thereto by the embankment. *Kansas City, M. & B. R. Co. v. Smith* (1895) 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78.

III. Necessity of substantial damage to preclude right.

The damage resulting to the lands of other proprietors from the erection

by a riparian proprietor of an embankment to protect his land from ordinary floods must be material or substantial, in order to preclude him from maintaining such embankment. *Parker v. Atchison* (1897) 58 Kan. 29, 48 Pac. 631; *Crawford v. Rambo* (1886) 44 Ohio St. 279, 7 N. E. 429; *Knight v. Durham* (1911) — Tex. Civ. App. —, 136 S. W. 591; *Way v. Roddy* (1911) — Tex. Civ. App. —, 140 S. W. 1148.

In *Crawford v. Rambo* (1886) 44 Ohio St. 279, 7 N. E. 429, holding that a riparian owner has the right to erect an embankment along the stream to prevent his land from being flooded, although other owners will be damaged, if the damage will be nominal or slight, the court, in discussing this point, said: "As each owner has the right to protect his own lands from the violence of the current, or to improve the same, by the erection of embankments, and, as a rule, this cannot be done without increasing to some extent the flow upon the opposite side, it follows that this must be permitted, to some extent, by all owning lands upon the stream, or the right cannot be exercised by any one of them. Such a rigid application of the principle of the maxim (*aqua currit et debet currere ut currere solebat*) would materially impair the interests of agriculture in some, if not all, of the most fertile valleys of the state, without any necessary requirement on the part, if not to the detriment, of private property. It is true, as a rule, that every invasion of a private right imports an injury for which the law will allow a recovery of nominal damages, at least, for the purpose of maintaining the right, and preventing the wrong from ripening into a right by lapse of time. *Tootle v. Clifton* (1871) 22 Ohio St. 247, 10 Am. Rep. 732; *Sedgw. Damages*, chap. 2. As a rule the infringement of a right can be determined without regard to the damages that may have been occasioned, the injury and the damage being plainly separable. But this is not so plainly the case among riparian proprietors. They have a common right in and over the waters of the

same stream, and the invasion of the individual right of one in the subject of their common enjoyment cannot be determined until some act is done by another that is in excess of the common right of all in the same subject. So that, in such cases, before an action can be brought by one riparian proprietor against another for an infringement of the former's right as such proprietor, he must show that he has been substantially damaged by the act of the latter." And in the headnote by the court it is stated that "by material injury must be understood an injury resulting in damages of a substantial nature; not merely nominal; and which are, in some cases, awarded to prevent a wrong from ripening into a right by lapse of time."

And in *Knight v. Durham* (1911) — Tex. Civ. App. —, 136 S. W. 591, holding that in order to enjoin the erection of such a levee or embankment, or to compel its removal, the one complaining thereof must show that he suffers material injury, the court said: "Appellant objects, by his 6th and 7th assignments of error, to that portion of the court's charge wherein the jury was required to find that the levees materially injured appellant's land before they could return a verdict for him. Appellant objects to the use of the word 'materially,' and his contention is that it is not necessary for appellant to show material injury. The result of his contention is that immaterial injury would be sufficient. The levees were erected by appellee, if any were in fact erected, upon his own land, and he had an undoubted right to do so, being limited only in the exercise of such right by the corresponding obligation not to injure the land of appellant. If there was such consequent injury, but it was not material, then the injury is not actionable. Equity certainly will not interfere with appellee's right to erect levees on his own land merely to gratify the whim of appellant, and this would be the practical result if the injury to his land was immaterial, which must be understood as 'not substantial, trivial, or unimportant.' Such a case would be proper for the

application of the maxim 'de minimis.'"

And in *Way v. Roddy* (1911) — Tex. Civ. App. —, 140 S. W. 1148, an injunction was denied because the lands of the other riparian owner were held not to have been injured, the court saying that the effect of the levee would be to deepen the water on the other's land, not exceeding 6 inches in the highest flood, which would not materially injure the land.

And in *Bickett v. Morris* (1866) 12 Jur. N. S. (Eng.) 803, there is a dictum to the following effect: "The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark ripæ muniendæ causa, but even in this necessary defense of themselves, they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite bank of the river. In this case, mere apprehension of danger will not be sufficient to found a complaint of the acts done by the opposite proprietor, because, being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences, upon the principle of 'sic utere tuo ut alienum non lædas.'"

IV. Distinction between ordinary and extraordinary floods.

Some difficulty is met in applying the general rule that a riparian owner may not embank against ordinary floods, but may embank against extraordinary floods, when we seek to determine whether the flood which caused the alleged damage was an ordinary or extraordinary one. It may safely be said that the floods which occur annually, or at other regular intervals, are ordinary floods, but those that occur at irregular intervals may or may not be extraordinary floods, dependent upon whether or not they should have been foreseen.

The court, in the case of *Jefferson v. Hicks* (1909) 23 Okla. 684, 24 L.R.A. (N.S.) 214, 102 Pac. 79, set out the distinction between ordinary floods and extraordinary floods as follows: "An ordinary flood is one the repeti-

tion of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream, . . . have been anticipated. An extraordinary flood is one of those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight."

Floods and freshets which habitually recur, though at irregular and infrequent intervals, are not extraordinary or unprecedented, but ordinary floods. *Cairo, V. & C. R. Co. v. Brevoort* (1894) 25 L.R.A. 527, 62 Fed. 129.

In *Diamond Match Co. v. New Haven* (1888) 55 Conn. 510, 3 Am. St. Rep. 70, 13 Atl. 409, in which a town was held not liable for damages to an upper riparian owner from the setting back of the water upon his land at the time of an extraordinary flood, because of the construction by the town of an embankment along the edge of the river, which case is not in point because based upon its character as a municipal corporation, and not as a riparian owner, it was contended that the flood which did the damage, though unusual, was not unprecedented, but was such a flood as had sometimes, though infrequently, occurred, and ought to have been expected, and that therefore it was not an extraordinary flood; the court, however, held that an extraordinary flood was not necessarily an unprecedented one, but might be one that happened so rarely, or in such unusual circumstances, that it was not to be expected.

And in *State v. Ousatonie Water Co.* (1884) 51 Conn. 137, not in point with this annotation, where the liability of the defendant for damages from the building of a dam depended upon whether the flood which caused the damage was an extraordinary one, the same view as in the preceding case, as to the character of an extraordinary flood, was taken.

A riparian owner is not liable for

damages suffered by the land of an opposite owner, caused by the erection by the former of an embankment along the stream, where the damage occurred during an extraordinary flood, which had been equaled but twice and exceeded but once in the memory of the inhabitants familiar with the history of the stream. *Kansas City, M. & B. R. Co. v. Smith* (1895) 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78.

In *Ohio & M. R. Co. v. Ramey* (1891) 139 Ill. 9, 32 Am. St. Rep. 176, 28 N. E. 1087, where a railroad embankment over the bottom lands bordering a watercourse caused flood waters which would otherwise have flowed away to be banked up and thrown upon the lands of an upper riparian owner, it was held that the railroad company was liable for damages resulting from an unusual or extraordinary flood which it should have anticipated would occur, since such floods had occasionally occurred in the past at irregular intervals, and that the duty of the railroad in constructing such embankment was not limited to providing against the consequences of ordinary floods.

In discussing this liability as to extraordinary floods, the court in this case, said: "The principle clearly is that, although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred, and, it may be, at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. It is within the knowledge of all who have long resided in this state that our streams are occasionally subject, after intervals which are sometimes of shorter and at other times of longer duration, to great floods, occasioned by very heavy rainfalls, and their heights are known by those who have felt interested in them. Such rainfalls were not usual and ordinary, but they were unusual and beyond ordinary, i. e., they were extraordinary; and yet it is just as certain that like rainfalls will occur in the future as it is that

the same laws of nature by which they are produced, and the same conditions to be affected by those laws, will continue to exist in the future as they have in the past. Though of rare occurrence, such rainfalls are not phenomenal, and therefore beyond reasonable anticipation, and it is hence but the prudence that a discreet man would exercise in his own affairs to provide against injury from them."

But in *Welty v. Vulgamore* (1901) 24 Ohio C. C. 572, affirmed without opinion in (1902) 67 Ohio St. 529, 67 N. E. 1103, holding that a riparian owner who constructed a levee along the bank of the river was not liable for resulting damage to the land of an opposite owner, sustained during an extraordinary and unusual flood which could not, at the time of the construction of the levee, have been anticipated by a man of ordinary prudence and intelligence, it appeared that the highest flood that had ever occurred, occurred in 1884, and that subsequent to this flood the defendant constructed his levee, and that extraordinary floods occurred thereafter in 1893, 1897, and 1898, and that it was these floods that caused the damage to plaintiff's lands, and that no damage was caused by the ordinary or usual floods, and it was contended that the defendant was liable for the damage from these extraordinary floods, because he had witnessed the 1834 flood, and that the case came within the rule laid down in the case of *Ohio & M. R. Co. v. Ramey* (Ill.) supra, to the effect that a riparian owner building a levee or embankment to protect his land from flood is bound to anticipate and provide, not only for the flow of the ordinary floods, but also for the floods which occur at long intervals, and which, from having been known to occur, may reasonably be expected again; but the court distinguished such case as follows: "Now, let us apply the facts of the case to the case as found here, on the evidence in this case. In that case, the court puts the decision upon the ground that they were not only to provide, in their embankment, against the floods that may usually occur, but such floods, as

extraordinary floods, that occur occasionally, and that have occurred in the past. Now, how stands the case at bar? In this case *Vulgamore* had one flood, as appears from the evidence, to guide him; that was the flood of 1884. No evidence showing that this Scioto river had occasionally—at long intervals, even—raised to the height that it did in 1884; therefore, he had but one of what may be generally known in this Scioto and Ohio valley, as one of the most remarkable floods that have appeared since the white man occupied the country; so that, as I say, he had nothing to indicate to him, excepting the flood of 1884. Now, what should a reasonable man do, knowing there had been one such flood, when he went to construct, or undertook to construct, a levee or embankment? Why, we will all see readily that an ordinary prudent man would not be required to anticipate the flood of 1884. Why? Because, as I said, from the evidence before us, no such flood had ever appeared before; therefore, he would not be required, as a prudent man, to guard against a flood of that kind in the future." The court, however, said, following the case of *Crawford v. Rambo* (1886) 44 Ohio St. 279, 7 N. E. 429, *supra*, in subd. II., that, if the embankment or levee had been constructed after the recurrence of two or three of the extraordinary floods, it would not have had any doubt in holding that those floods might be considered as ordinary floods that might be anticipated.

And in regard to the question as to what constitutes an extraordinary flood, the court in *Cubbins v. Mississippi River Commission* (1916) 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671, said: "Were the overflows in this case accidental and extraordinary? is, then, the proposition to which the case reduces itself. That the volume of water from the vast watershed which the Mississippi river drains, and which, by means of percolation and tributaries, reaches that river, is susceptible now and again of being so simultaneously drained off from the watershed into the river, and thus so vastly increasing the amount

of water to be carried off in a given time, as to cause the overflow of the valley which the river traverses, and to thereby endanger the enormous interests concerned, is too well known to require anything but statement. But that the possibilities of such a result do not, when such overflows occur, cause them to be not accidental, is, to say the least, persuasively established by the ruling in *Viterbo v. Friedlander* (1887) 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962. And leaving aside this view, it is obvious, from the situation and the causes which, in the nature of things, may accidentally bring about the emptying into the river at one and the same time of the volumes of water from all the vast sources of supply which drain the expansive watershed into the river, in the absence of which accidental union there could be no flood, that the accidental character of the unity of the conditions upon which the flood depends serves to affix that character to the result,—the flood itself."

V. Surface-water theory of floods.

In some of the cases the right of a riparian proprietor to embank against the flood waters of the stream is defended upon the theory that such water is surface water, and therefore a common enemy against which any riparian owner may fight, although others are damaged by his action, and the courts, in some instances, have decided the case at bar upon this theory. (There is, of course, no intention to discuss in this annotation the correctness or incorrectness of "common-enemy doctrine" as to surface water.)

The great majority of the cases, however, do not touch upon this theory at all, and in *Crawford v. Rambo* (1886) 44 Ohio St. 279, 7 N. E. 429, the court stated that the question as to surface water was not involved, and in discussing the point said: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then

exceeds what it ordinarily is. Whether high or low the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that when, swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel, as, when by droughts it is reduced to its minimum, it is then in its low-water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be surface water. So, that, as we think, it is not material to inquire in this case what the law is as to surface water, for the facts stated in the petition do not present such a case."

It was sought in *Cairo, V. & C. R. Co. v. Brevoort* (1894) 25 L.R.A. 527, 62 Fed. 129, to defend a bill to enjoin the construction of a levee along the edge of the regular channel of a river, upon the ground that the waters of a stream, when swollen beyond its banks by ordinary and habitually recurring floods, are in the nature of surface water, and that such waters are a common enemy which a riparian proprietor may fight off as he will, but the court held that such waters were not surface waters, and in this connection said: "The flow of a river, when swollen beyond the low-water mark of the dry seasons by the ordinary rains which fall in wet seasons, or by the melting of snow, does not constitute surface water. The waters of a natural stream are not surface water, in any just sense, and the waters of a stream are those which are cast into it by rainfalls and melting snows. . . . The waters cast into a stream by ordinary floods must have a channel in which they are accustomed to flow, and, if they have, that channel is a natural watercourse, with which no riparian proprietor can

lawfully interfere to the injury of another. If there is a natural waterway or course, and its existence is necessary to carry off the water cast into the stream by ordinary floods, that way is the flood channel of the stream; and, if it is the flood channel of the stream, the water which flows there cannot be regarded as surface water. . . . 'A stream,' says Gould, 'does not cease to be a watercourse, and become mere surface water, because, at a certain point, it spreads over a level meadow, and flows for a distance without defined banks, before flowing again in a definite channel.' Gould, *Waters*, § 264. It must necessarily follow from this general principle that where water naturally flows, though the volume may change with the varying seasons, there is a natural watercourse, even though at times the place where the water flows in ordinary floods may become entirely dry. It can make no difference that the boundaries within which the water flows change with varying seasons, for the way which nature has provided for its flow is the stream, and water flowing in that waterway is not surface water. . . . With reasonably near approximation to accuracy, it may be laid down as a general rule that all the waters of a river, which form one body, when flowing within the boundaries within which they have been immemorially accustomed to flow, in times of ordinary floods, constitute waters of the river, and are not surface waters."

And it was contended in *Keck v. Venghause* (1905) 127 Iowa, 529, 103 N. W. 773, 4 Ann. Cas. 716, that overflow water is surface water, and that it may be repelled in the interests of good husbandry, and the court stated that it would have to be treated as surface water under the formed decisions of Iowa, but that that did not give the defendant the right to embank against the flood water, because by the civil law, which had been adopted in Iowa, the upper owner had no right to precipitate the water in greatly increased or unnatural quantities upon his neighbor to his substantial injury.

And it was held in *Mauvaisterre Drainage & Levee Dist. v. Wabash R. Co.* (1921) 299 Ill. 299, — A.L.R. —, 132 N. E. 559, that where the natural slope of the land is such as to make land on one side of a small stream the dominant, and that on the other the servient, heritage, the owner of the servient heritage has no right, by embankment or any other artificial means, to stop the natural flow of flood waters over his land and thus throw them back upon the dominant heritage. The reason given for this holding was that under the rule of the civil law, which had been adopted in Illinois, the right of drainage is governed by the law of nature, the owner of the dominant heritage having a natural easement over the land of the servient estate for the flow of surface water, and that the lower proprietor cannot do anything to obstruct the natural flow of surface water and cast it back upon the land above, and that in Illinois water overflowing the banks of a small stream in times of flood, because of the insufficiency of the natural channel to carry it off, is surface water within the meaning of the law relating to natural drainage.

In *O'Connell v. East Tennessee, V. & G. R. Co.* (1891) 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489, it was contended that the overflow from a river in time of flood or freshet was surface water, against which by the common law a man might protect himself without regard to the consequences to his neighbor, and many cases were cited making a distinction between the common law and the civil law as to surface water, the former allowing the landowner to dispose of it in any way, the latter restraining him from so using it as to injure his neighbor's tenement; but the court held that there was authority to show that there was no difference between the common and the civil law in this respect, and that the common law followed the civil law, and further held that the common law does not regard flood water as mere surface water, but as a part of the river, and said that the civil law might be more favorable to the contender, because

the civil law seems to regard the flood waters of a river as a common enemy against which each riparian owner may build defenses with impunity. In discussing whether flood waters were properly classed as surface water, the court in this case said: "This depends upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current, or leaves the stream, never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times, without losing the character of a watercourse. So, on the other hand, it may have a 'flood channel' to retain the surplus waters until they can be discharged by the natural flow. The low places on a river act as natural safety valves in times of freshet; and the defendant claims the right to stop up one of these without liability for ensuing damage."

In *Sullivan v. Dooley* (1903) 31 Tex. Civ. App. 589, 73 S. W. 82, the court said that the question presented was the same as that in the preceding case, and, in this connection, said: "Under the civil law it appears that all waters, whether surface water or that flowing in watercourses, is regulated by the same rule, which is that if they have their course regulated by the contour of the land, by regulation, or by title or ancient possession, no change can be made in the course of the water, to the detriment of anyone else. The common-law rule on that subject is uncertain, but it has been declared to be the rule of the common law that a person may act as he pleases to get rid of the surface water, and that neither its detention, diversion, nor

repulsion is an actionable injury, even though damages may ensue. *Jones v. Hannovan* (1874) 55 Mo. 462; *Bowlsby v. Speer* (1865) 31 N. J. L. 351, 86 Am. Dec. 216. There has been a great diversity of opinion as to the rights and liabilities of parties diverting surface water from their land, but not more so than on the question as to what constitutes surface water. Some courts hold that flood water from a stream is surface water, but the larger number class such water as a part of the stream, and hold that it is not surface water. In the case of *O'Connell v. East Tennessee, V. & G. R. Co.* (Ga.) *supra*, the authorities on the question as to what constitutes surface water, and as to the right of parties to divert waters, whether surface or otherwise, are fully reviewed by the supreme court of Georgia. The court said: 'If the flood water becomes severed from the main current,' etc. [copying the quotation from this case set out in the preceding paragraph commencing with the foregoing words, and ending with the words], 'until they can be discharged by the natural flow.' We think the language quoted is supported by common sense and experience, as well as the weight of authority."

The ordinary flood water of a river which forms a continuous body with the water flowing in the ordinary channel, or which has departed from the channel presently to return, must be regarded as a part of the stream, and not surface water, so that a railroad company constructing a solid embankment over bottom lands along and parallel with the bank of the river is liable for damages to the opposite riparian owner from the overflow of his lands in times of ordinary floods. *Fordham v. Northern P. R. Co.* (1904) 30 Mont. 421, 66 L.R.A. 556, 104 Am. St. Rep. 729, 76 Pac. 1040. The court discussed this point as follows: "The only serious question for determination is: Are these flood or overflow waters of the Bitter Root river, which, prior to 1897, flowed off over the lowland now crossed by respondent's new fill, to be treated as a part of a natural watercourse, or as surface waters?"

And this question is to be resolved independently of the question whether the common-law rule or civil-law rule respecting the disposition to be made of these waters, after their character is determined, prevails in this state. It must be conceded that, if these overflow waters are to be treated as the other waters of the Bitter Root river when within its banks, and the low bottom land across which defendant's right of way extends as a natural watercourse during flood times, then defendant had no right to interfere with the natural flow of such waters to the damage of plaintiff, and the court erred in granting a nonsuit. Are these overflow or flood waters of the Bitter Root river to be treated as surface waters, or as a part of the natural watercourse? . . . The annual overflow of the Bitter Root river is caused by the melting of the snows in the mountains many miles from the land in controversy. The water is collected in the main channel and carried down, until, by the addition of the waters of its tributaries, the whole amount exceeds the capacity of the channel in which the waters of the river ordinarily flow, when these floods or overflows occur. The source of supply in low water and high water is the same, the only difference being the quantity of water precipitated by that supply. We are of the opinion that great difficulty would be experienced in attempting to distinguish between the river waters proper and the overflow waters, where they form one continuous body, and in attempting to apply a particular rule to one, and another rule to the other. Without attempting to reconcile the diverse decisions, we are of the opinion that the following rule furnishes the safest guide for the determination of a question which has vexed the courts of many of our states as well as those of England, viz: Whether the water from the overflow of streams is to be considered as still a part of the watercourse, or to be treated as surface water, shall depend upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel.

If the flood water becomes severed from the main current, or leaves the same never to return, and spreads out over the lower ground, it becomes surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel presently to return, it is to be regarded as still a part of the stream. 13 Am. & Eng. Enc. Law, 2d ed. p. 687. Applying the foregoing definition to the facts of this case, we are of the opinion that the waters in question, which were obstructed by defendant's new fill or embankment, were a part of a natural watercourse."

But in *Harvey v. Northern P. R. Co.* (1911) 63 Wash. 669, 116 Pac. 464, the question whether a railroad company was liable for damages to a neighboring landowner from the overflow of the latter's land during the ordinary floods of a stream, because of the construction of an embankment by the railroad company to protect its right of way from the flood waters of the stream, was solved by the court upon the theory, as contended by the railroad company, that such flood waters were surface waters, and were therefore a common enemy against which any property owner might defend himself, although in so doing he caused injury to others, such injury being *damnum absque injuria*.

VI. Effect of prior erection of embankment by complainant.

In *Wilhelm v. Burleyson* (1890) 106 N. C. 381, 11 S. E. 590, the court, while recognizing the rule that a riparian owner cannot erect upon his own land bulwarks to protect his property from the overflow of the stream, where it cannot be done without injury to other riparian owners, held that an instruction to that effect was erroneous in the case because the plaintiff first erected a wall along the bank of the river on his side, and the defendant, in order to prevent the overflow of his lands lower down on the opposite side of the river, erected the bulwarks in question along the bank of the river on his side, and that the defendant was not liable for resulting damage to the plaintiff's land, where the wall

erected by the defendant was only such a one as was necessary to protect him from the overflow in ordinary floods, caused by the plaintiff's wall on his side.

It as held in *Mauvaisterre Drainage & Levee Dist. v. Wabash R. Co.* (1921) 299 Ill. 299, — A.L.R. —, 132 N. E. 559, that where a railroad company, whose right of way adjoined a small stream, had constructed an embankment or levee which threw more of the water of the stream than naturally overflowed from it onto the opposite land, the opposite riparian owner had a right to build a levee to prevent this additional water from overflowing his land.

And it was held in *Jackson v. United States* (1912) 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, that the building of levees along the bank of the Mississippi river, or the closing of breaks therein for the purpose of retaining the water in the river, whereby the levee of riparian owners, built to protect their lands, became ineffective because of the resulting increase of the volume of water in the river, and the raising of the flood level, would not give a right of action as against an individual for the resulting injury to the lands and crops. Regarding the effect of the maintenance by the complaining riparian owner of an embankment along the river, upon the right of another proprietor to protect his land from the overflow of the river, the court in this case said: "It is not averred that the land of the claimants bordering on the east bank of the river, in the absence of all levees, and in a state of nature, would not, in seasons of high water, be overflowed; and if it had been so alleged, it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain, and thus all progress and development be rendered impossible. When accurately fixed, the complaint is but this: that because the claimants had built a levee for the purpose of protecting their lands, and which answered that purpose, if levees were not built by others to protect their lands, actionable injury

would be occasioned claimants when anybody else sought to protect his land from overflow, since to so do would increase the volume of water in the river and raise the flood level, to the detriment of claimants. In its essence, however, this but amounts to saying that, because the claimants have built a levee along their property for the purpose of protecting it from overflow in times of high water, they have acquired the right to stereotype the conditions existing at the time they built their levee, even to the extent of preventing anyone from subsequently exerting his right to build a levee to protect his land. Nothing could more completely illustrate the accuracy of this statement than the averments in the supplemental petition concerning the closing of the Bougere crevasse; since those averments, in their last analysis, but charge that there was a right on the part of the claimants to subject a vast area of country on the west bank to the devastation resulting from the existence of so extensive a crevasse, simply because to close it would subject the levee of claimants, across the river, to a greater pressure, consequent on the retaining of the flood water of the river within its banks. And indeed a like illustration is afforded by the averments as to the escape of water from the river on the west bank, and the spread of that water through the White river and Tensas basins, until it ultimately reached the gulf by emptying into remote streams. To make the demonstration, if possible, clearer, let us suppose that by the acts of individuals for their own protection, sanctioned by the local laws, a complete line of levees had been built, accomplishing the very result which it is insisted brought about the injury here complained of. Would it be said that the claimants would have a resulting right of action in damages because other owners had exerted the very right which the claimants had previously resorted to, for the purpose of protecting their own land?"

The court, in *Trafford v. Rex* (1832) 2 Crompt. & J. 265, 149 Eng. Reprint, 16 A.L.R.—41.

114, 8 Bing. 204, 131 Eng. Reprint, 379, 1 Moore & S. 401, 1 L. J. Exch. N. S. 90, recognized that if, by the building of an aqueduct across a stream, more water was wrongfully turned back upon the low lands of upper riparian proprietors in times of ordinary floods, than was formerly collected in such times, such proprietors were entitled, or had the right, to protect their lands from being flooded because of the construction of such aqueduct, by the erection of artificial banks or fenders along the bank of the stream, although the water in times of ordinary floods was forced against and endangered the aqueduct.

But in *Burwell v. Hobson* (1885) 12 Gratt (Va.) 322, 65 Am. Dec. 247, where it appeared that the owner of land on both sides of a creek built a dike along the south side of it to protect his low grounds on that side, and at his death the land on the north side of the creek came into the hands of a different owner from that on the south side, and the owner on the north side commenced to erect a dike on his side to prevent his land from being overflowed, which would have the effect of overflowing, in times of ordinary floods, the land on the south side, unless the dike on that side was raised and strengthened, it was contended that the fact that the owner of the south side of the creek had erected a dike along the creek on that side, which had the effect of throwing the water, in ordinary floods, onto the land of the opposite owner, gave the latter the right to erect a dike along the creek on his side, to defend it against such inundations; but the court overruled this contention on the ground that the correctness of this position depended upon whether the dike on the south side of the creek was lawfully erected, and whether the owner of the land on that side had a legal right to the protection which it afforded him, and the court said that it was lawfully erected, because erected by the owner of both sides of the creek, who had a perfect right to erect it because it interfered with nobody but himself; and in discussing

the right of the appellant, the owner on the south side of the creek, to the protection of a dike on his side, said: "Then has not the appellant a legal right to the dike, and to the protection which it affords him? Why is he not as much so entitled as he is to any other part of the land on which it stands? What difference is there between an artificial dike lawfully erected, as this was, and a natural mound? There is a natural mound below the dike—which is but an artificial continuation of that mound to a point near the upper line. Until the dike was erected, the proper course of a part only of the superabundant water produced by freshets was over the northern side; after that erection, the proper course of all that water was over that side; just as if, from natural causes, it had always flowed on that side. The change was made by one who had a perfect right to make it. And the flow of the water can no more be disturbed, to the injury of another, in its new direction, than it could have been in its natural course. Suppose the intestate had changed the ordinary bed of the creek, and made it run entirely through the land on the north side of the natural bed. Could the appellee, by any obstruction of the new bed, turn back the stream to the old, to the injury of the appellant? What difference is there between a change of the course of the ordinary stream and a change of the course of the superabundant water produced by freshets? Suppose a mill had been erected, instead of a dike, on the south side, and the water thrown back on the land on the north side; would not the appellant have been entitled to the mill and its appurtenances, including the right to overflow the land on the north side? That he would be is shown by the case of *Kilgour v. Ashcom* (1820) 5 Harr. & J. (Md.) 82, in which a similar question arose. The children of the intestate, said the court in that case, 'took their respective proportions of their father's estate in the same condition, and subject to the same advantages and disadvantages, under which he held it.'"

It was further contended in this case that, conceding that the owner on the south side of the creek was entitled to the benefit of the dike previously erected on that side, the owner on the north side had a similar right to erect a similar dike on his own land, for the purpose of defending it from inundations occasioned by the dike on the other side. This contention was answered by the court in the following words: "This admission, I think, concedes the whole question in controversy. For if the appellant be entitled to the benefit of the dike, I do not see how it can be taken away from him indirectly, by erecting a counter dike on the other side. But even if the appellee were entitled to this mere right of defense, it would not justify him in erecting a dike much higher and stronger than that of the appellant. Having erected such a dike, he was compelled to rely on other grounds for his justification, and therefore claimed a right to erect any obstruction on his own land which may be necessary to protect it from floods, though the superabundant water be thereby thrown on the land of his neighbor. This ground is wholly irrespective of the question as to the right of the appellant to the benefit of the dike on his land, and would, if sustainable, be a sufficient justification, even if no such dike existed. But I think I have said enough to show that the right so claimed by the appellee does not exist."

VII. Cases opposing or limiting general rule.

See also *Harvey v. Northern P. R. Co.* (1911) 63 Wash. 669, 116 Pac. 464, under subd. V. supra; and *Jackson v. United States* (1912) 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, and *Wilhelm v. Burleyson* (1890) 106 N. C. 381, 11 S. E. 590, under subd. VI. supra.

The opposite rule to that stated at the beginning of this annotation has been established in California, to the effect that the flood waters of a stream are a common enemy against which any riparian proprietor may embank,

although the result is to throw an increased volume of water, during ordinary floods, upon the lands of opposite or lower proprietors, to their injury. *Lamb v. Reclamation Dist.* (1887) 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; *De Baker v. Southern California R. Co.* (1895) 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; *Gray v. McWilliams* (1893) 98 Cal. 157, 21 L.R.A. 593, 35 Am. St. Rep. 163, 32 Pac. 976; *Island Reclamation Dist. v. Floribel Alfalfa Syndicate* (1914) 167 Cal. 467, 140 Pac. 4; *Weinberg Co. v. Bixby* (1921) — Cal. —, 196 Pac. 25.

The California rule that a riparian owner may embank against extraordinary floods, although it causes damage to other owners, is recognized in *McDaniel v. Cummings* (1890) 83 Cal. 515, 8 L.R.A. 575, 23 Pac. 795.

The reason for this rule is stated in *Weinberg Co. v. Bixby* (Cal.) *supra*, as follows: "This rule, which permits the owners of lands subject to overflow from adjacent rivers to erect barriers to such overflow upon their own borders, may and often does result in serious damage to adjoining or lower properties, but it is the only rule consistent with the development and improvement of vast bodies of potentially rich and valuable lands along low-lying river bottoms. It is true that if the whole territory is permitted to lie in its native state, these periodical floods may repeatedly spread over the surface of the country in a gradual unobstructed flow, and pass off with very little damage to the soil. But the moment improvements are made this condition begins to change. Every furrow that is plowed, every fence erected, every orchard planted, every irrigation ditch constructed, creates an obstruction or diversion which changes the course and volume of the current, and starts new channels and cuts and erosions. It becomes absolutely essential that those who build houses, plant crops and orchards, and make other valuable improvements must be permitted to shut out from their premises these vagrant floods, though the result may overwhelm an adjoining or lower

proprietor. In many of our California streams, particularly in the southern part of the state and near the sea, where the rainfall is periodical and the valleys low and level, the natural eroded bed of the stream is wholly inadequate to carry the flood waters in periods of heavy rainfall. In this case the channel of the Los Angeles river was but 2 or 3 feet lower than the surrounding surface of the valley, and 100 or 200 feet in width. In seasons of flood the whole valley is needed as a watercourse. Under such circumstances, if the landowners on one side of the stream build dikes and embankments, it throws the whole volume of the flood on the opposite side. If both banks are protected, the compressed and elevated volume of water is poured in a torrent upon any unprotected lands below. The only practical recourse is for every man to 'build over against his own house,' or for the community to join in a public system of flood protection for the entire exposed territory."

It appears from the general rules set out in subd. II. *supra*, that a riparian owner may erect an embankment even along the bank of the ordinary channel of the stream, if, as a result thereof, the lands of others are not damaged during ordinary floods, but only during extraordinary floods, and that he may construct an embankment along the bank of the flood channel in any case, although the lands of others are damaged thereby, since the resulting damage is necessarily from extraordinary floods only. Keeping this in mind, it will be observed that a number of cases which hold that a riparian owner may embank against the flood waters of the stream are reconcilable with the general rule stated at the beginning of this annotation.

Thus, in *Fischer v. Davis* (1913) 24 Idaho, 216, 133 Pac. 910, the court denied relief to a riparian owner complaining of the construction of an embankment by the opposite owner along his bank of the stream, upon the ground that the former sustained no damage thereby. And in a former appeal of the same case, in (1911): 19 Idaho, 493, 168 Pac. 412, where

the court said that they believed the rule to be that riparian owners of lands abutting upon a stream, whether navigable or non-navigable, had the right to place such barriers as would prevent their lands from being overflowed or damaged by the stream, and for the purpose of keeping the same within its natural channels, the question in the case, as they stated, was whether a riparian owner had the right to place an obstruction from the banks of a stream, out into the stream, and thereby change the course of the stream, or a portion thereof, to the damage of a riparian owner upon the opposite side of the stream; and they held that he could not.

And in *American Plate Glass Co. v. Nicoson* (1904) 34 Ind. App. 643, 73 N. E. 625, where it was held that a riparian owner had the right to construct levees or embankments upon his own land, on his side of the stream and outside of the channel thereof, though to the injury of an upper proprietor, provided such levees do not in any manner interfere with the free flow of the water in the full width of the channel, the court sustained a demurrer to a complaint for damages and the abatement of a nuisance consisting in the construction of dams across a watercourse, the deposit of sand in the stream, and the erection of a levee or embankment along the bank of the stream, upon the ground that the complaint did not contain any averments from which the court could say that, by reason of the acts complained of, damage was sustained.

It was held in *Shelbyville & B. Turnp. Co. v. Green* (1884) 99 Ind. 205, that a riparian owner, to protect himself from the occasional overflowings of the river, could build a levee on his own land, although it caused a greater quantity of water to overflow adjacent lands to their injury, provided that the levee did not obstruct the channel of the river. In this case the court said that it appeared that the overflow was the result of temporary causes, and was not usually there, and there was a finding to the effect that the construction of the levee had the effect of

damaging other lands in extraordinary and unusual freshets or floods.

A riparian owner may erect barriers or dikes on his own land on the banks of a watercourse, or in the interior of his land, for the purpose of confining flood waters within the natural banks of the stream, although such action may result in injury to another riparian owner. *Taylor v. Chesapeake & O. R. Co.* (1919) 84 W. Va. 442, 7 A.L.R. 112, 100 S. E. 218. It appears, however, in this case, that the damage resulted from a cloudburst on the head waters of the creek which caused a flood therein of unprecedented volume and violence, and that the railroad, by placing an engine upon its bridge across the creek causing wreckage and debris to lodge there, caused the water to be dammed back upstream, and over and upon the plaintiff's property to its great damage, and it was held that the right of a riparian owner to protect his land by dikes did not justify the railroad in so obstructing the stream, and that it was liable for the resulting damage. (As to liability for damages to riparian owner by means adopted to protect bridge or other structure in or across stream at time of flood, see note to this case in 7 A.L.R. 116.)

In the reported case (*GERRARD v. CROWE*, ante, 625), it was held that a riparian owner has the right to protect his land from being overflowed by the water of the stream, in times of flood, by the construction of an embankment along the margin of the stream, although the effect of the embankment is to throw upon the land of the opposite proprietor, in times of flood, more water than would otherwise have gone there. The embankment in this case was constructed from a point on the land of its builders about a half a mile from the stream, diagonally to its banks, and the court distinguished the English cases holding that a riparian owner could not embank against ordinary flood waters to the injury of others, upon the ground that in the case at bar it was not proved that any flood channel of the stream was obstructed or existed, or that there was any ancient or rightful

course for the flood waters across the lands upon which the embankment was constructed, and this distinction points to a basis for harmonizing the reported case with the general rule, since it is apparent that, as a physical fact, an embankment along the margin of a stream which did not obstruct the flood channel, and was located along the edge of, or back from, such channel, would not interfere in any way with the waters of the stream in times of ordinary flood, but would only divert the water in times of extraordinary flood.

In *Blaine v. Brady* (1885) 64 Md. 373, 1 Atl. 609, it was held that an injunction will not be granted at the suit of a riparian owner to restrain the maintenance of an embankment by an opposite owner, to prevent the flooding of his own land in times of high water, on the ground of the threatened overflow of the former's land by reason thereof, where it does not appear how often in the past the stream has overflowed its bank, nor how much of the plaintiff's land had been, or is liable to be, overflowed at such times, in consequence of the embankment made or threatened to be made. The court in this case expressly refused to pass on the question whether a riparian owner has the right to place an embankment on the bank of a stream, the consequence of which is to cast the overflow upon the land of the other proprietor, unless he chooses to make a similar embankment on his land and on his side of the stream.

In *Kansas City, M. & B. R. Co. v. Smith* (1895) 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78, the court said that it was not disposed to rest the nonliability of the defendant solely on the ground that plaintiff's damage was caused by extraordinary floods, and, continuing, said: "For it involves the concession that, as against the overflowing water of alluvial streams, a riparian owner may do nothing to protect himself against periodically recurring floods, but, so long as they continue as a part of the moving mass of waters of which the stream is the thread, must give way to them as flowing in a watercourse. To

so hold would, in our opinion, be to apply to the bodies of water of a distinctive class, rules which were formulated for entirely different conditions, and which, if followed, will lead away from the principles upon which the rules rest. Some part of the valleys of alluvial streams must be land not within a watercourse. How much, it may be difficult to determine, but surely something may be withdrawn by man from the natural condition of things for his own use. We think it may with safety be said that a valley of a mile, or a mile and a half, along streams of the class of Town creek, goes far beyond any requirement of the law for the course of the stream. How much less than this would be sufficient we need not attempt to declare. That the embankment of the railway has not obstructed the course of the stream is demonstrated by the fact that no injury has resulted to anyone during the ordinary floods, which have passed harmlessly away. It is extraordinary, the exceptional, the unexpected, which has caused the injury for which the plaintiff sues." It may be noted in this connection that the valley of Town creek was from 2 to 3 miles wide, and that the railroad embankment was located about $\frac{1}{4}$ of a mile back from, and parallel with, the course of the stream.

It was held in *Farquharson v. Farquharson* (1741) Morison's Dict. (Scot.) 12,779, that a riparian owner may erect a structure along the side of a river upon his own land to prevent damage to his ground by the overflow of the river, though thereby damage should happen to his neighbor on the opposite side of the river by throwing the whole overflow, in time of flood, upon the latter's grounds. This case, however, was distinguished in *Menzies v. Breadalbane* (1828) 3 Bligh, N. R. 414, 4 Eng. Reprint, 1387, supra, as follows: "The principal authority, as it was conceived in the court below, and as it was at your lordships' bar, was a case decided in the year 1741,—the case of *Farquharson v. Farquharson* (the papers were reprinted, and laid before the

House). It was considered that that was a case directly in point; and if that had been a decision directly in point, I confess I should have had very great hesitation in declaring the opinion I am now doing. But I have read through that case, and attended to the different reports of it with the greatest attention, and I think that it is distinguishable, in almost every particular, from the case now before your lordships. That was the case of the land of two proprietors on the river Cluny, on opposite banks of the river, which runs northward and falls into the river Dee. Auchindyne grounds were on the left bank; Invercauld's grounds on the right. Invercauld on his grounds had erected a mound, and the question was, as between him and Auchindyne, whether he was entitled to erect that mound; and it was decided that he was. But the circumstances were of this description: The river had been continually going to the eastward. It had, in one instance, actually departed from its original course, and taken a new direction, placing a part of Invercauld grounds on Auchindyne side, and was obviously repeating, or attempting to repeat, the same operation, by a new encroachment on Auchindyne grounds. The mound erected, therefore, was not to have the effect of altering the old course of the river, but it was to have the effect of preventing the old course of the river from being altered; and that, I apprehend, is a most material distinction in cases of this kind. But, independently of this, there was evidence to show that at least a considerable part of the bank was built on old foundations. There was further evidence of this description, which, with respect to cases like the present, is of the most important character, that, according to the custom of that part of the country, proprietors on the opposite sides of the rivers had embanked against each other; and in this particular case it was proved that Auchindyne had himself embanked on his side of the river, for the purpose of preventing the overflow of the water on his side, so as to throw it on Invercauld; it was proved also, as the last

circumstance, that the destruction of the grounds of Invercauld would have followed, if these works had not been allowed, and that the most trifling damage, in point of amount, was occasioned to the proprietor on the other side. It was under these circumstances, with all these facts appearing, that the court gave their opinion in favor of Invercauld. That case is distinguishable in all its particulars from the present. That was a dam erected to prevent a change in the course of the water, and it was sanctioned also by the custom in that part of the country, and sanctioned also by the practice which had prevailed as between those different and opposite proprietors."

It was held in *Maxey Drainage Bd. v. Great Northern R. Co.* (1912) 106 L. T. N. S. (Eng.) 429, 76 L. P. 236, 56 Sol. Jo. 275, 10 L. G. R. 248, that a railroad company owning a triangular piece of land between two forks of a watercourse had the right, provided it used reasonable care and skill and adopted reasonable and usual means for the purpose, to protect such land, by the erection of embankments, from the flood waters of the stream, although damage resulted therefrom to others, and that the damage so sustained by such others was *damnum absque injuria* for which no action would lie. It is impossible to tell from the report of this case whether the land was riparian land, or whether the water first flooded across the lands of others and was repelled as surface water by the railroad company, the court saying that they had to deal with a case where a landowner had erected works on his own ground to prevent natural flooding waters, which, by the lie of the ground, would come upon his land, from doing so, in consequence of which they flooded somewhere else; and that it was a case in which the works were erected by the owner on his own land for the purpose of defending himself against the common enemy of a flood.

In *Rex v. Trafford* (1831) 1 Barn. & Ad. 874, 109 Eng. Reprint, 1011, it was held that a riparian owner could not build an artificial bank or fender along the stream which would, in

times of ordinary floods, cause the water to flow down in so large a body against an aqueduct over the stream as to endanger such aqueduct and obstruct the navigation in the canal carried by the aqueduct over the stream, where, before the construction of such fenders, the arches in the aqueduct were sufficient to carry off the flood waters of the stream. The court said: "Now, it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction. The *Pagham Case* (*Rex v. Sewer Comrs.*) (1828) 8 Barn. & C. 355, 108 Eng. Reprint, 1075, quoted in the argument for the defendant, is of a very different kind. It is a well-known fact that the sea occasionally, by some change proceeding from natural and unknown causes, makes gradual inroads on parts of a coast which had been free from its waters for centuries. On such occurrences it has been compared, and justly compared, to a common enemy, against which every person may defend himself as he can; but this is perfectly different from an occasional course of superabundant inland water flowing in the same direction whenever the occasion happens, and the ordinary channel is become insufficient to carry it off. In the one case, if the works be successful, the water is prevented from coming where, within time of memory at least, it never had come; in the other, it is prevented from passing in the way in which, when the occasion happened, it had been always accustomed to pass."

This case, however, was reversed in *Trafford v. Rex* (1832) 2 Crompt. & J. 265, 149 Eng. Reprint, 114, 8 Bing. 204, 181 Eng. Reprint, 379, 1 Moore &

S. 401, 1 L. J. Exch. N. S. 90, but the appellate court agreed to the principle that a riparian owner cannot embank against an ordinary flood to the injury of other owners, but held that they could not apply it to the case, because it did not appear whether the raising of the fenders was not an accustomed and rightful usage before the construction of the canal, whether the course which the flood water took was the ancient and rightful course which it ought to take, or whether the raising of the fenders was or was not necessary in consequence of the construction of the canal.

It was held in *Kansas City, M. & B. R. Co. v. Smith* (1895) 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78, that the rule of the common law that a riparian owner had no right to construct, to the injury of other owners, an embankment along the ordinary bank of the stream, and thus obstruct the flood channel of the stream, in order to protect his own lands from ordinary floods, could not be strictly applied under all circumstances, and in this connection the court said: "It cannot be the law, however, in this state, that the flood waters of the large streams which are within or along the borders of this state are to be dealt with as the waters of a stream, not to be obstructed, impeded, or turned aside under any circumstances, except upon condition that the persons so doing shall respond in damages for all injury sustained by another riparian owner, and be liable for nominal damages as for the infringement of the legal rights of adjacent proprietors who in truth suffer no real injury. . . . If the waters of the Mississippi river, which at flood sometimes spread in width from 20 to 40 miles, and flow in a continuous and unbroken body down the valley, are to be dealt with as the waters of the stream, and the whole valley is to be given up as the course way of the stream, the most fertile portion of our state may at once be abandoned. From Memphis to Vicksburg, and from the foothills to the river, there is not a square yard of land that was not deposited by the

overflowing waters of the river. If the course usually pursued by the ordinary flood waters is the channel of the stream, the whole valley is the channel. It is evident that to so declare would be to announce as a positive rule of law, and as an indisputable fact, that which is not true, and which, if put into practical operation, would relegate prosperous and fertile districts to the condition of a wilderness. There are farms innumerable, and railroads, villages, towns, and cities, situated in a water-course, if the usual flow of the flood waters of the Mississippi river mark and define the course of that stream. It is manifest that to apply the strict rules of law controlling in cases of streams and the obstructions thereof to such a river and to such conditions, in the very nature of things, impracticable and impossible. Calling these overwhelming floods surface or channel water, for the purpose of dealing with them under rules applicable to entirely different conditions, advances us no step in the solution of the questions involved. We must deal with things, and not names, and conditions inherently and radically different cannot be assimilated by mere terminology. The rules governing the rights and duties of individuals in reference to waters rest upon principles which underlie very many other property rights. At least, they depend upon the two legal maxims that one may make such use as he wills of his own, and that he must so use his own as not to impinge on the legal rights of others. As to surface water and streams flowing along their channels, general rules have been formulated, which are usually applicable, and under which the relative rights and duties of parties may be adjusted; but to apply these rules to waters of a radically different class is to measure different conditions by a single standard. To say that flood waters are surface waters, and may always be dealt with as such, or that they may be fenced against as may the waters of the sea, regardless of consequences, would be to give to one riparian owner the

power and right of benefiting and preserving his own property at the direct expense of another. But, on the other hand, if it be the rule that alluvial lands subject to occasional floodings are to be dealt with as comprising the bed of a stream, the beneficial ownership therein is practically destroyed in the interest and for the benefit of other riparian owners. The difficulty or impossibility of formulating an exact rule by which the rights of parties under varying circumstances may be adjusted is of but little importance, in view of the fact that it is not the less difficult to determine such rights by the application of those already existing, and which were formulated for the control of somewhat analogous, but not similar, conditions. It is but the usual difficulty of applying legal principles to varying facts. Along the lines which separate what is clearly the exercise of a legal right from the commission of actionable injury, there are often found circumstances in which it cannot be said with confidence to which class the particular act should be assigned; but this difficulty is not peculiar to the class of cases now under consideration, and suggests rather the propriety of resorting to more flexible, rather than more rigid, rules."

There is a provision in the Georgia Code to the effect that all persons owning lands on any watercourses in that state are authorized and empowered to ditch and embank their lands so as to protect the same from freshets and overflows in said watercourses, provided, always, that the said ditching and embanking do not divert said watercourse from its ordinary channel. But in *O'Connell v. East Tennessee, V. & G. R. Co.* (1891) 87 Ga. 246, 18 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489, where a railroad company erected an embankment for its track along the margin of a river, causing the river, in flood times, to overflow the opposite side more than it had done before, it was held, on a demurrer to a complaint for the injuries resulting therefrom, that such statute was not

applicable, because the complaint alleged that the defendant diverted the river from its ordinary channel, and that the defendant embanked its land, not to protect it from overflows in the river, but for the purpose of laying its track thereon, without regard to any consequences of benefit or injury to the contiguous country.

And in *Collins v. Macon* (1882) 69 Ga. 542, an unsuccessful attempt to hold a city liable for damages from the flooding of land by reason of the destruction of an embankment constructed by the city along a river, the court, in regard to the right of the city originally to build the embankment, said: "Under certain sections of the city charter, we are inclined to think the city had an implied permis-

sive authority, for the preservation and protection of its property from floods or overflows, as well as in promoting the security, welfare, and health of the city, to erect this levee on its own land. Moreover, the general law of the state authorizes all persons who own, or may hereafter own, lands, to ditch and embank them so as to protect the same from freshets and overflows. Code, § 2232. The city owned the lands upon which this levee was built, and the construction of it did no harm; but the complaint is that its permissive destruction by the purchaser from the city caused the damage." Section 2232 is the same section construed in *O'Connell v. East Tennessee, V. & G. R. Co.* (Ga.) *supra*. G. V. I.

SUPREME LODGE OF KNIGHTS OF PYTHIAS, Appt.,

v.

SALLIE N. OVERTON.

Alabama Supreme Court—April 17, 1919.

(203 Ala. 193, 82 So. 443.)

Insurance — incontestable clause — killing of escaping felon.

1. That an insured was killed while attempting to escape imprisonment and execution after sentence to death as a felon is no defense to an action upon an insurance policy upon his life containing an incontestable clause.

[See note on this question beginning on page 651.]

— validity of incontestable clause.

2. An incontestable clause in an insurance policy is valid and binding and not against public policy.

[See 14 R. C. L. 1199.]

APPEAL by defendant from a judgment of the Circuit Court for Madison County (Brickell, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed*.

The facts are stated in the opinion of the court.

Messrs. Cooper & Cooper for appellant.

Mr. R. E. Smith, for appellee:

Unless the contract provided that death while engaged in, or in consequence of, an unlawful act, shall avoid the policy, death of the insured, while committing a felony is no defense.

Bacon, Ben. Soc. 4th ed. § 443; McDonald v. Triple Alliance, 57 Mo. App. 87; 4 Cooley, Ins. p. 3142.

Mayfield, J., delivered the opinion of the court:

The only question presented for review on this appeal is whether or not the insurer should be allowed to

defend an action on an insurance policy which contains an "incontestable clause," by setting up as special defenses that the insured was a felon sentenced to death, and was killed while attempting to escape imprisonment and execution.

This decision must be ruled by the recent decisions of this court in the cases of *Ex parte Weil*, 201 Ala. 409, 78 So. 528, and *Mutual L. Ins. Co. v. Lovejoy*, 201 Ala. 337, L.R.A. 1918D, 860, 78 So. 299.

In one of the above-cited cases the defense of suicide by the insured was held not to be availing, and in the other, where the insured was publicly executed by hanging, was likewise not availing as a defense to an action on life insurance policies which contained the usual incontestable clause.

The defense that the insured was killed as an escaping felon, under death sentence, is likewise unavailing as a defense against an insurance contract containing an incontestable clause.

We do not decide, as said in *Weil's Case*, that a contract to insure against such risk would not be against public policy, and therefore void; but we do decide that an incontestable clause in life insurance policies is valid and binding and not against public policy, and that, nothing appearing to render such clauses void, they will be enforced by the courts; and they cannot be enforced if such defenses as above stated may be set up to defeat the policy. Such defenses, as well as any other, would absolutely defeat the cause in question, and render the policy no better than if it contained no such clause.

The contract sued on in this case and in the two cases cited above were not on their faces void. No one of them on its face was against public policy or good morals, but perfectly valid and binding as any other contract of insurance. The attempted defense in each case was

to show that the death or cause of death was not within the contract of insurance. This may be true, but the trouble with the defense is that the defendant for a consideration had agreed in advance not to contest its liability on any ground other than those specified in the contract, none of which were attempted to be set up. The court will not now hear the insurer attempt to set up defenses and contest payment on grounds which it has, for a consideration and which induced the contract, agreed not to so defend or contest.

The decision is not that suicide while sane or intentional, or death by public execution or while a fleeing felon, is not a defense to an action on an insurance policy; but the decision is that by a valid contract the insurer has estopped himself from setting up these as well as any other defenses except those mentioned in the contract. The court will not presume that such defenses exist, and the party has estopped himself from alleging or proving it.

If a plea should allege that there was no contract of insurance because it was void in its inception, being against public policy, as an attempt to violate or evade the law, then a different question would be presented that would attack the incontestable clause as well as all other provisions of the policy. The effect of such a plea would be to show there was never any contract of insurance.

No such case or issue was attempted in either of the cases cited or the one now under consideration. There is nothing to show that the insured or insurer ever contemplated that death would result in the mode or by the cause attempted to be set up. Hence, so far as appears, the contract was perfectly valid and binding, unless breached in the mode attempted to be set up in the pleas, and the parties had agreed that the contract should not be contested on these grounds, not that the insurer should pay, even though

Insurance—
incontestable
clause—killing
of escaping
felon.

—validity of
incontestable
clause.

death did result from the causes attempted to be set up in the pleas.

The court merely approves the contract, and holds the party estopped from litigating those questions, not that if the facts did exist the insurer would be liable.

Anderson, Ch. J., and Somerville, and Thomas, JJ., concur.

Petition for rehearing denied May 22, 1919.

Writ of error dismissed by the Supreme Court of United States, January 31, 1921 (U. S. Adv. Ops. 1920-21, p. 298) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 321.

NOTE.

The question of the validity and ef-

fect of incontestable clauses as excluding defenses based upon public policy is covered by the annotation in 6 A.L.R. 448, which is supplemented in 13 A.L.R. 674. It will be observed that the conclusion in the reported case (SUPREME LODGE, K. P. v. OVERTON, ante, 649), which was cited in the annotation in 6 A.L.R. 448, as upholding the availability of the incontestable clause, even where the insured was killed while attempting to commit a felony, has now become final, a petition for rehearing having been denied by the state court, and a writ of error having been dismissed by the Supreme Court of the United States (U. S. Adv. Ops. 1920-21, p. 298)—U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 321.

FIRST NATIONAL BANK OF PHILADELPHIA, Plff. in Err.,

v.

M. WALTER FARRELL et al., Trading as Weil, Farrell, & Company.

United States Circuit Court of Appeals, Third Circuit—January 4, 1921.

(272 Fed. 371.)

Bank — duty to examine statement — estoppel.

1. A bank depositor must examine personally or by authorized agents a bank's periodical statements showing credits and debits accompanied with paid checks as vouchers for the latter, and report to the bank without unreasonable delay any discovered errors, or the bank may regard his silence as an admission that the entries as shown are correct.

[See note on this question beginning on page 660.

—duty to supervise acts of agent.

2. A depositor authorizing an agent to draw checks on his account and examine the bank's periodical statements must properly supervise the agent's conduct in the examination of the statements, especially where it appears that the agent has an interest in concealing frauds committed by him, and in the absence of such supervision knowledge of the dishonest agent of fraudulent entries and incorrect balances is the knowledge of the principal, so far as an examination of the account would disclose it.

[See 3 R. C. L. 536, 537; see note in 15 A.L.R. 162.]

—permitting overdrawing of account by agent—effect.

3. A bank which knowingly permits an agent to exceed his authority in drawing checks upon his principal's account cannot take advantage of the principal's failure to supervise the agent's examination of the periodical statements rendered by the bank, so as to absolve itself from liability for the loss occasioned by its act.

—right to control application of payment to principal.

4. A bank which has honored checks of an agent upon his principal's account in excess of his authority cannot complain of the application by the

principal of money paid him by the agent from his own funds in satisfaction of other claims which the principal had against him, rather than upon the amount which he wrongfully drew from the principal's account, and which the bank is under obligation to refund to the principal.

—duty to account for money overdrawn by agent.

5. A bank depositor is entitled to recover from the bank deposits of his money which the bank permitted to be withdrawn by his agent in excess of written authority conferred upon the agent, notice of which was served upon the bank.

—effect of restoration of funds by agent.

6. If money which is wrongfully withdrawn by an agent from his principal's bank account is restored by him from his own funds, and the bank subsequently permits the agent

to withdraw it again by checks in excess of the agent's authority, the bank is liable to the principal for such portions of the withdrawal as do not reach the principal.

—claim for money restored by agent.

7. Checks by which an agent wrongfully withdrew money from his principal's account, which he subsequently restored from his own money and then wrongfully withdrew again, cannot be included in the claim by the principal against the bank for wrongfully honoring the agent's checks.

—basis of account.

8. The amount which a depositor can recover from a bank which permitted his agent to withdraw money from his account without authority is the total amount of his deposit less sums paid out by lawful checks and sums paid out on unlawful checks which ultimately reached him from the agent.

ERROR to the District Court of the United States for the Eastern District of Pennsylvania (Thompson, J.) to review a judgment in favor of plaintiffs in an action brought to recover the amount paid by defendant to plaintiffs' agent on checks drawn in excess of his authority. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Argued before Buffington, Woolley, and Davis, Circuit Judges.

Messrs. Joseph S. Clark and Owen J. Roberts for plaintiff in error.

Messrs. Henry A. Rubino, J. Howard Reber, and Percival H. Granger for defendants in error.

Woolley, C. J., delivered the opinion of the court:

The judgment brought here by this writ of error was entered by the district court for want of a sufficient affidavit of defense upon pleadings drawn to state a case of undisputed facts and to present only issues of law. We shall speak of the parties as they stood in the court below, and shall give only the main facts of the case in an endeavor to avoid the confusion which has arisen from the number and complexity of their details.

The plaintiffs had for many years been engaged in the business of selling commercial paper. They operated from a main office in Boston through branch offices in other

cities, one of which was in Philadelphia. The Philadelphia office was opened in March, 1910, with M. T. Snyder as their agent.

The course of business was briefly this: The plaintiffs sent Snyder commercial paper to sell to local banking institutions. When Snyder made a sale he was required immediately to report the same by telegraph or telephone to the plaintiffs at Boston and deposit the proceeds—invariably the purchaser's check or draft drawn to the plaintiff's order—to the credit of their account with the Girard National Bank of Philadelphia. Such deposit was required to be made by two deposit slips, an original and duplicate; the original, giving the name of the maker of the check, the amount thereof, and the total, if the deposit included several checks, to be retained by the bank; the duplicate, showing the same entries, to be stamped by the receiving teller and returned to Snyder for transmission

to the plaintiffs, thereby showing that the proceeds of the sale previously reported had been deposited. Snyder had no power to draw on this account.

Later in 1910, the plaintiffs opened an account with the Merchants' National Bank of Philadelphia. A short time afterward this bank merged with the First National Bank of Philadelphia, the defendant in this action, the latter bank at the same time taking over the account. This account, standing always in the name of Weil, Farrell, & Company, was a petty cash account opened by the plaintiffs upon a deposit of \$1,000 for the use of Snyder in meeting the expenses of the Philadelphia office. Against this account Snyder was authorized to draw checks for limited sums under a power of attorney made by the plaintiffs and lodged with and accepted by the defendant bank as the terms on which it carried the account. The power of attorney, so far as it is pertinent to this case, is as follows:

"Know All Men By These Presents, That we, Weil, Farrell, & Co., do make, constitute, and appoint M. T. Snyder our true and lawful attorney for us and in our name—

"(1) To draw checks against our account in the Merchants' National Bank of Philadelphia, Pennsylvania, in no event to draw in excess of \$1,000 at any one time, . . . and to have full authority to manage and make settlement of said account."

"(2) To indorse notes, checks, drafts, or bills of exchange, or other instruments of writing for deposit as cash, or for collection, in the Merchants' National Bank of Philadelphia, Pennsylvania."

It thus appears that in the conduct of the plaintiffs' banking business, Snyder, their agent, had authority to deposit without limit to the credit of, but not to draw in any amount upon, their account with the Girard National Bank; and that he had authority to make deposits in any amount to the credit of their account with the First National Bank,

and to draw against the same as often as he chose in an amount not in excess of \$1,000 at any one time. Under this arrangement Snyder conducted in an orderly way the plaintiffs' business with the two banks until April, 1915, when, desiring to embark in speculation, he conceived a scheme whereby he could obtain the use of his principals' money for short periods as it flowed from purchasers of commercial paper through the banks to the plaintiffs in Boston.

Snyder's scheme was this:

When his principals sent him commercial paper, Snyder had to account for it either as unsold or sold. If sold, he was required to account for the proceeds by sending to the plaintiffs the stamped duplicate deposit slip of the Girard National Bank, evidencing deposit of such proceeds with that institution. Having no power to draw on this account, Snyder, in order to use the plaintiffs' money, had to get it before it reached this account. Therefore, instead of depositing the proceeds of sales of negotiable paper to the credit of the plaintiffs' main account with the Girard National Bank as he should have done, he deposited the same, or much of them, to the credit of the plaintiffs' petty cash account with the First National Bank, the defendant. Having authority under the power of attorney to draw against this account by as many checks as he chose, but never at any one time for a sum in excess of \$1,000, he could have drawn from the defendant bank by checks within that limit all the money he there deposited to the credit of the plaintiffs. But as his speculative transactions were large, and as his deposits made to meet them were correspondingly large, drafts by a great number of checks for small amounts would inevitably have excited suspicion. He therefore drew against the plaintiffs' account with the defendant bank (thus augmented) by checks substantially larger in amount than those authorized by

the power of attorney. These checks the bank honored.

By this means Snyder drew for his personal use large sums of money from the plaintiffs' account with the defendant bank. But money thus obtained had to be used quickly and had to be restored or replaced by other money, because, in the plaintiffs' method of doing business, the proceeds of negotiable paper which Snyder had reported as sold were required presently to appear by duplicate deposit slip to have been deposited in the Girard National Bank. Such deposit was imperative upon Snyder. To make it he had to have money. He found the money by appropriating the proceeds of later sales, and, depositing them with the Girard National Bank, he reported such deposits as the proceeds of earlier sales. He did this in one of two ways, and, when under the necessity of forcing figures, he did it in both ways. They were these: First, he deposited with the Girard National Bank the check of a purchaser in a later transaction, drawn as always to the order of the plaintiffs, properly noted as to name and amount on the original deposit slip, making the duplicate deposit slip show the same money entries as the original, but leaving it blank as to the name of the maker of the check. Such duplicate, showing correctly the amount deposited, but being mute as to the maker of the check deposited, the paying teller of the Girard National Bank stamped in evidence of the deposit made, and on its return to Snyder he falsified it by filling in the blanks with the name of purchaser of a previously reported sale. Or, second, Snyder drew a check for an amount in excess of \$1,000 on the plaintiffs' account with the defendant bank, and deposited it to the credit of the plaintiffs' account with the Girard National Bank. By the latter move Snyder would, of course, get none of the plaintiffs' money, but he would thereby be able to make the necessary deposit to cover earlier sales, or to force the figures properly to correspond.

Transactions of this character carried Snyder over for only a few days at a time, but during such short periods he was able to use the plaintiffs' revolving funds in an amount which remained constant at between \$90,000 and \$100,000. Obviously, he was required to repeat these transactions again and again in order to keep himself in speculative funds and to keep a few days ahead of exposure.

These transactions, running from July, 1915, to May, 1917, grew in bulk to 382 checks, each in excess of \$1,000, honored by the defendant bank in violation of the plaintiffs' power of attorney, and aggregated the astonishing sum of \$3,161,981.74.

After discovery the plaintiffs brought this action against the bank to recover a book balance of \$751.96 admittedly due, and the sum of \$92,750, the amount which they claimed should have remained to their credit had the defendant bank observed their power of attorney and had not honored checks in excess of the authority there conferred and limited; first, however, giving the defendant bank credit for all moneys paid on checks unlawfully honored in excess of \$1,000 which had ultimately reached them through redeposit with the Girard National Bank. On these items with interest, less a small credit not in issue, the trial judge, sitting without a jury, entered judgment for \$94,445.26. 263 Fed. 778. To this judgment the instant writ is directed.

Of the several questions involved the first arises out of a defense made to the whole action. By the power of attorney under which the plaintiff depositors opened and the defendant bank carried the account, Snyder, the plaintiffs' agent, in addition to the power to draw checks in limited amounts, was given, "full authority to manage and make settlement of said account." Pursuant thereto the bank rendered monthly statements to Snyder, who, under the authority thus conferred, examined and approved the same without

submitting them to the plaintiffs. Had they been received and examined by the plaintiffs they would have disclosed deposits grossly disproportionate to the purpose for which the account was kept, and also heavy withdrawals by checks drawn by Snyder and honored by the bank beyond the authority which the plaintiffs had conferred upon them.

As the plaintiffs had delegated to an agent the duty of examining the monthly statements, the defendant bank claimed at the trial that the plaintiff depositors were chargeable with knowledge of all that its agent knew and all that the statements and canceled checks disclosed, and that, in consequence, the bank, on the plaintiffs' failure to inform it of Snyder's unlawful conduct, was not liable to the plaintiffs for unlawful withdrawals following the period when they should have found it out.

As we approve the decision of the learned trial judge against this contention, on the authorities and for the reasons given in 263 Fed. 778, 783, 786, we shall very briefly state and distinguish the rules of law which we think control this question.

A depositor sustains such relation to his bank that he is bound to give heed to its periodical statements showing the transactions of his account. Out of this relation

Bank—duty to examine statement—estoppel.

there has grown a rule of law which requires a depositor in a bank to examine, personally or by an authorized agent, and with due diligence, his balanced pass book, or the bank's periodical statements showing credits and debits, accompanied with paid checks as vouchers for the latter, and to report to the bank without unreasonable delay any errors he may discover. Otherwise, the bank may regard his silence as an admission that the entries as shown are correct. *Leather Mfrs' Nat. Bank. v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *National Bank*

v. Tacoma Mills Co. (C. C. A. 9th) 104 C. C. A. 441, 182 Fed. 1.

Without weakening this general rule, other principles come into operation according as circumstances vary its application, and according also as it responds to the test whether the failure of the depositor promptly to examine the bank's statements and apprise it of discovered errors has misled the bank to its prejudice. These arise more frequently when an agent, whom the depositor has authorized, as in this case, to examine and settle the account, has himself depleted the account by forged checks, altered checks, or checks drawn beyond the scope of his authority, against which the bank has a right to be protected. Here the depositor owes the bank the further duty of properly supervising the conduct of his agent in the examination of the bank's statements, —duty to supervise acts of agent. especially where it appears that the

agent committing the frauds had an interest in concealing them. *National Bank v. Tacoma Mills Co.* supra. This obviously should be so, for, aside from its own diligence, a bank's only protection against forgeries by a confidential agent to whom settlement of the bank account has been delegated is verification of statements by the depositor himself, who in such case is clearly responsible for the acts and omissions of his agent in the course of duties with which he had intrusted him. *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280. In such instances the cases hold that knowledge of a dishonest agent of fraudulent entries and incorrect balance is equally the knowledge of his principal, with the qualification, however, that the principal is chargeable, not with the knowledge of wrongdoing the agent possessed from the fact that he himself was dishonest, but with knowledge of such facts as an honest agent, unaware of the wrongdoing, would acquire when examining the statements within the scope of his

employment. The dishonesty of the agent does not change his relationship to his principal, and accordingly does not change the rule charging his principal with knowledge of such facts. *Dana v. National Bank*, 132 Mass. 156; *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 973; *Leather Mfrs' Nat. Bank v. Morgan*, supra.

But the general rule arising from the examination of pass book or statements by the depositor himself, and the variation of the rule arising from the examination of them by his authorized agent, involve in practically every reported instance wrongdoing where the negligence of the bank was not involved and where the wrongful act was entirely that of a person other than the bank. Both the rule and its variations disappear altogether where the bank has been negligent in detecting the fraud; *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 16 L.R.A. (N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 72, 16 Am. Rep. 576; *Myers v. Southwestern Nat. Bank*, supra; when the neglect of the bank to observe the limitation of a drawing power was, as here, the primary and proximate cause of the loss; and particularly where, as here, the wrongful act (in the sense of conduct beyond the scope of its authority) was the act of the bank itself, but for which the criminal act of the trusted agent could not have been carried into execution. In honoring checks beyond the authority granted it by the depositors' power of attorney,—a document in its possession,—the bank in this case knew, or was charged with knowledge of, its own unlawful conduct. *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 72, 16 Am. Rep. 576; *Leather Mfrs' Nat. Bank v. Morgan*, supra. The depositors' failure personally to examine the

periodical statements and promptly to acquaint the bank with its own wrongdoing misled the bank in nothing.

—permitting
overdrawing
of account by
agent—effect.

Therefore the law did not impose upon depositors in this case the duty to check up a pass book or examine monthly statements to prevent the defendant bank from continuing its own wrongful conduct; nor did the law exonerate the bank from acts which it knew were wrong, simply because the depositors had not found it out and had not told it to stop.

We are of opinion that the learned trial judge made no mistake of law in holding the bank liable for honoring checks beyond the authority which the plaintiff depositors had conferred upon it.

The second question in the case relates to the application by the plaintiffs, in ease of Snyder's indebtedness to them, of certain money drawn by Snyder from his own account and turned over to the plaintiffs after his dishonesty had been discovered. As it appears that the money which Snyder paid the plaintiffs belonged to him, we find no error in the ruling of the trial judge denying the defendant's claim to credit same against its indebtedness.

—right to control
application of
payment to
principal.

The third question—which is both difficult and elusive—has to do not with a question of law, but with a question of fact—a question of fact which should have been submitted on an accounting.

In our endeavor to perform the task of accountants, our first difficulty has been in determining whether the facts of the controversy—coming into the case, not by evidence, but by pleadings and stipulations—are such as admit of an accounting. If the facts are in the case, manifestly they are not in a form that will permit us to place them in debit and credit columns and deduce a result, for they appear entirely by totals—and by grand

totals—of hundreds of transactions in figures. After much labor in a field which is not ours, we have, however, evolved a theory or principle on which, if the facts are present, a judgment can be rendered.

In formulating a theory on which an accounting can be made in a situation where admittedly all items of the account are not present, we come at the threshold to the question of the relation of the parties and of the character of this action arising out of that relation. The parties were a bank and its depositors; their relation was that of debtor and creditors. In this relation the depositors sued, originally in tort, now in assumpsit. Turning to the pleadings, it appears that the plaintiffs seek to recover the difference between all moneys deposited to their credit with the defendant bank, and all moneys withdrawn on checks not in excess of the amount authorized and on checks made by Snyder and honored by the bank in excess of the amount authorized by the plaintiffs' power of attorney, where the same did not reach them by redeposits with the Girard National Bank. If all moneys deposited to the credit of the plaintiffs with the defendant bank had been moneys belonging to the plaintiffs, the matter would be simple enough, but certain of the moneys so deposited, it is claimed, did not belong to them, but belonged to Snyder.

The transactions out of which the difficulty arose were these: After withdrawing from the plaintiffs' account by unlawful checks (a term we shall use for convenience in referring to checks in excess of \$1,000) various sums of money aggregating \$35,385.06, Snyder, finding himself pinched in time within which to cover his withdrawals, deposited to the credit of the plaintiffs' account in the defendant bank moneys of his own, aggregating the sum of \$35,385.06 previously drawn out. After he had deposited, or had added to the plaintiffs' money in the account, or had "restored" (as it has been termed) this latter sum, Snyder went on as before, making

large deposits in, and drawing unlawful checks against, his principals' account for the dual purpose of meeting his sales transactions through the Girard National Bank and of taking his employers' money for his own speculative purposes. We assume as a fact in the case that the total deposits made to the credit of the plaintiffs' account in the defendant bank included not only deposits of the plaintiffs' own money, but also of Snyder's money to the extent named. This is the crux of the difficulty arising from the record as framed. We find this fact from our reading of the record (§ 18 of the affidavit of defense) where it is said that "all of the said \$35,385.06 of deposits are included with \$36,767.10 of deposits set forth in § 7 of the amended statement."

Paragraph 7 of the amended statement shows a total deposit to the credit of the plaintiffs' account in the defendant bank of \$3,254,015.03, of which the \$36,767.10 referred to was a part. If this is right, Snyder's money in the sum of \$35,385.06 was credited to the plaintiffs' account, and there is pertinency in the bank's contention that the plaintiffs now ask not only for their own money, but for Snyder's as well. In other words the defendant bank maintains that the item of \$35,385.06 of Snyder's money is included in the total deposits made to the credit of the plaintiffs, and therefore constitutes a false item of gross deposits from which to deduct the total of unlawful checks and to determine the balance truly due the plaintiffs. In this situation of accounting, each party, and also the trial judge, framed an argument in figures, which, standing alone, we confess difficulty in answering. Hence it is that we go back to the pleadings and inquire, What are the plaintiffs entitled to recover? Certainly they are entitled to recover every dollar of deposits of their own money, which, but for payment by the bank of lawful checks and payment of Snyder's

—duty to
account for
money over-
drawn by agent.

unlawful checks (when no part of them reached the plaintiffs circuitously), would now be in the bank to their credit. It is equally certain that the plaintiffs are not entitled to recover any moneys placed to their credit which was not theirs. We next inquire, Whose money was the \$35,385.06? That it belonged to Snyder is not disputed. Let us assume for easy illustration that this sum, instead of being drawn out and paid back by many checks, was drawn out by one check and paid back by one check. If the account had shown a balance of \$35,385.06, and if Snyder had drawn out the whole of this sum by one unlawful check, Snyder would have taken \$35,385.06 of the plaintiffs' money, and the plaintiffs' account would have been wiped out. The bank would then have been liable to the plaintiff depositors for just \$35,385.06. When later Snyder made a deposit of this amount from money of his own, the plaintiffs' account was restored and they had to their credit precisely the same balance they had before Snyder wrongfully drew it out. The bank owed the plaintiff depositors just the same now as before. If, afterward, Snyder by unlawful checks took a part of the restored \$35,385.06 and deposited it to the credit of the plaintiffs in the Girard National Bank (as he actually did in the sum of \$22,942.53), and took the remainder and appropriated it to his own use (as he actually did in the amount of \$12,442.53), then the bank on the two new transactions would be liable to the plaintiffs initially for only \$35,385.06 and finally for only \$12,442.52, because the remainder of the deposits withdrawn by unlawful checks found its way into the Girard National Bank and ultimately reached the plaintiffs.

—effect of
restoration of
funds by agent.

But in the plaintiffs' statement of claim there arises this situation: The transactions of this complex business were not limited to the deposits and to the withdrawals we have endeavored to describe, but

extended also to loans of money by the bank to Snyder on options of negotiable paper for \$191,938.38, which was refunded and for which no claim was made; an item of \$51,741.18 of unlawful checks on which no claim was made; an item of \$34,304.20 of unlawful checks on which no claim was made; an item of \$5,000 on which no claim was made; an item of a demand loan for \$30,023.68, claim for which it is contended was precluded by stipulation; leaving as sums specifically claimed the item of \$751.96, balance admittedly due by the bank at the time of the discovery of Snyder's transaction, and an item of \$92,750 paid out on thirty-five unlawful checks and kept by Snyder, together aggregating \$93,501.96. This is the net sum demanded by the plaintiffs and awarded by the judgment of the court, plus interest. We are not clear whether included in the thirty-five checks aggregating \$92,750 were some of the unlawful checks by which Snyder first drew out the \$35,385.06. Apparently some were included. (Paragraph 18, Affidavit of Defense.) The bank contended that \$35,385.06 of Snyder's money should be deducted from the \$92,750 (aggregate of the thirty-five checks), on the implication or on the fact that the initial unlawful checks for \$35,385.06 are included in the thirty-five checks pleaded. The defendant says it makes no difference whether they were included or not, because the thirty-five checks mentioned in suit and calculated by the trial judge in reaching the judgment were only a part of several hundred unlawful checks by which Snyder got the plaintiffs' money; and further, because the suit is not on the thirty-five checks, but is for the difference between the total deposits and what should have been in bank but for the bank honoring unlawful checks.

There would be force in the plaintiffs' position,—for obviously the suit is on the whole transaction,—were it not for the fact that the plaintiffs in their pleadings elimi-

nated from the whole transaction all items touching unlawful withdrawals of varied kinds except the \$92,750 obtained by Snyder through the named thirty-five unlawful checks. It may be that the controversy does not turn here; yet the plaintiffs expressly admitted by their statement (Record, pp. 17, 18), and the trial judge expressly allowed in the judgment (Record, p. 89), the items of \$751.96, small balance, and the contested item of \$92,750 paid Snyder by the bank through the medium of thirty-five unlawful checks. These were the only two items for which the plaintiffs made claim and on which the court based its judgment. This is true, for the plaintiffs eliminated all other items by showing that they had received the money drawn out by all other unlawful checks, and that unlawful advances of the bank otherwise made were covered without loss. Assuming again for convenience that the \$35,385.06 was first drawn out by Snyder on one check, what is the situation? If one of the thirty-five checks was used in drawing out this sum when Snyder took it for his own use, and if, after restoring the amount, another of the thirty-five checks was drawn by Snyder on the account thus restored, both checks cannot be counted and charged against the bank as unlawful checks, for they would aggregate \$70,770.12, while all the plaintiffs' money that Snyder obtained by the two checks was \$35,385.06. If such

-claim for
money restored
by agent.

two checks were charged against the bank, it is possible that one or the other of them may appear either in the transactions aggregating \$92,750, or in some other transactions. But no shortage is claimed in any other transaction. So on this showing it must be that the \$35,385.06 is in the \$92,750. Hence the plaintiffs are entitled, not to \$92,750 (plus the small balance), but to \$92,750 (and the small balance) less \$35,385.06, together with interest properly computed.

But if this reasoning be chal-

lenged we await objection to the following: By the 7th paragraph of the plaintiffs' statement they said that, commencing on a certain date, Snyder deposited in the bank "to the credit of the plaintiffs' checks, duebills and drafts, the property of the plaintiffs, the moneys representing which were collected by the defendant, aggregating \$3,182,247.93." That in addition to this sum Snyder deposited in the defendant bank, to the credit of the plaintiffs, "cash and checks amounting to \$36,767.10." (Included in this item is the \$35,385.06 in dispute.) In addition to the above two sums Snyder caused to be placed to the credit of the plaintiff's account in the defendant bank the sum of \$35,000, representing loans made by the defendant bank at the request of Snyder "without the plaintiffs' knowledge and consent" (this item is no part of the \$35,385.06 under discussion), and "that the total sum credited to the plaintiffs' account by the defendant was \$3,254,015.03." A careful analysis of this statement of claim shows that the first large item of deposits was "property of the plaintiffs," the second and third items do not contain this averment, and the plaintiffs do not say whether these were deposits of their money or not. If the \$35,385.06 first withdrawn by Snyder by unlawful checks, and then restored, is included in the total of \$3,254,015.03 (as ¶ 7 of the statement clearly says), then all of this large sum was not the plaintiffs' money, and the plaintiffs are not entitled to recover a net ascertained from a gross that was not all theirs. *Their* money on deposit was this gross less Snyder's \$35,385.06. By deducting Snyder's money from the plaintiffs' estimated gross, we have a new gross deposit of money actually the plaintiff's, from which the unlawful checks should be deducted. From this new gross the plaintiffs should strike a balance of their own ^{-basis of account.} moneys, for they are entitled to recover from the bank a sum equal to their total deposits,

less sums paid out on lawful checks and sums paid out on unlawful checks which ultimately reached them through the channel of the Girard National Bank.

As a last answer the plaintiffs say: But immediately after Snyder's restoration of \$35,385.06, \$22,942.53 thereof was transferred by unlawful checks from the defendant bank to the Girard National Bank, and as it reached us through that channel we have given the defendant credit for that much of the \$35,385.06 in the item of \$2,847,594.79. But this does not answer the question, because this credit was on only one deposit of \$35,385.06, while in the grand total named there are two deposits of this sum.

The remaining dispute relates to three unlawful checks bearing dates June 6, 9, and 16, 1916, for \$2,700, \$2,600, and \$3,000 respectively, disallowed by the trial judge as deductions. We affirm this action if separately considered, for the three checks in question were included in the \$35,385.06 of checks unlawfully honored by the bank, and therefore

are included in the deduction we shall direct.

We affirm the findings of the District Court on all questions, except one, and with reference to that one we direct that the judgment be modified, by deducting \$35,385.06 and appropriate interest from the amount thereof.

Petition for rehearing denied April 25, 1921.

Petition for writ of certiorari denied by the Supreme Court of the United States, October 10, 1921 (U. S. Adv. Ops. 1921-22, p. 8) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. —).

NOTE.

The examination of account, pass book, or canceled checks by bank depositor is the subject of the annotation in 15 A.L.R. 159. The effect of the delegation of the duty, in that regard, to an employee who was guilty of the fraud, is treated in subd. III. of that annotation.

NEW YORK TRUST COMPANY et al., Exrs., etc., of J. Harsen Purdy,
Plffs. in Err.,

v.

MARK EISNER.

United States Supreme Court — May 16, 1921.

(— U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 506.)

Tax — deductions — state inheritance and succession taxes.

1. State inheritance and succession taxes on the rights of individual beneficiaries are not deductible from the value of the gross estate of a decedent when determining the net value of such estate for the purpose of the tax imposed by the Act of September 8, 1916, upon the transfer of the net estates of decedents, as charges against the estate that are allowed by the laws of the jurisdiction under which the estate is being administered. Such charges are those only which affect the estate as a whole.

[See note on this question beginning on page 674.]

Federal estate tax — interference with rights of states.

2. The rights of the several states

to regulate descent and distribution are not unconstitutionally interfered with by the tax imposed by the Act of

September 8, 1916, upon the transfer of the net estates of decedents.

[See 23 R. C. L. 989; 26 R. C. L. 199.]

—direct tax — estate tax — apportionment.

3. The direct taxes which, under the Federal Constitution, must be apportioned, do not include a tax upon the transfer of the net estates of deced-

ents, since, such a tax is a duty, or excise.

[See 23 R. C. L. 989; 26 R. C. L. 196, 197.]

—discrimination — Federal estate tax.

4. Inequalities as to intestate successors or legatees do not render unconstitutional, a statute imposing a tax upon the transfer of the net estates of decedents.

ERROR to the District Court of the United States for the Southern District of New York to review a judgment dismissing a suit to recover back the amount of a Federal estate tax. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. George Sutherland, H. T. Newcomb, and Francis J. McLoughlin, for plaintiffs in error:

If the exaction complained of is a price, it must be for some privilege related to the transmission of property from the dead to the living, but such privileges are not at the disposal of the United States, and it is without power to demand a consideration therefor.

Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; Baker v. Baker, E. & Co. 242 U. S. 394, 400, 401, 61 L. ed. 386, 391, 37 Sup. Ct. Rep. 152; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Knowlton v. Moore, 178 U. S. 41, 58, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Cahen v. Brewster, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215; State v. Dalrymple, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82.

If the exaction complained of is a tax, it is not a tax of the kind upheld in Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99, and Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

Jackson v. Myers, 257 Pa. 104, L.R.A.1917F, 821, 101 Atl. 341; Re Hazard, 228 N. Y. 26, 126 N. E. 345; Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212; Mason v. Sargent, 104 U. S. 689, 591-593, 26 L. ed. 894, 895; Sturges v. United States, 117 U. S. 363, 29 L. ed. 920, 6 Sup. Ct. Rep. 767; Vanderbilt v. Eidman, 196 U. S. 480, 500, 501, 49 L. ed. 563, 570, 571, 25 Sup. Ct. Rep. 331; United States v. Jones, 236 U. S. 106, 59 L. ed. 488, 35 Sup. Ct. Rep. 261, Ann. Cas. 1916A, 316; McCoach v.

Pratt, 236 U. S. 562, 59 L. ed. 720, 35 Sup. Ct. Rep. 421; Uterhart v. United States, 240 U. S. 598, 60 L. ed. 819, 36 Sup. Ct. Rep. 417; Sage v. United States, 250 U. S. 33, 63 L. ed. 828, 39 Sup. Ct. Rep. 415; Gleason & O. Inheritance Taxn. 2d ed pp. 553, 554; Knight's Estate, 261 Pa. 537, 104 Atl. 765; Roebeling's Estate, 89 N. J. Eq. 163, 104 Atl. 295; Re Hamlin, 226 N. Y. 407, 7 A.L.R. 701, 124 N. E. 4; United States v. Field (U. S. Adv. Ops. 1920-21, p. 335) — U. S. —, 65 L. ed. —, — A.L.R. —, 41 Sup. Ct. Rep. 256; Re Sherman, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed, 22 N. Y. 540; Re Bierstadt, 178 App. Div. 836, 166 N. Y. Supp. 168; People v. Pasfield, 284 Ill. 450, 120 N. E. 286; Fuller v. Gale, 78 N. H. 544, 103 Atl. 308; Plunkett v. Old Colony Trust Co. 233 Mass. 471, 7 A.L.R. 696, 124 N. E. 265; State ex rel. Smith v. Probate Ct. 139 Minn. 210, 166 N. W. 125; Randolph v. Craig, 267 Fed. 993; Hanson, Death Duties, 6th ed. 1911, pp. 1, 2, 5; Winans v. Atty. Gen. [1910] A. C. 27, 79 L. J. K. B. N. S. 156, 101 L. T. N. S. 754, 26 Times L. R. 133, 54 Sol. Jo. 133, 47 Scot. L. R. 598; Atty. Gen. v. Beech [1899] A. C. 53, 68 L. J. Q. B. N. S. 130, 63 J. P. 116, 47 Week. Rep. 257, 79 L. T. N. S. 565, 15 Times L. R. 85.

The power to regulate descent and distribution is a sovereign power and belongs exclusively to the states.

United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; Roberston v. Pickrell, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct.

Rep. 407; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Cahen v. Brewster, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; Baker v. Baker, E. & Co. 242 U. S. 394, 61 L. ed. 386, 37 Sup. Ct. Rep. 152; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 38 Sup. Ct. Rep. 529, 3 L.R.A. 649, Ann. Cas. 1918E, 724; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122.

Death duties, in certain of their forms, are essentially a manifestation of the power to regulate descent and distribution.

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Campbell v. California, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Carpenter v. Pennsylvania, 17 How. 456, 16 L. ed. 127; Frederickson v. Louisiana, 23 How. 445, 16 L. ed. 577; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Snyder v. Bettman, 190 U. S. 249, 256, 47 L. ed. 1035, 1038, 23 Sup. Ct. Rep. 803; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Board of Education v. Illinois, 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157; Chanler v. Kelsey, 205 U. S. 466, 479, 480, 51 L. ed. 882, 889, 29 Sup. Ct. Rep. 550; Keeney v. Comptroller, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 106; Bull-

en v. Wisconsin, 240 U. S. 625, 60 L. ed. 830, 36 Sup. Ct. Rep. 473; Peterson v. Iowa, 245 U. S. 170, 62 L. ed. 225, 38 Sup. Ct. Rep. 109; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; Dos Passos, Collateral & Direct Inheritance, 2d ed. p. 31; State ex rel. McClintock v. Guinotte, 275 Mo. 298, 204 S. W. 806; Posey v. Com. 123 Va. 551, 96 S. E. 771; Warner v. Corbin, 91 Conn. 532, 100 Atl. 354; Strauss v. State, 36 N. D. 594, L.R.A. 1917E, 909, 162 N. W. 908; Week's Estate, 169 Wis. 316, 172 N. W. 732; State v. Alston, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; English v. Crenshaw, 120 Tenn. 531, 17 L.R.A. (N.S.) 753, 127 Am. St. Rep. 1025, 110 S. W. 210; Re Hickok, 78 Vt. 259, 62 Atl. 724, 6 Ann. Cas. 578; Pullen v. Wake County, 66 N. C. 361; Strode v. Com. 52 Pa. 181; Corbin v. Baldwin, 92 Conn. 99, 101 Atl. 834, Ann. Cas. 1918E, 932; State ex rel. Peterson v. Dunlap, 28 Idaho, 784, 156 Pac. 1141, Ann. Cas. 1918A, 546; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; Ayers v. Chicago Title & T. Co. 187 Ill. 42, 58 N. E. 318; Re Speed, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809, affirmed in 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157; Re Graves, 242 Ill. 212, 89 N. E. 879; People v. Griffith, 245 Ill. 532, 92 N. E. 313; National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430, affirmed in 232 U. S. 58, 58 L. ed. 504, 34 Sup. Ct. Rep. 209; Northern Trust Co. v. Buck & Rayner, 263 Ill. 222, 104 N. E. 1114; Arnaud v. His Executor, 3 La. 336; Kohn's Succession, 115 La. Ann. 71, 38 So. 898; Levy's Succession, 115 La. Ann. 377, 8 L.R.A. (N.S.) 1180, 39 So. 37, 5 Ann. Cas. 871; Westefeldt's Succession, 122 La. Ann. 836, 48 So. 281; Fisher v. State, 106 Md. 104, 66 Atl. 661; Washington County Hospital Asso. v. Mealey, 121 Md. 274, 48 L.R.A. (N.S.) 373, 88 Atl. 136, Ann. Cas. 1915B, 1050; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033; Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549; Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; Atty. Gen. v. Stone, 209 Mass. 186, 95 N. E. 895; Atty. Gen. v. Clark, 222 Mass. 291, L.R.A. 1916C, 679, 110 N. E. 299, Ann. Cas. 1917B, 119; Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487, 84 N. W. 1101; State ex rel. Gage v. Probate Ct. 112 Minn. 279, 128

N. W. 18; State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093; Maguire v. University of Missouri, 271 Mo. 359, 196 S. W. 737; Re Cupple, 272 Mo. 465, 199 S. W. 556; Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; Re Touhy, 35 Mont. 431, 90 Pac. 170; State ex rel. Floyd v. District Ct. 41 Mont. 357, 109 Pac. 438; Howell v. Edwards, 88 N. J. L. 134, 96 Atl. 186; Re Hamilton, 148 N. Y. 310, 42 N. E. 717; Re Sherman, 153 N. Y. 1, 46 N. E. 1032; Re Dows, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; Re Delano, 176 N. Y. 486, 64 L.R.A. 279, 68 N. E. 871; Re Lansing, 182 N. Y. 238, 74 N. E. 882; Re White, 208 N. Y. 64, 46 L.R.A.(N.S.) 714, 101 N. E. 793, Ann. Cas. 1914D, 75; Re Zborowski, 213 N. Y. 109, 107 N. E. 44; Re Penfold, 216 N. Y. 163, 110 N. E. 497, Ann. Cas. 1916A, 783; Alvany v. Powell, 55 N. C. (2 Jones, Eq.) 51; Re Morris, 138 N. C. 259, 50 S. E. 682; Finnen's Estate, 196 Pa. 72, 46 Atl. 269; Jewell's Estate, 235 Pa. 119, 83 Atl. 610; Jackson v. Myers, 257 Pa. 104, L.R.A.1917F, 821, 101 Atl. 31; Sherman v. State, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 126 N. W. 611; Knox v. Emerson, 123 Tenn. 409, 131 S. W. 972; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947; Schoolfield v. Lynchburg, 78 Va. 366; Re Joysslin, 76 Vt. 88, 56 Atl. 281; State v. Clark, 30 Wash. 439, 71 Pac. 20; Nunnemacher v. State, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711.

The taxing power of the United States cannot constitutionally be so exercised as to amount to a usurpation of any sovereign power belonging to the states. If the United States has attempted to impose death duties in a form in which such requisitions are essentially a manifestation of the sovereign power to regulate descent and distribution, this is an attempted usurpation of a sovereign power belonging to the states.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232, reversing 75 Kan. 664, 90 Pac. 319; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 380; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Passenger Cases, 7 How. 283, 12 L. ed. 702; Almy v.

California, 24 How. 169, 16 L. ed. 644; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Postal Teleg.-Cable Co. v. Richmond, 249 U. S. 252, 63 L. ed. 590, 39 Sup. Ct. Rep. 265; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black. 620, 17 L. ed. 451; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122.

The death duty attempted to be imposed by the Act of September 8, 1916, is of such form that, if effective, its enactment would be a usurpation of the sovereign power to regulate descent and distribution.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Strode v. Com. 52 Pa. 181; Re McKennan, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 126 N. W. 611; Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212; Mason v. Sargent, 104 U. S. 689, 26 L. ed. 894; Sturges v. United States, 117 U. S. 363, 29 L. ed. 920, 6 Sup. Ct. Rep. 767; United States v. Jones, 236 U. S. 106, 59 L. ed. 488, 35 Sup. Ct. Rep. 261, Ann. Cas. 1916A, 316; McCoach v. Pratt, 236 U. S. 562, 59 L. ed. 720, 35 Sup. Ct. Rep. 421; Uterhart v. United States, 240 U. S. 598, 60 L. ed. 819, 36 Sup. Ct. Rep. 417; Sage v. United States, 250 U. S. 33, 63 L. ed. 828, 39 Sup. Ct. Rep. 415; Cahen v. Brewster, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215.

If the exaction complained of is a tax in respect to the transfer of the whole estate, it must relate to the transfer to the personal representatives, and therefore be an unconstitutional attempt to tax an essential step lawfully required by the states in the exercise of their exclusive power over descent and distribution.

United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *Moore v. Ruckgaber*, 184 U. S. 593, 46 L. ed. 705, 22 Sup. Ct. Rep. 521; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Snyder v. Bettman*, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331; *Cahen v. Brewster*, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215; *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; *Keeney v. New York*, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; *People ex rel. Gould v. Barker*, 150 N. Y. 52, 44 N. E. 785; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Kendall v. Creighton*, 23 How. 90, 106, 16 L. ed. 419, 423; *Dixon v. Ramsey*, 3 Cranch, 319, 2 L. ed. 453; *Vaughan v. Northup*, 15 Pet. 1, 10 L. ed. 639; *Board of Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687; *Wall v. Bissell*, 125 U. S. 382, 31 L. ed. 772, 8 Sup. Ct. Rep. 979; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Raugh v. Weis*, 138 Ind. 42, 37 N. E. 331; *Stagg v. Green*, 47 Mo. 500; *State ex rel. Welch v. Morrison*, 244 Mo. 193, 148 S. W. 907; *Ex parte Peterson*, 253 U. S. 300, 64 L. ed. 919, 40 Sup. Ct. Rep. 543; *Griffith v. Frazier*, 8 Cranch, 9, 3 L. ed. 471; *Kane v. Paul*, 14 Pet. 33, 10 L. ed. 341; *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283; *Hagan v. Walker*, 14 How. 29, 14 L. ed. 312; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *Wilkins v. Ellett*, 9 Wall. 740, 19 L. ed. 586; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Kieley v. McGlynn*, 21 Wall. 503, 22 L. ed. 599; *Wilkins v. Ellett*, 108 U. S. 256, 27 L. ed. 718, 2

Sup. Ct. Rep. 641; *Borer v. Chapman*, 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342; *Baker v. Baker, E. & Co.* 242 U. S. 394, 61 L. ed. 386, 37 Sup. Ct. Rep. 152; *Shoenberger v. Lancaster Sav. Inst.* 28 Pa. 459; *Strode v. Com.* 52 Pa. 181; *Northern Trust Co. v. Lederer*, 257 Fed. 812; *United States v. Jones*, 236 U. S. 106, 59 L. ed. 488, 35 Sup. Ct. Rep. 261, Ann. Cas. 1916A, 316; *McCoach v. Pratt*, 236 U. S. 562, 59 L. ed. 722, 35 Sup. Ct. Rep. 421; *Beauregard v. New Orleans*, 18 How. 497, 15 L. ed. 469; *Newcomb v. Williams*, 9 Met. 525; *Hunter v. Bryson*, 5 Gill & J. 483, 25 Am. Dec. 313; *Hagthorp v. Hook*, 1 Gill & J. 270; *Fisher v. State*, 106 Md. 104, 66 Atl. 661; *Smith v. Denny*, 37 Mo. 20; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129; *Sevier v. Woodson*, 205 Mo. 202, 120 Am. St. Rep. 728, 104 S. W. 1; *State ex rel. Welch v. Morrison*, 244 Mo. 193, 148 S. W. 907; *Alvany v. Powell*, 55 N. C. (2 Jones, Eq.) 51; *Whit v. Ray*, 26 N. C. (4 Ired. L.) 14; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 20 L. ed. 122; *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Fifield v. Close*, 15 Mich. 505; *Warren v. Paul*, 22 Ind. 276; *Union Bank v. Hill*, 3 Coldw. 325; *Jones v. Keep*, 19 Wis. 369; *Sayles v. Davis*, 22 Wis. 225; *Craig v. Dimock*, 47 Ill. 308; *Carpenter v. Snelling*, 97 Mass. 452; *Latham v. Smith*, 45 Ill. 29; *Davis v. Richardson*, 45 Miss. 499, 7 Am. Rep. 732; *Wade v. Foss*, 96 Me. 230, 52 Atl. 640; *Smith v. Short*, 40 Ala. 385; *Bumpass v. Taggart*, 26 Ark. 398, 7 Am. Rep. 623; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535; *Griffin v. Ranney*, 35 Conn. 239; *Garland v. Gaines*, 73 Conn. 662, 84 Am. St. Rep. 182, 49 Atl. 19; *Small v. Slocumb*, 112 Ga. 279, 53 L.R.A. 130, 81 Am. St. Rep. 50, 37 S. E. 481; *Bunker v. Green*, 48 Ill. 243; *Richardson v. Roberts*, 195 Ill. 27, 62 N. E. 840; *Wallace v. Cravens*, 34 Ind. 534; *Hunter v. Cobb*, 1 Bush, 239; *Pargoud v. Richardson*, 30 La. Ann. 1286; *Holt v. Harts' Liquidators*, 83 La. Ann. 673; *Dudley v. Wells*, 55 Me. 145; *Sawyer v. Parker*, 57 Me. 39; *Wade v. Curtis*, 96 Me. 309, 52 Atl. 762; *Green v. Holway*,

- 101 Mass. 243, 3 Am. Rep. 339; Moore v. Quirk, 105 Mass. 49, 7 Am. Rep. 499; Clemens v. Conrad, 19 Mich. 170; Sammons v. Halloway, 21 Mich. 162, 4 Am. Rep. 465; Amos-Richita v. Northwestern Mut. L. Ins. Co. 143 Mich. 684, 107 N. W. 707; People ex rel. Barbour v. Gates, 43 N. Y. 40; Moore v. Moore, 47 N. Y. 467, 7 Am. Rep. 466; Gilbert v. Sage, 5 Lans. 287, affirmed in 57 N. Y. 641; Haight v. Grist, 64 N. C. 739; Cassidy v. St. Germain, 22 R. I. 53, 46 Atl. 35; Kennedy v. Roundtree, 59 S. C. 324, 82 Am. St. Rep. 841, 37 S. E. 942; Miller v. Morrow, 5 Heisk. 688; Walt v. Walsh, 10 Heisk. 314; Sporrer v. Eifer, 1 Heisk. 633; Southern Ins. Co. v. Estes, 106 Tenn. 472, 52 L.R.A. 915, 82 Am. St. Rep. 892, 62 S. W. 149; Watson v. Mirike, 25 Tex. Civ. App. 527, 61 S. W. 538; Hale v. Wilkinson, 21 Gratt. 75; Dawson v. McCarty, 21 Wash. 314, 75 Am. St. Rep. 841, 57 Pac. 816; Freedman v. Sigel, 10 Blatchf. 327, Fed. Cas. No. 5,080; State ex rel. Lakey v. Garton, 32 Ind. 1, 2 Am. Rep. 315; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; United States v. Owens, 100 Fed. 70; Stirneman v. Smith, 40 C. C. A. 581, 100 Fed. 600; Warwick v. Bettman, 102 Fed. 127, affirmed in 47 C. C. A. 185, 108 Fed. 46; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; New York ex rel. Bank of Commerce v. Tax. Comrs. 2 Black, 620, 17 L. ed. 451; Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Merchant's Nat. Bank v. United States, 101 U. S. 1, 25 L. ed. 979; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Taney's Letter to Hon. S. P. Chase, Secretary of Treasury, 157 U. S. 701, 39 L. ed. 1155, 15 Sup. Ct. Rep. IX; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; United States v. Doremus, 249 U. S. 86, 63 L. ed. 493, 39 Sup. Ct. Rep. 214; Evans v. Gore, 253 U. S. 245, 64 L. ed. 887, 11 A.L.R. 519, 40 Sup. Ct. Rep. 550; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Passenger Cases, 7 How. 283, 12 L. ed. 702; Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Texas v. White, 7 Wall. 700, 19 L. ed. 227; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; South Covington & C. Street R. Co. v. Kentucky, 252 U. S. 399, 64 L. ed. 631, 40 Sup. Ct. Rep. 378.
- If the exaction complained of is a tax in respect of the transfer to those beneficially entitled, or an income tax, it is unconstitutional because of its gross and capricious inequalities.
- Cooley, Const. Lim. 7th ed p. 695; Woodbridge v. Detroit, 8 Mich. 274; Black, Am. Const. Law, 3d ed. p. 442; Seligman, Essays in Taxn, 7th ed. p. 5; Redfield, Theory & Practice of Taxn. p. 511; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Story, Const., 5th ed. § 1399; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650; Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559; Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Osborn v. Nicholson, 13 Wall. 654, 20 L. ed. 689; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Knowlton v. Moore, 178

- U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; *Evans v. Gore*, 253 U. S. 245, 64 L. ed. 887, 11 A.L.R. 519, 40 Sup. Ct. Rep. 550; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *United States v. Baltimore & O. R. Co.*, 17 Wall. 322, 21 L. ed. 597; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Wright v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Green v. Frazier*, 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *United States v. Singer*, 15 Wall. 111, 21 L. ed. 49; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Kentucky R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Royall v. Virginia*, 116 U. S. 572, 29 L. ed. 735, 6 Sup. Ct. Rep. 510; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Travis v. Yale & T. Mfg. Co.*, 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 223; *United States v. Doremus*, 249 U. S. 86, 63 L. ed. 493, 39 Sup. Ct. Rep. 214; *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; *Kentucky R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; *Southern R. Co. v. Green*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Griffith v. Connecticut*, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; *Keeney v. New York*, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Quong Wing v. Kirkendall*, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; *Rosenthal v. New York*, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441; *Barrett v. Indiana*, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; *Billings v. United States*, 232 U. S. 261, 58 L. ed. 596, 34 Sup. Ct. Rep. 421; *International Harvester Co. v. Missouri*, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; *Mt. St. Mary's Cemetery Asso. v. Mullins*, 248 U. S. 501, 63 L. ed. 383, 39 Sup. Ct. Rep. 173; *Withnell v. Rueck-*

- ing Constr. Co. 249 U. S. 63, 63 L. ed. 479, 39 Sup. Ct. Rep. 200; Dominion Hotel v. Arizona, 249 U. S. 265, 63 L. ed. 597, 39 Sup. Ct. Rep. 273; Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 Sup. Ct. Rep. 366; Mackay Teleg. & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. ed. 863, 39 Sup. Ct. Rep. 428; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; Branson v. Bush, 251 U. S. 182, 64 L. ed. 215, 40 Sup. Ct. Rep. 113; Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221; Goldsmith v. George G. Prendergast Constr. Co. 252 U. S. 12, 64 L. ed. 427, 40 Sup. Ct. Rep. 273; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989, 40 Sup. Ct. Rep. 560; Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254; Houck v. Little River Drainage Dist. 239 U. S. 254, 60 L. ed. 266, 36 Sup. Ct. Rep. 58; Martin v. District of Columbia, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440; Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; French v. Techemaker, 24 Cal. 544; Miller v. Kister, 68 Cal. 142, 8 Pac. 813; Booth v. Woodbury, 32 Conn. 118; Herriott v. Potter, 115 Iowa, 648, 89 N. W. 91; Atchison, T. & S. F. R. Co. v. Clark, 60 Kan. 826, 47 L.R.A. 77, 58 Pac. 477; Sutton v. Louisville, 5 Dana, 28; Lexington v. McQuillan, 9 Dana, 513, 35 Am. Dec. 159; Cheaney v. Hooser, 9 B. Mon. 330; New Orleans Canal & Bkg. Co. v. New Orleans, 30 La. Ann. 1371; Com. v. People's Five Cents Sav. Bank, 5 Allen, 428; Freeland v. Hastings, 10 Allen, 570; Oliver v. Washington Mills, 11 Allen, 268; Portland Bank v. Apthorp, 12 Mass. 252; Cheshire v. Berkshire County, 118 Mass. 386; Woodbridge v. Detroit, 8 Mich. 274; Ryerson v. Utley, 16 Mich. 269; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400; Callam v. Saginaw, 50 Mich. 7, 14 N. W. 677; Sanborn v. Rice County, 9 Minn. 273, Gil. 258; State ex rel. Foot v. Bazille, 97 Minn. 11, 6 L.R.A.(N.S.) 732, 106 N. W. 93, 7 Ann. Cas. 1056; Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Deal v. Mississippi County, 107 Mo. 464, 14 L.R.A. 622, 18 S. W. 24; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Magneau v. Fre-
- mont, 30 Neb. 843, 9 L.R.A. 786, 27 Am. St. Rep. 436, 47 N. W. 280; State v. United States & C. Exp. Co. 60 N. H. 219; Thompson v. Kidder, 74 N. H. 89, 65 Atl. 392, 12 Ann. Cas. 948; State ex rel. White House School Dist. v. Readington Twp. 36 N. J. L. 66; State, Agens, Prosecutor, v. Newark, 37 N. J. L. 415, 18 Am. Rep. 729; State ex rel. Richards v. Hammer, 42 N. J. L. 435; Maxwell v. Edwards, 89 N. J. L. 446, 99 Atl. 138; Tide-water Co. v. Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634; People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; People ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515; People ex rel. Eisman v. Ronner, 185 N. Y. 285, 77 N. E. 1061; Re Keeney, 194 N. Y. 281, 87 N. E. 423, affirmed in 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; Puitt v. Gaston County, 94 N. C. 709, 55 Am. Rep. 638; Scovill v. Cleveland, 1 Ohio St. 126; Debolt v. Ohio L. Ins. & T. Co. 1 Ohio St. 563; Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159; Ellis v. Frazier, 38 Or. 462, 53 L.R.A. 454, 63 Pac. 642; Bank of Pennsylvania v. Com. 19 Pa. 144; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Philadelphia Asso. v. Wood, 39 Pa. 73; Tyson v. School Directors, 51 Pa. 9; Durach's Appeal, 62 Pa. 491; Hammett v. Philadelphia, 65 Pa. 146; Re Washington Ave. 69 Pa. 352, 8 Am. Rep. 255; Fox's Appeal, 112 Pa. 337, 4 Atl. 149; Allegheny City v. Western Pennsylvania R. Co. 138 Pa. 375, 21 Atl. 763; Pittsburg's Petition, 138 Pa. 401, 21 Atl. 757, 759, 761; Re Morewood Ave. 159 Pa. 20, 28 Atl. 123, 132; Cope's Estate, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79; Re McKennan, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 126 N. W. 611; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; Allen v. Drew, 44 Vt. 174; Richmond & A. R. Co. v. Lynchbury, 81 Va. 473; Beals v. State, 139 Wis. 544, 121 N. W. 347; Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; Friend v. Levy, 76 Ohio St. 26, 80 N. E. 1036;

Curry v. Spencer, 61 N. H. 624, 60 Am. Rep. 337; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; State ex rel. Frye v. Bazille, 87 Minn. 500, 94 Am. St. Rep. 718, 92 N. W. 415; Drew v. Tift, 79 Minn. 175, 47 L.R.A. 525, 79 Am. St. Rep. 446, 81 N. W. 839; State ex rel. Davidson v. Gorman, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948.

The term "direct taxes," as used in the Constitution, embraces every exaction that rests upon the fact of ownership of real or personal property as distinguished from a tax dependent upon the active use of property, the term "active use" not indicating the merely passive consequence of ownership, but rather the exercise of some right or privilege.

Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 20 L. ed. 370; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 Sup. Ct. Rep. 495; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Eisner v. Macomber, 252 U. S. 189, 64 L. ed. 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Pierce v. United States, 232 U. S. 290, 58 L. ed. 609, 34 Sup. Ct. Rep. 427; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The diversion to a state of part of the property of estates by means of death duties is, pro tanto, a denial of the right or privilege to transmit from the dead to the living, and Congress is without power to impose a tax in respect of the denial of any privilege.

Senff v. Edwards, 85 N. J. L. 67, 88 Atl. 1026; Kingsbury v. Bazeley, 75 N. H. 13, 139 Am. St. Rep. 664, 70 Atl. 916, 20 Ann. Cas. 1355; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; Howell v. Edwards, 88 N. J. L. 134, 96 Atl. 186; Mann v. Carter, 74 N. H. 345, 15 L.R.A.(N.S.)

150, 68 Atl. 130; Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; State v. Dalrymple, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; Re Stanford, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462; Warner v. Corbin, 91 Conn. 532, 100 Atl. 354; Hopkins's Appeal, 77 Conn. 644, 60 Atl. 657; Corbin v. Baldwin, 92 Conn. 99, 101 Atl. 834, Ann. Cas. 1918E, 932; Re Martin, 153 Cal. 225, 94 Pac. 1053; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; Billings v. United States, 232 U. S. 261, 58 L. ed. 596, 34 Sup. Ct. Rep. 421; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; The Abby Dodge, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310; Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136; United States v. Bennett, 232 U. S. 299, 58 L. ed. 612, 34 Sup. Ct. Rep. 433; United States v. Standard Brewery, 251 U. S. 210, 64 L. ed. 229, 40 Sup. Ct. Rep. 139; Baender v. Barnett (U. S. Adv. Ops. 1920-21, p. 342) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 271.

Mr. John B. Gleason, for the comptroller of the state of New York:

The estate tax is void if its necessary effect is to make a deduction from the estate, or from the transfer prior to the imposition of the state transfer tax, or if the state tax must be adjusted.

Re Bierstadt, 178 App. Div. 836, 166 N. Y. Supp. 168; Re Sherman, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed without opinion, in 222 N. Y. 540, 118 N. E. 1078; Re Penfold, 216 N. Y. 163, 110 N. E. 497, Ann. Cas. 1916A, 783; Re Gihon, 169 N. Y. 443, 62 N. E. 561.

If the tax is an estate tax, it is void as a regulation of the transfer, and as a tax on property without apportionment.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; Re Watson, 226 N. Y. 384, 123 N. E. 758; Snyder v. Bettman, 180 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803.

Mr. J. Weston Allen, Attorney General, for the commonwealth of Massachusetts, as amicus curiæ:

The Federal estate tax cannot be sustained upon the grounds on which the succession taxes were sustained in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99.

Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647; *Knight's Estate*, 261 Pa. 537, 104 Atl. 765; *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286; *State ex rel. Smith v. Probate Ct.* 139 Minn. 210, 166 N. W. 125; *People v. Bemis*, 68 Colo. 43, 189 Pac. 32; *State v. First Calumet Trust & Sav. Bank*, — Ind. App. —, 125 N. E. 200; *Northern Trust Co. v. Lederer*, 257 Fed. 812, affirmed in — C. C. A. —, 262 Fed. 52; *Re Miller*, — Cal. —, post, 694, 195 Pac. 413; *Woodward v. United States* (March 14, 1921) — Ct. Cl. —; *Hanson, Death Duties*, 6th ed. pp. 1, 2.

The several states possess the exclusive power to regulate and control the descent and distribution of property.

Mager v. Grima, 8 How. 493, 12 L. ed. 1170; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 20 L. ed. 122.

The Federal estate tax imposed by the Act of September 8, 1916, is, in its operation and effect an invasion of the sovereign power of the states to regulate the descent and distribution of property of decedents.

Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Strode v. Com.* 52 Pa. 181; *South Carolina v.*

United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

The Federal estate tax is a direct tax, and therefore unconstitutional because not apportioned in accordance with the requirements of the Federal Constitution.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Thomas v. United States*, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; *South Carolina v. United States*, 39 Ct. Cl. 257, affirmed in 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *McCoach v. Minehill*, & *S. H. R. Co.* 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419; *Cooley*, Const. Lim. 7th ed. 680; *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *Dawson v. Kentucky Distilleries & Warehouse Co.* (U. S. Adv. Ops. 1920-21, p. 336) 255 U. S. 288, 65 L. ed. —, 41 Sup. Ct. Rep. 272; *Alexander Hamilton*, *Federalist*, No. 21.

Messrs. Clifford L. Hilton, Attorney General, and Egbert S. Oakley, Assistant Attorney General, for the state of Minnesota, as amici curiæ:

While the taxing power of Congress extends to all usual subjects of taxation, including receipt or transmission of property occasioned by death, yet its power to tax cannot be so exercised, in the constitutional sense, as to impose burdens on the exclusive power of the states to regulate successions.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The power to regulate descent and succession of property on death is a sovereign power, and belongs exclusively to the states.

United States v. Fox, 94 U. S. 315, 24 L. ed. 192; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; *Tilt v. Kelsey*, 207 U. S. 43,

52 L. ed. 95, 28 Sup. Ct. Rep. 1; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1127, 1197; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

The so-called succession or inheritance tax enactments by the several states were but an exercise of the power of regulating the devolution of property by death.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073.

The exaction attempted to be imposed by the Act of September 8, 1916, whether considered as attaching to the interest that ceases at death, or as attaching to the interest to which some person succeeds at death, by its operation and effect as enforced, is a form of regulation of successions, and directly interferes with and casts a burden upon state power of regulation.

Re Hamlin, 7 A.L.R. 701, and note, 226 N. Y. 407, 124 N. E. 4; *Plunkett v. Old Colony Trust Co.* 233 Mass. 471, 7 A.L.R. 696, 124 N. E. 265; *Knight's Estate*, 261 Pa. 537, 104 Atl. 765; *Corbin v. Townshend*, 92 Conn. 501, 103 Atl. 647; *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286; *State ex rel. Smith v. Probate Ct.* 139 Minn. 210, 166 N. W. 125; *People v. Northern Trust Co.* 7 A.L.R. 709, and note, 289 Ill. 475, 124 N. E. 662; *Week's Estate*, 169 Wis. 316, 172 N. W. 732; *Re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed in 222 N. Y. 540, 118 N. E. 1078; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Byers v. McAuley*, 149 U. S. 609, 37 L. ed. 868, 13 Sup. Ct. Rep. 906; *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; *Wall v. Bissell*, 125 U. S. 382, 31 L. ed. 772, 8 Sup. Ct. Rep. 979; *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 20 L. ed. 122; *Ambrosini v. United States*, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; 12 C. J. 98; *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299; *Re McKennan*, 25 S. D. 369, 27

S. D. 136, 33 L.R.A.(N.S.) 606, 128 N. W. 611, 130 N. W. 33, Ann. Cas. 1913D, 745; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 23 L. ed. 543; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 30, 54 L. ed. 367, 30 Sup. Ct. Rep. 190.

Messrs. *Arcadius L. Agatin* and *Francis H. DeGroat*, also as amici curiæ:

The transmission of property on death is acknowledged to be within the exclusive power of the states to regulate, and all manifestations of that power are designed for the entire result and the production of a uniform whole, by the authority solely possessing the power.

Re Merriam, 141 N. Y. 479, 36 N. E. 505; *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Board of Education v. Illinois*, 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157; *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; *Petersen v. Iowa*, 245 U. S. 170, 62 L. ed. 225, 38 Sup. Ct. Rep. 109; *Murdock v. Ward*, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; *Prevost v. Greenaux*, 19 How. 1, 15 L. ed. 572; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; *Keeney v. New York*, 222 U. S. 525, 56 L. ed. 299, 33 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Snyder v. Bettman*, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Scholey v. Rew*, 22 Wall. 331, 23 L. ed. 99; *Wright v. Blakeslee*, 101 U. S. 174, 25 L. ed. 1048; *Clapp v. Mason*, 94 U. S. 589, 24 L. ed. 212; *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894; *Sturges v. United States*, 117 U. S. 363, 29 L. ed. 920, 6 Sup. Ct. Rep. 767; *United States v. Marion Trust Co.* 74 C. C. A. 439, 143 Fed. 301, affirmed in 206 U. S. 565, 51 L. ed. 1191, 27 Sup. Ct. Rep. 797.

It is wholly immaterial that a burden was not intended to be cast

upon the state's power; if the act operates as such, its validity cannot be sustained.

Re Hamlin, 226 N. Y. 407, 7 A.L.R. 701, 124 N. E. 4; Plunkett v. Old Colony Trust Co. 233 Mass. 471, 7 A.L.R. 696, 124 N. E. 265; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 Sup. Ct. Rep. 862.

The Federal power to tax on the occasion of transmission of property on death must be governed by the state's exclusive power of regulation of that subject, and its full execution.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Re Watson, 226 N. Y. 384, 123 N. E. 758; Re Stanford, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462.

The operation and effect of the tax is to render the states powerless to regulate transmission of property on death in the same manner sought by their measures.

Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Cope's Estate, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79; The Federalist, No. 31; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The act is entirely wanting in proper basis for classification, and sensibly violates fundamental principles underlying just taxation in the utter disregard of the interests of persons, patently present in the subject taxed.

People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A. (N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515, affirmed in 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 233, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 160, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep.

351; Cooley, Taxn. 3d ed. 76; Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; State ex rel. Sanderson v. Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; State ex rel. Davidson v. Gorman, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; People ex rel. Phillips v. Raynes, 136 App. Div. 417, 120 N. Y. Supp. 1053, affirmed in 198 N. Y. 539, 92 N. E. 1097; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A. (N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Danville v. Shelton, 76 Va. 325; Banger's Appeal, 109 Pa. 79; Re Ruan Street, 132 Pa. 257, 7 L.R.A. 193, 19 Atl. 219; Com. ex rel. Fertig v. Patton, 88 Pa. 258; Grim v. Weissenberg School Dist. 57 Pa. 433, 98 Am. Dec. 237; Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The 5th Amendment stands as a condition upon which the power to tax may be exercised, and, because of the inequality and capricious operation produced, the act must stand condemned as in violation of that Amendment.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Duncan v.

Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Cooley, Const. Lim.* 6th ed. p. 598; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Ambrosini v. United States*, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; *United States v. Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Collector v. Day (Buffington v. Day)* 11 Wall. 113, 20 L. ed. 122; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; *Pervear v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; *Brushaber v. Union P. R. Co.* 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713.

Mr. William L. Frierson, Solicitor General, for defendant in error:

The tax in question is a death duty, and rests upon the power to transmit, or the transmission from the dead to the living.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

Death duties, in general, when levied by the Federal government, are not subject to constitutional objection upon the ground that they are direct taxes and cannot be imposed without apportionment.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497; *Knowlton v. Moore*, supra.

The imposition of an estate tax by the Federal government is no more an interference with the power of the states to regulate the descent and distribution of estates than is the imposition of a legacy tax.

Knowlton v. Moore, supra.

Conceding that a legacy tax imposed by the Federal government is not a direct tax, it follows that an inheritance tax is likewise not a direct tax. *Ibid.*

State succession and inheritance taxes are not deductible for the

purpose of determining the value of the net estate.

Re Penfold, 216 N. Y. 163, 110 N. E. 497, Ann. Cas. 1916A, 783; *Re Gihon*, 169 N. Y. 443, 62 N. E. 561; *Smith v. Browning*, 225 N. Y. 358, 122 N. E. 217; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the executors of one Purdy to recover an estate tax levied under the Act of Congress of September 8, 1916, chap. 463, Title 2, § 201, 39 Stat. at L. 756, 777, Comp. Stat. §§ 6336a, 6336+b, Fed. Stat. Anno. Supp. 1918, p. 305, and paid under duress on December 14, 1917. According to the complaint, Purdy died leaving a will and codicil directing that all succession, inheritance, and transfer taxes should be paid out of the residuary estate, which was bequeathed to the descendants of his brother. The value of the residuary estate was \$427,414.96, subject to some administration expenses. The executors had been required to pay and had paid inheritance and succession taxes to New York (\$32,988.97) and other states (\$4,780.91), amounting in all to \$37,769.88. The gross estate, as defined in § 202 of the act of Congress, was \$769,799.39; funeral expenses and expenses of administration, except the above taxes, \$61,322.08; leaving a net value for the payment of legacies, except as reduced by the taxes of the United States, of \$670,707.43. The plaintiffs were compelled to pay \$23,910.77 to the United States, no deduction of any part of the above-mentioned \$37,769.88 being allowed. They allege that the act of Congress is unconstitutional, and also that it was misconstrued in not allowing a deduction of state inheritance and succession taxes as charges within the meaning of § 203. On demurrer the district court dismissed the suit.

By § 201 of the act, "a tax . . . equal to the following percentages of the value of the net estate, to be determined or provided in section

two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act . . .” with percentages rising from 1 per centum of the amount of the net estate not in excess of \$50,000 to 10 per centum of the amount in excess of \$5,000,000. Section 202 gives the mode of determining the value of the gross estate. Then, by § 203, it is enacted: “That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate (1) such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and (2) an exemption of \$50,000.” The tax is to be due in one year after the decedent’s death. § 204. Within thirty days after qualifying, the executor is to give written notice to the collector, and later to make return of the gross estate, deductions allowed, net estate, and the tax payable thereon. § 205. The executor is to pay the tax. § 207. The tax is a lien for two years on the gross estate except such part as is paid out for allowed charges, § 209, and, if not paid within sixty days after it is due, is to be collected by a suit to subject the decedent’s property to be sold. § 208. In case of collection from some person other than the executor, the same section provides for contribution from or marshaling of persons subject to equal or prior liability, “it being the purpose and intent of this title that so far as is practicable and unless otherwise

16 A.L.R.—43.

directed by the will of the decedent the tax shall be paid out of the estate before its distribution.” These provisions are assailed by the plaintiffs in error as an unconstitutional interference with the rights of the states to regulate descent and distribution, as unequal, and as a direct tax, not apportioned as the Constitution requires.

The statement of the constitutional objections urged imports on its face a distinction that, if correct, evidently hitherto has escaped this court. See *United States v. Field*, Feb. 28 1921 [255 U. S. 257, 65 L. ed. —, 41 Sup. Ct. Rep. 256]. It is admitted, as, since *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, it has to be, that the United States has power to tax legacies, but it is said that this tax is cast upon a transfer while it is being effectuated by the state itself, and therefore is an intrusion upon its processes; whereas a legacy tax is not imposed until

the process is complete. An analogy is sought in the difference between the attempt of a state to tax commerce among the states and its right after the goods have become mingled with the general stock in the state. A consideration of the parallel is enough to detect the fallacy. A tax that was directed solely against goods imported into the state, and that was determined by the fact of importation, would be no better after the goods were at rest in the state than before. It would be as much an interference with commerce in one case as in the other. *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347. Conversely, if a tax on the property distributed by the laws of a state, determined by the fact that distribution has been accomplished, is valid, a tax determined by the fact that distribution is about to begin is no greater interference and is equally good.

Knowlton v. Moore, *supra*, dealt,

Tax—Federal estate tax—interference with rights of states.

it is true, with a legacy tax. But the tax was met with the same objection; that it usurped or interfered with the exercise of state powers, and the answer to the objection was based upon general considerations, and treated the "power to transmit or the transmission or receipt of property by death" as all standing on the same footing. 178 U. S. 57, 59. After the elaborate discussion that the subject received in that case, we think it unnecessary to dwell upon matters that in principle were disposed of there. The same may be said of the argument that the tax is direct, and therefore

—direct tax—
estate tax—
apportionment.

is void for want of apportionment. It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable, and therefore direct. But that matter also is disposed of by *Knowlton v. Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use,—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax,—“has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.” 178 U. S. 81–83. Upon this point a page of history is worth a volume of logic.

The inequalities charged upon the statute, if there is an intestacy, are all inequalities in the amounts that beneficiaries might receive in case of estates of different values, of different proportions be-

tween real and personal estate, and of different numbers of recipients; or, if there is a will, affect legatees. As to the inequalities in case of a will, they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes. As to intestate successors, the tax is not imposed upon them, but precedes them; and the fact that they may receive less or different sums because of the statute does not concern the United States.

There remains only the construction of the act. The argument against its constitutionality is based upon a premise that is unfavorable to the contention of the plaintiffs in error upon this point. For if the tax attaches to the estate before distribution,—if it is a tax on the right to transmit, or on the transmission at its beginning,—obviously it attaches to the whole estate, except so far as the statute sets a limit. “Charges against the estate,” as pointed out by the court below, are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries.

This reasoning excludes not only the New York succession tax, but those paid to other states, which can stand no better than that paid in New York. What amount New York may take as the basis of taxation, and questions of priority between the United States and the state, are not open in this case.

—deductions—
state inheritance
and succession
taxes.

Decree affirmed.

ANNOTATION.

Deduction of state estate or succession tax before computing Federal Tax.

The decision in the reported case *NEW YORK TRUST CO. v. EISNER*, ante, 660), to the effect that state inheritance and succession taxes on the rights of individual beneficiaries are

not deductible from the value of the gross estate of a decedent, when determining the net value of such estate for the purpose of the tax imposed by the Federal Act of 1916,

apparently settles this question only so far as state taxes of the character indicated are involved. The state tax involved in the reported case was that of New York. The contrary decision in *Sayre v. Brewster* (1920) 268 Fed. 553,—that the New York tax is deductible,—is, of course, overruled by the decision in the reported case, but seemingly state inheritance taxes which are estate and not legacy taxes are deductible. The circuit court of appeals in *Lederer v. Northern Trust Co.* (1920) — C. C. A. —, 262 Fed.

52, so held with reference to the Pennsylvania tax, and petition for writ of certiorari to this decision was denied by the Supreme Court in (1920) 253 U. S. 487, 64 L. ed. 1026, 40 Sup. Ct. Rep. 483.

See argument in *Re Gheens*, post, 685.

The question whether the Federal tax should be deducted before computing the state tax is discussed in the note in 7 A.L.R., at page 714, supplemented by the note to *Re MILLER*, post, 702. W. A. E.

RE ESTATE OF ROBERT D. INMAN, Deceased.

JOHN POULSEN et al., Exrs., etc., of Robert D. Inman, Deceased, Appts.,
v.

O. P. HOFF, State Treasurer, Respt.

Oregon Supreme Court (In Banco)—July 19, 1921.

(— Or. —, 199 Pac. 615.)

Tax — deduction of Federal tax.

1. The Federal estate tax, being a tax on the right to transmit the estate, is to be deducted before assessing a tax under a state statute upon the right to receive the estate transmitted, which bases the amount of tax upon the value of the property received.

[See note on this question beginning on page 702.]

Descent — right to receive property.

2. There is no natural right to receive property by will or inheritance.

[See 9 R. C. L. 13, 14.]

a direct tax upon property nor a capitation tax.

[See 26 R. C. L. 196.]

— on estate — character — effect of creating lien.

5. Making a death duty a lien on the estate, and requiring the executor to pay it, do not make it a direct tax on property.

[See 26 R. C. L. 197.]

— excise or impost.

6. Death duties are excises or imposts upon the right to transmit property at death, or upon the right to succeed to it from the dead.

[See 26 R. C. L. 196.]

Tax — inheritance — right of state.

3. The state may impose a tax upon the right to receive property by devise or inheritance and discriminate between persons bearing different relations to the property owner.

[See 26 R. C. L. 198, 200.]

— character of death duty.

4. A death duty, whether an estate duty or an inheritance tax, is neither

APPEAL by petitioners from a decree of the Circuit Court for Multnomah County (Tazwell, J.) refusing to deduct the Federal estate tax in a proceeding to determine the amount of an inheritance tax to be paid to the state. *Modified.*

Statement by Harris, J.:

Robert D. Inman died testate on April 27, 1920. The will was admitted to probate, and Johan Poulsen, George W. Thatcher, and H. B. Van Duzer were appointed executors.

Under date of December 16, 1920, the executors filed a petition asking the court to determine the amount of the inheritance tax to be paid to the state of Oregon. The petition showed that the estate was valued at \$744,204.16, and that the indebtedness of the estate, including an allowance made to the widow, sickness and funeral charges, and other claims filed against the estate, court costs, fees of attorneys, and fees of executors, aggregated \$82,324.05. The petition also showed that the Federal estate tax amounted to \$25,067.36.

Among the devisees and legatees named in the will were Clara A. Inman, the widow; Minnie Myrtle Inman, a daughter; Ivy Frances Inman, a daughter; and George W. Thatcher. The court fixed "the value of the inheritance" of the widow at \$345,890.55; of each daughter at \$157,945.27; and of George W. Thatcher at \$4,000. The court "ordered that the inheritance tax of Clara A. Inman, widow, is hereby fixed at the sum of \$9,819.53;" of each daughter at \$3,263.36; and of George W. Thatcher at \$250.

In their petition the executors asked that the Federal estate tax, amounting to \$25,067.36, be deducted, together with debts of the decedent, funeral charges, and the like, from the gross value of the estate, before calculating the amount of the state inheritance tax. The court refused to deduct the Federal estate tax before computing the state inheritance tax, and the executors appealed.

Messrs. Cake & Cake, for appellants:

An attempt to create an estate tax, as distinguished from a tax on gifts, legacies, and inheritances, is foreign to the subject expressed in the title of chapter 392, Laws 1919.

Heuel v. Wallowa County, 76 Or.

354, 149 Pac. 77; Turnidge v. Thompson, 89 Or. 637, 175 Pac. 281; Benson v. Olcott, 95 Or. 249, 187 Pac. 843; Clayton v. Enterprise Electric Co. 82 Or. 149, 161 Pac. 411; Re Willow Creek, 74 Or. 592, 144 Pac. 505, 146 Pac. 475.

The so-called Federal Inheritance Tax Statute is in reality an estate tax statute, and the amount of taxes paid to the state is not deductible.

Re Hamlin, 226 N. Y. 407, 7 A.L.R. 701, 124 N. E. 4; Lederer v. Northern Trust Co. — C. C. A. —, 262 Fed. 52; New York Trust Co. v. Eisner, 263 Fed. 620; Plunket v. Old Colony Trust Co. 233 Mass. 471, 7 A.L.R. 696, 124 N. E. 265.

In computing the amount of tax to be paid under the state inheritance tax laws, claims and charges against estates, expenses of administration, and the amount paid to the Federal government for the Federal estate tax should be deducted.

Hooper v. Shaw, 176 Mass. 190, 57 N. E. 361; Re Knight, 261 Pa. 537, 104 Atl. 765; State ex rel. Smith v. Probate Ct. 139 Minn. 210, 166 N. W. 125; Corbin v. State, 107 Wash. 424, 7 A.L.R. 685, 181 Pac. 910; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430; Merrifield's Estate v. People, 212 Ill. 400, 72 N. E. 446; People v. Pasfield, 284 Ill. 450, 120 N. E. 286; People v. Northern Trust Co. 7 A.L.R. 709, and note, 289 Ill. 475, 124 N. E. 662; Re Macky, 46 Colo. 79, 23 L.R.A. (N.S.) 1207, 102 Pac. 1075; People v. Bemis, 68 Colo. 48, 139 Pac. 32; Re Roebling, 89 N. J. Eq. 163, 104 Atl. 295.

Messrs. I. H. Van Winkle, Attorney General, Walter H. Evans, and James W. Crawford, for respondent:

The statutes which are construed as assessing the inheritance or succession tax upon the right of succession, which class includes the Oregon statute, do not authorize deduction.

Re Weeks, 169 Wis. 316, 172 N. W. 733.

Inheritance taxes and all taxes of a similar nature are taxes upon the right of succession, and not direct taxes upon the property passing by will or statutes of inheritance.

State v. Handlin, 100 Ark. 175, 139 S. W. 1112; People v. Palmer, 25 Colo. App. 450, 139 Pac. 555; McDaniel v. Byrket, 120 Ark. 295, 179 S. W. 491; Rodman v. Com. 180 Ky. 83, 33 L.R.A.

(N.S.) 592, 118 S. W. 61; Re McKennan, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 126 N. W. 611; State ex rel. Ise v. Cline, 91 Kan. 416, 50 L.R.A.(N.S.) 991, 137 Pac. 932; Re Gihon, 169 N. Y. 443, 62 N. E. 561; Re Clark, — Or. —, 195 Pac. 370.

Congress may impose an excise tax, such as the Federal estate tax, and the state may impose a like local tax, but Congress cannot abridge the power of the state to tax a privilege the state confers by act of its legislature. Such a construction will not be given unless the proper construction of the local act imperatively demands it.

Re Sherman, 222 N. Y. 540, 118 N. E. 1078; Re Plummer, 30 Misc. 19, 62 N. Y. Supp. 1024; 26 R. C. L. § 169, p. 199; Blakemore & B. Inheritance Tax Law, § 29.

Harris, J., delivered the opinion of the court:

The executors are contending that the Federal estate tax exacted under the Act of Congress of September 8, 1916, chap. 463, title 2, § 201 (39 Stat. at L. 756, 777, Comp. Stat. § 6336½b Fed. Stat. Anno. Supp. 1918, p. 305), and amendatory acts, must be deducted from the gross value of the estate before the state inheritance tax can be calculated. The state treasurer is contending that the Federal estate tax should not be deducted. If the position taken by the state treasurer is to be approved, then the order of the court fixing the state inheritance tax is correct, and should be affirmed; but if the view of the executors is the correct one, then the order of the court should be modified. If the Federal estate tax should have been deducted before calculating the state inheritance tax, then there was an overcharge of \$626.31 against the widow's share, and an overcharge of \$187.89 against each of the shares of the two daughters.

A correct solution of the problem presented requires an examination of the act of Congress providing for what is commonly known as the Federal estate tax, and also an analysis of the act of our state legislature providing for inheritance taxes. At the very outset we may

premise that the nature and incidence of the respective taxes are the factors which will control the final decision. We must then ascertain the nature of these taxes, and discover the incidence of each tax, before we can determine whether the state tax should be calculated after first deducting the Federal tax. Since sometimes, as said by Mr. Justice Holmes in *New York Trust Co. v. Eisner*, — U. S. —, 65 L. ed. — ante, 660, 41 Sup. Ct. Rep. 506, "a page of history is worth a volume of logic," it will be of material aid in arriving at a correct understanding of the act of Congress and of our state statute if, instead of at once entering into an inquiry concerning the nature and incidence of the two taxes claiming our special attention, we first make a brief statement of the history of legislation providing for different forms of death duties.

Inheritance taxes are of ancient origin. It is said that this form of imposts was adopted in Egypt in the seventh century before Christ, and that in the year 6 A. D., the Romans copied the idea from the Egyptians. Traces of this method of taxation may be found in the history of the Middle Ages; and practically all the nations of Europe have adopted some system of inheritance taxation. Since 1797 the Federal government of the United States has at different periods enforced legislation providing for some form of inheritance taxation. In most of the states of the American Union inheritance taxes are now collected. *Blakemore & B. Inheritance Taxes*, §§ 15 and 18; *Ross, Inheritance Taxn.* § 9; *Gleason & O. Inheritance Taxn.* 2d ed. § 3; *Re McKennan*, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 612, 126 N. W. 611; *id.*, 27 S. D. 136, 33 L.R.A.(N.S.) 620, 130 N. W. 33, *Ann. Cas.* 1913D, 745; *State ex rel. Ise v. Cline*, 91 Kan. 416, 50 L.R.A.(N.S.) 991, 994, 137 Pac. 932.

One form of death duties was introduced into Great Britain in 1694; and subsequently, from time to time, additional acts were adopted, enlarging not only the species of

death duties imposed, but also the area of their operation; and since the distinctions between these acts were well known and invariably observed in Great Britain, a brief history of the different acts adopted in that country, beginning with 1694 and ending with 1894, and also a brief history of legislation enacted in this country by the Congress of the United States, will be pertinent, for it may be that a page of this history will be "worth a volume of logic." A complete account of the acts adopted in Great Britain appears in Hanson's *Death Duties*, 6th ed.; and a concise analysis of the death duties imposed in Great Britain, as well as a thorough exposition of the statutes adopted by our national government, may be found in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. See also *State v. Alston*, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; 26 R. C. L. 195.

A probate duty was established in England in 1694. This probate duty was a fixed tax, which was dependent on the amount of the personal estate within the jurisdiction of the probate court, and was payable on the grant of letters of probate by means of stamp duties; and this duty was treated as an expense of administration. In 1780 a duty known as a legacy tax was imposed; and this duty was collected by affixing a stamp to the receipt given as evidence of the payment of a legacy or share in the personal property of the deceased person. The legacy tax was not deducted as an expense of administration, but it was charged and collected upon the passing of the individual legacies and interests upon which it was imposed. In 1853 an act was passed providing for what is known as the succession duty. This law was a supplement to the legacy tax, for the reason that the succession duty was imposed upon land passing by reason of death, and also upon interests in personal property not touched by the legacy tax. This tax, known as the succession duty, was on the one hand un-

like the probate duty, in that the latter was and the former was not treated as an expense of administration; but the succession duty was like the legacy tax, in that both were charged upon and collected out of the particular interests subjected to the tax. In 1894 an act known as the Finance Act was adopted. Section 1 of the Finance Act provides that: "In the case of every person dying . . . there shall . . . be levied and paid, upon the principle value . . . of all property . . . which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned." Hanson *Death Duties*, 6th ed. 75.

The estate duty provided for by the Finance Act superseded the probate duty. The estate duty is imposed upon the estate, and is payable by the executor as an administration expense. Re *Roebling*, 89 N. J. Eq. 163, 166, 104 Atl. 295; *Knowlton v. Moore*, 178 U. S. 41, 49, 44 L. ed. 969, 973, 20 Sup. Ct. Rep. 747; Hanson, *Death Duties*, 6th ed. p. 138. Although the estate duty covers real and personal property, and therefore the area of its operation is broader than that of the old probate duty, the two duties are alike in nature and essential characteristics. And although the succession duty covers real and personal property, and therefore the field of its operation is broader than that of the legacy duty, these two duties are alike in their nature and essential characteristics. Hanson, *Death Duties*, 6th ed. 2. Referring to the difference between estate and succession duties, it is said in Hanson, *Death Duties*, 6th ed. p. 76: "Succession duty looks forward to the interest to which the successors succeeds; estate duty looks back to the property enjoyed immediately prior to the death. In the one case the 'succession' which accrues on a death is taxed; in the other, the interest which the death determines or disturbs."

The probate duty was, and the estate duty is, the price exacted for

obtaining probate. Probate duty was, and estate duty is, the toll which the state exacts where property left by a decedent, considered as a unit, departs from the dead on its way to the living; and this toll is collected without regard to the destination towards which the property is to be moved. Hanson, *Death Duties*, 6th ed. 2; Dobson, *Death Duties*, 57.

It will be found that, beginning with the Act of 1797 (1 Stat. at L. 527, chap. 11) and ending with the Act of 1916, and amendatory statutes, the legislation enacted by the Congress of the United States recognized and preserved the distinctions found in the English acts. In 1797 Congress imposed a legacy tax which, like the English Legacy Act of 1780, was collected by stamp duties laid on receipts given as evidence of the payment of legacies and distributive shares of personal property; and this tax, like the English legacy duty, was charged upon the legacies, and not upon the residue of the personality. In 1862 an act was passed (12 Stat at L. 485, chap. 119) which, when considered in connection with an act adopted in 1864 (13 Stat. at L. 285, chap. 173), had the effect of putting in force in this country the system of death duties prevailing in England, with the result that in the United States there were, in 1864, "a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personality, and a succession duty charged against each interest in real property." *Knowlton v. Moore*, 178 U. S. 41, 51, 44 L. ed. 969, 974, 20 Sup. Ct. Rep. 747, 752.

In 1898 Congress enacted a statute commonly known as the War Revenue Act (30 Stat. at L. 448, chap. 448, Comp. Stat. § 6144, 4 Fed. Stat. Anno. 2d ed. p. 135). This act was the subject-matter of the opinion rendered in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. The tax imposed by this statute was in its nature like the English legacy tax, and

the incidence of one was the same as the other.

Confusion of ideas may be avoided if some of the nomenclature to be employed here is limited and defined. The generic term "death" most aptly describes all duties occasioned by death; and hence the words "death duties" embrace not only probate and estate duties, but also legacy and succession duties. Although the word "inheritance" has been sometimes so employed as to include taxes of the nature of estate duties, as well as those of the nature of legacy and succession duties, it seems to the writer that a proper regard for the etymology of the term is sufficient to restrain us from extending its meaning beyond the legacy and succession duties; and, moreover, it will tend to avoid confusion of thought if we do not extend the meaning of the words "inheritance taxes" beyond legacy and succession duties, for even then the term "inheritance" is enlarged beyond its etymological meaning. It is particularly appropriate, however, that the words "inheritance taxes" shall be used to include legacy and succession duties, for by so doing we employ the words in the sense in which they are used in our state statute. Death duties may, for the purposes of this discussion, be divided into two principal classes. The first principal class includes (a) probate and (b) estate duties; for these two duties are treated as expenses of administration, and they are alike as to nature and incidence, although the range of one is broader than that of the other. The second principal class embraces inheritance taxes; and this class is in turn divided into (a) legacy and (b) succession duties; but it must be remembered that these two species of inheritance taxes are alike as to their nature and incidence, although one covers a broader range than does the other; and it must also be remembered that neither one of these two species of inheritance taxes has ever been treated as an expense of administration.

Most of the death duty statutes enacted by the states of the Union have been confined to those species of death duties which we have termed "inheritance taxes;" but, as previously explained, our national legislation enacted during the period beginning with 1797 and ending with 1864 covered practically the whole field of death duties; because during that period the Congress provided for (1) an estate duty and (2) inheritance taxes, including (a) a legacy duty and (b) a succession duty.

The Federal Statute of 1916 provided for an estate duty, as distinguished from an inheritance tax. The record made of the proceedings in the national House of Representatives and in the Senate demonstrates with mathematical certainty that the framers of the statute intended to enact a law imposing a pure estate duty. *Re Hamlin*, 226 N. Y. 407, 7 A.L.R. 701, 124 N. E. 4; *Plunkett v. Old Colony Trust Co.* 233 Mass. 471, 7 A.L.R. 696, 124 N. E. 265. Title 2 of the Federal Act of 1916 is headed, "Estate Tax," and in the 2d section, under title 2, being § 201 of the act, it is provided "that a tax . . . equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act. . . ." 39 Stat. at L. 756, chap. 463, Comp. Stat. § 6336a, Fed. Stat. Anno. Supp. 1918, p. 312, entitled "An Act to Increase the Revenue, and for Other Purposes," as amended by Act March 3, 1917, chap. 159, 39 Stat. at L. 1000, and Act Oct. 3, 1917, chap. 63, 40 Stat. at L. 300, Comp. Stat. § 6336aa, Fed. Stat. Anno. Supp. 1918, p. 336.

The Federal Act of 1919 in no wise changes the nature or incidence of the tax; for this act, like the Act of 1916, calls the tax an "estate tax" (see title 4), and imposes "upon the transfer of the net estate of every decedent" a tax "equal to the sum of the following percentages of the value of the net estate."

Section 401, chap. 18, 40 Stat. at L. 1057, 1096, Comp. Stat. § 6336fb. It will be observed that the Federal statutes, including the original Act of 1916 and the latest act adopted in 1919, in express terms, declare that the tax is imposed "upon the transfer of the net estate of every decedent." The only question to be asked and answered for the determination of the amount of the Federal tax is: How much is the net estate of the decedent? The question to be answered is not: How much is the value of the beneficial interest which is to go to a given heir, distributee, devisee, or legatee? No inquiry need be made as to how much of the estate is to be received by a given successor.

Every estate within the embrace of the Federal statute must pass through the Federal government's tollgate before it can be divided, and the several portions into which it is divided sent onward to their respective destinations. Figuratively speaking, this tollgate is erected and maintained at the place where the net estate of the decedent is assembled preparatory to its division and distribution; but, before the net estate can be divided and pass through the tollgate, a toll must be paid to the national government. This toll is fixed and collected upon the assembled net estate considered as a unit, without regard to the different portions into which it is to be divided, and without regard to the different roads over which the several portions are to go after passing through the tollgate, and without regard to the destination of the different portions.

When the Federal Act of 1916, and its amendatory acts, and the Act of 1919, are examined in the light of their history, and are viewed in the light of the distinctions which have been so long observed between estate taxes on the one hand and inheritance taxes on the other hand, it is manifest that the Federal tax is a pure estate tax, and that it has none of the characteristics of an inheritance tax. *New York Trust Co. v. Eisner*, — U. S.

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—, 65 L. ed. —, ante, 660, 41 Sup. Ct. Rep. 506; Plunkett v. Old Colony Trust Co. supra; Re Hamlin, supra; Re Roebeling, 89 N. J. Eq. 163, 104 Atl. 295; Lederer v. Northern Trust Co. — C. C. A. —, 262 Fed. 52; New York Trust Co. v. Eisner (D. C.) 263 Fed. 620.

We now direct attention to our state Inheritance Tax Statute, which provides in § 1191, Or. Laws, that "all property within the jurisdiction of the state, and any interest therein, . . . which shall pass or vest by dower, curtesy, will, or by statutes or [of] inheritance, . . . or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death . . . to any person or persons, . . . shall be and is subject to a tax at the rate hereinafter specified in § 1192, to be paid to the treasurer of the state for the use of the state."

The title of the original statute enacted in 1903 explained the object of the enactment by declaring that it was "An Act to Tax Gifts, Legacies, and Inheritances, and to Provide for the Collection of the Same" (Gen. Laws 1903, p. 49), and, as pointed out by Mr. Justice Benson in *Re Clark*, — Or. —, 195 Pac. 370, the original object was never departed from, but was preserved in all the amendatory legislation. It will be observed that § 1191, Or. Laws, touches only property "which shall pass or vest." Our statute looks not to the estate or interest which was ended by death, but to the estate or interest which was newly created by death. Plainly, as ruled in *Re Clark*, supra, our statute provides for an inheritance tax, and not for an estate tax.

The doctrine accepted in this jurisdiction, and in nearly all the other jurisdictions, is that the right to dispose of property by will and the right to receive property by will or inheritance are not natural rights, but are the creatures of the law. *McDermid v. Bourhill*, —

Or. —, — A.L.R. —, 199 Pac. 610; *Re Macky*, 46 Colo. 79, 23 L.R.A. (N.S.) 1207, 102 Pac. 1075; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Maxwell v. Bugbee*, 250 U. S. 525, 536, 63 L. ed. 1124, 1129, 40 Sup. Ct. Rep. 2; *State v. Alston*, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750. In this and in other jurisdictions, therefore, where it is held that the right to transmit property at death and the right of the living to receive property upon the death of another are creatures of the law, it is perfectly logical also to hold that the power which creates the right to transmit and the right to receive can tax such created rights, and in fixing the amount of such tax can discriminate between relatives, distinguish between strangers and relatives, and grant exemptions. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *State ex rel. Ise v. Cline*, 91 Kan. 416, 50 L.R.A. (N.S.) 991, 137 Pac. 932; *State v. Handlin*, 100 Ark. 175, 139 S. W. 1112; *People v. Palmer*, 25 Colo. App. 450, 139 Pac. 554; *McDaniel v. Byrkett*, 120 Ark. 295, 179 S. W. 491; *Booth v. Com.* 130 Ky. 88, 33 L.R.A. (N.S.) 592, 113 S. W. 61; *Re Corbin*, 107 Wash. 424, 7 A.L.R. 685, 181 Pac. 910; *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Re Roebeling*, 89 N. J. Eq. 163, 104 Atl. 295; *Re Macky*, 46 Colo. 79, 23 L.R.A. (N.S.) 1207, 102 Pac. 1075; *Re Miller*, — Cal. —, post, 694, 195 Pac. 413; *Blakemore & B. Inheritance Taxes*, p. 7; *Gleason & O. Inheritance Taxn.* 2 ed. p. 7. However, even in the few jurisdictions where it is held that the right to take property by will or inheritance is a natural right which cannot be taken away by the legislature, it is ruled that an inheritance tax may be lawfully imposed under the power to make reasonable regulations for the devolution of property upon the

Descent—right to receive property.

death of the owner. *State ex rel. Ise v. Cline*, 91 Kan. 416, 50 L.R.A. (N.S.) 991, 137 Pac. 932.

A death duty, whether it be an estate duty or whether it be an inheritance tax, is

~~—character of death duty.~~ neither a direct tax upon property nor a

capitation tax. *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *New York Trust Co. v. Eisner*, — U. S. —, 65 L. ed. —, ante, 660, 41 Sup. Ct. Rep. 506. Nor is such a tax necessarily made a direct tax on property merely because the statute provides for a lien upon property

and requires payment by the executor or administrator, as such provisions are nothing more than appropriate regulations to secure the collection of the tax. *Scholey v. Rew*, supra. Although in our state statute, as in many inheritance tax statutes, language may be found referring to "the rate of tax on all estates," and "taxes levied on such estate," and the like, this language does not of itself make the tax a direct property tax. The value of the property is used merely as a measure of the amount of the tax to be paid, and the property is then looked to for the purpose of insuring payment, just as in a multitude of instances property is looked to for the purpose of insuring payment of debts due private persons, as, for example, money judgments. If, then, the tax is not imposed directly upon property, upon what is the tax imposed?

~~—on estate—character—effect of creating lien.~~

The devolution of property by death involves a transferor, a transfer of property, and a transferee. A valid transfer of property cannot be effected unless the transferor has a right to transfer it and the transferee has a right to receive it. A death duty is not a capitation tax, and hence it is not laid upon the transferor, nor is it laid upon the transferee. A death duty is not a direct property tax, and hence it is

not laid upon the property. It must be, then, that death duties are laid upon the right to transmit, or the transfer, or the right to receive.

Death duties are, in reality, excises or imposts upon the right to transmit property at death, or upon the right to succeed to it from the dead. *Gleason & O. Inheritance Taxn.* 2d ed. p. 7; *State v. Handlin*, 100 Ark. 175, 139 S. W. 1112; *State ex rel. Ise v. Cline*, supra; *Knowlton v. Moore*, 178 U. S. 41, 81, 44 L. ed. 969, 985, 20 Sup. Ct. Rep. 747.

The Federal statutes, both the Act of 1916 and that of 1919, in terms, declare that a tax is imposed "upon the transfer of the net estate of every decedent." The tax is measured by the net value of the entire estate, as it is assembled in a single unit and before it is broken up into parts for distribution. The Federal tax attaches to the whole estate, and it is an excise upon the transmission at its very beginning; but, inextricably connected with the transfer at its beginning is the right to transmit, and therefore the Federal tax is on the right to transmit, or upon the transfer at its beginning, and not upon the right to receive; for the estate has not yet been divided, and so it has not yet passed to or reached the several points where the rights of heirs, distributees, legatees, and devisees to receive attach. A tax "on the transfer" is substantially a tax on the power to transmit. *New York Trust Co. v. Eisner*, — U. S. —, 65 L. ed. —, ante, 660, 41 Sup. Ct. Rep. 506; *People v. Bemis*, 68 Colo. 48, 189 Pac. 32; *Re Macky*, 46 Colo. 79, 89, 23 L.R.A. (N.S.) 1207, 102 Pac. 1075; *Re Roebing*, 89 N. J. Eq. 163, 168, 104 Atl. 295; *United States v. Perkins*, 163 U. S. 625, 628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073. At any rate a tax which looks to an old interest in property ended by death, and not to a new interest created by death, is devoid of any suggestion that it is a tax on the right to receive.

The constitutionality of a Federal

(— *Or.* —, 199 *Pac.* 615.)

inheritance tax is determined in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and the constitutionality of a Federal estate tax is established in *New York Trust Co. v. Eisner*, *supra*, and therefore, the constitutionality of death duties imposed by Federal statutes can no longer be the subject of controversy. In the absence of some special constitutional provision to the contrary, there can be no doubt about the power of a state legislature to levy inheritance taxes. 26 R. C. L. 198.

It has been said that an inheritance tax is laid upon the receipt of property; and again it has been suggested that the tax is imposed upon the exercise of the right to receive; but the commonly accepted theory is that the tax is imposed upon the right to receive. This right to receive which is taxed is the right as it exists in concrete form, as where it is ripened, and not as it exists in the abstract, as where it is no more than a mere possibility. All citizens have the abstract right to receive property from the dead; but all citizens do not receive property from the dead. A tax is not laid upon the abstract right to receive property from the dead given to every citizen; but the tax is laid only where the right to receive has been transformed from an abstract right into a concrete right, and property is actually transmitted from the dead. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 288, 42 L. ed. 1038, 1039, 18 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 54, 44 L. ed. 969, 975, 20 Sup. Ct. Rep. 747; *Maxwell v. Bugbee*, 250 U. S. 525, 536, 68 L. ed. 1124, 1130, 40 Sup. Ct. Rep. 2; *State ex rel. Ise v. Cline*, 91 Kan. 416, 50 L.R.A. (N.S.) 991, 137 *Pac.* 932; *Re Sanford*, 188 Iowa, 833, 175 N. W. 506, 509; *State v. Handlin*, 100 Ark. 175, 179, 139 S. W. 1112; *People v. Palmer*, 25 Colo. App. 450, 139 *Pac.* 554; *McDaniel v. Byrnett*, 120 Ark. 295, 179 S. W. 491; *Booth v. Com.* 130 Ky. 88, 33 L.R.A. (N.S.) 592, 113 S. W. 61; *Re Corbin*, 107 Wash. 424, 7 A.L.R. 685, 181 *Pac.* 910; *Kocher-*

sperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Re Roebeling*, 89 N. J. Eq. 163, 104 Atl. 295; *Re Macky*, 46 Colo. 79, 23 L.R.A. (N.S.) 1207, 102 *Pac.* 1075; *Re Miller*, — Cal. —, post, 694, 195 *Pac.* 413; *State ex rel. Gilmore v. District Ct.* 45 Mont. 335, 122 *Pac.* 922, Ann. Cas. 1914A, 469; *Blakemore & B. Inheritance Taxes*, p. 7; *Gleason & O. Inheritance Taxn.* 2d ed. p. 7.

Although, as previously explained, language may be found in our Inheritance Tax Act, as in most of the inheritance tax statutes, such as "tax on all estates," "taxes levied on such estates," property "shall be subject to a tax," and the like, yet our statute, when considered in its entirety, provides for a tax which is plainly and indisputably a perfect example of an inheritance tax. The tax is on the right to receive; but the amount of the tax so laid upon such right is measured by the value of the property to which the right attaches. The language of our statute is: "All property . . . which shall pass" to "or vest" in a given person "is subject to a tax at the rate hereinafter specified." The measure of the tax is, then, the value of the property which passes to or vests in a given person. The value of the property received is one of the determining factors in the measurement of the amount of the tax. It is true that the executor or administrator is required to pay the tax, but the payment is nevertheless based upon the value of the interest which the successor is entitled to receive, and which, in contemplation of law, he has received.

No part of the Federal estate tax amounting to \$25,067.36 ever passed, theoretically or actually, to the widow or daughters; for this tax was imposed and collected before distribution, and, like the old probate tax, ought to be deducted from the gross estate, just as expenses of administration are deducted. The share received by an heir, distributee, legatee, or devisee is, in the final analysis, the unit by

which to determine the amount of the inheritance tax. This idea is illustrated throughout the different sections of our statute, as, for example, in § 1196 it is declared that "every tax imposed by this act shall be a lien upon the property embraced in any inheritance, devise, bequest, legacy, or gift, until paid, and the person to whom such property is transferred, and the administrators, executors, and trustee of every estate embracing such property shall be personally liable for such tax until its payment, to the extent of the value of such property. . . ."

The Federal estate tax, or the tax upon the right to transmit, is, in the final analysis, measured by the net value of the old interest which ceased with death; while the inheritance taxes, or the tax upon the right to receive, are measured respectively by the values of the several new interests which were created by death. The Federal estate tax is taken from the net estate "before the distributive shares are determined, rather than off the distributive shares." *Corbin v. Townshend*, 92 Conn. 501, 103 Atl. 647. The Federal estate tax paid to the national government by the executors reduced the value of the property which passed to the legatees and devisees to the extent of such payment; and hence, when the widow and daughters were required to pay an inheritance tax on any part of the amount of the Federal estate tax, they were required to pay a tax on property which never passed to them.

Cases dealing with the question of deductibility where the only statutes involved were the inheritance tax statutes of two states, or the national Inheritance Tax Act of 1898 and a state inheritance tax statute, are not in point, for the reason that in these cases the taxes considered are exactly alike as to their nature and incidence. The current of judicial opinion is divided upon the question of deductibility where property is subject to one or

more inheritance tax statutes; but we need not now inquire which of the two views is the more logical, because we are now dealing with two taxes which have different points of incidence, and are different in some other respects. See *Blake-more & B. on Inheritance Taxes*, § 371. There are a few precedents which might, at first blush, seem to give support to the contention that the Federal estate tax is not deductible; and yet, on a careful examination, it will be discovered that they turn upon the peculiar language of the statutes involved. Among such precedents are: *Week's Estate*, 169 Wis. 316, 172 N. W. 732; *Re Sanford*, 188 Iowa, 833, 175 N. W. 506.

A few adjudications holding that the Federal estate is not deductible reach that conclusion by applying the reasoning employed by precedents which have ruled against deductibility where the statutes involved were a state inheritance tax statute and the national Inheritance Tax Act of 1898 (see *Re Bierstadt*, 178 App. Div. 836, 166 N. Y. Supp. 169); but, we repeat, such adjudications are not in point, because they involve two taxes which are alike in language, and touch the same thing at the same time and at the same point. *Re Miller*, — Cal. —, post, 694, 195 Pac. 413. So far as we have been able to discover, every reported judicial opinion which recognizes and observes the well-defined and universally acknowledged distinction between an estate tax and an inheritance tax is to the effect that the Federal estate tax must be deducted before measuring the amount of ^{—deduction of Federal tax.} the state inheritance tax, unless, however, some peculiar and unusual language appearing in the state statute controls and produces a different result. *Re Knight*, 261 Pa. 537, 539, 104 Atl. 765; *State ex rel. Smith v. Probate Ct.* 139 Minn. 210, 166 N. W. 125; *People v. Pasfield*, 284 Ill. 450, 120 N. E. 287; *People v. Northern Trust*

Co. 289 Ill. 475, 477, 7 A.L.R. 709, 124 N. E. 662; *Re Roebling*, 89 N. J. Eq. 163, 104 Atl. 295; *Corbin v. Townshend*, and *Re Miller*, supra; *State v. First Calumet Trust & Sav. Bank*, — Ind. App. —, 125 N. E. 200. See also *New York Trust Co. v. Eisner*, — U. S. —, 65 L. ed. —, ante, 660, 41 Sup. Ct. Rep. 506.

The Federal estate tax should have been deducted before measuring the amount of the state inheritance tax. The decree is therefore modified.

Benson, J., not sitting.

NOTE.

There are two theories—accounted for in part by the form of the state statute—as to whether the Federal estate tax is deductible and the state tax computed only on the balance. The court in the reported case (*RE INMAN*, ante, 675) adheres to the theory that the Federal taxes are deductible and the state tax computed on the balance. The cases on this question are discussed in the note in 7 A.L.R. 714 and supplementary note, post, 702.

RE SUCCESSION OF JOHN R. GHEENS, Deceased.

CHARLES W. GHEENS et al., Exrs., etc., of John R. Gheens, Deceased, Appts.

Louisiana Supreme Court — February 28, 1921.

(148 La. 1017, 88 So. 253.)

Tax — priority of state tax.

1. Where a state forbids any transfer of a decedent's estate until its succession tax is paid, there is nothing upon which the Federal estate tax can attach until the state tax has been deducted, and therefore the Federal tax cannot be deducted from the mass before the state tax is exacted.

[See note on this question beginning on page 702.]

Constitutional law — power of state to prevent Federal succession tax.

2. A state may prohibit the devolution of property so as to leave nothing upon which the Federal government might impose a succession tax.

[See 26 R. C. L. 199.]

Tax — succession — power of Congress.

3. Congress was without power to exact a succession tax upon that portion of a decedent's estate which is exacted by the state for its needs.

— Federal tax — deduction of state tax.

4. The Federal statute imposing a succession tax upon the net estates of deceased persons affects only what is left of the estate after the state inheritance tax has been deducted.

[See note in 7 A.L.R. 714.]

— character of Federal tax.

5. The Federal estate tax, although imposed upon the net mass of the estate before distribution, is merely a tax on the transfer to each individual of his part of the estate.

[See note in 7 A.L.R. 714.]

APPEAL by the executors from a judgment of the Civil District Court for the Parish of Orleans (Rogers, J.) fixing the amount of an inheritance tax in a proceeding to determine such amount. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Borah, Himel, Bloch, & Borah, for appellants:

The inheritance laws of Louisiana provide that all debts and charges against an estate shall be paid and deducted from the gross estate in determining the cash value of the property passing to each heir or beneficiary, in order to determine the tax due by said heir or legatee, and the Federal estate tax, being an estate tax payable out of the gross estate, must necessarily be deducted in determining the value of the property going to each heir or legatee and fixing the tax thereon.

Knight's Estate, 261 Pa. 539, 104 Atl. 765; *Roebeling's Estate*, 89 N. J. Eq. 163, 104 Atl. 295; *Re Tyler*, 89 N. J. Eq. 170, 104 Atl. 298; *People v. Plasfield*, 284 Ill. 450, 120 N. E. 286; *Hooper v. Shaw*, 176 Mass. 190, 57 N. E. 361; *Corbin v. Townshend*, 92 Conn. 501, 103 Atl. 647; *State ex rel. Smith v. Probate Ct.* 139 Minn. 210, 166 N. W. 125; *Bugbee v. Roebeling*, — N. J. —, 111 Atl. 29.

Messrs. Harry P. Gamble and Edward Rightor, for appellee:

The Federal government cannot, by the imposition of a transfer tax, impair or diminish in any way the right of the state of Louisiana to fix, and not have interfered with, the proportion of the estates of its deceased citizens that it appropriates for the purpose of supporting its own government.

Re Becker, 26 Misc. 633, 57 N. Y. Supp. 940; *Hughes v. Murdock*, 45 La. Ann. 935, 13 So. 182; *Kohn's Succession*, 115 La. 75, 38 So. 898; *Morris v. Lalaurie*, 39 La. Ann. 53, 1 So. 659; *Shreveport v. Gregg*, 28 La. Ann. 836; *Geren v. Gruber*, 26 La. Ann. 694; *Stauffer's Succession*, 119 La. 66, 43 So. 928; *May's Succession*, 120 La. 699, 45 So. 551; *Westefeldt's Succession*, 122 La. 836, 48 So. 281; *Cahen v. Brewster*, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215; *Levy's Succession*, 115 La. 383, 8 L.R.A.(N.S.) 1180, 39 So. 37, 5 Ann. Cas. 871; *Foreman v. Fontenot*, 131 La. 928, 60 So. 618; *Re Coreil*, 137 La. 706, 69 So. 145; *Pavey's Succession*, 124 La. 520, 50 So. 518; *Blum v. Allen*, 145 La. 71, 81 So. 760.

Dawkins, J., delivered the opinion of the court:

This is a proceeding to determine the amount of inheritance tax which is due by the heirs of de-

ceased, and presents only a question of law, i. e., should the amount paid the Federal government (\$43,617.37) under the Revenue Act of September 8, 1916, title 2 (39 Stat. at L. 777-780, chap. 463, Comp. Stat. §§ 6336½a-6336½m, Fed. Stat. Anno. Supp. 1918, pp. 305-310), be deducted from the mass before computing the sum due the state?

In determining this question, we begin with the fundamental principle that the rules of transmission and devolution of property are exclusively within the power and control of the individual sovereign state. If it sees fit, it may ordain that no one shall inherit the estate of a deceased person, and that the entirety shall inure to the public fisc, in which event the national government would be powerless to impose any tax or burden thereon, for such imposition would be

an encroachment upon state sovereignty not authorized by the powers delegated under the Federal Constitution. Therefore, for the same reason, Congress was without right to impose upon that portion of the estates of deceased persons exacted by the legislature

Constitutional law—power of state to prevent Federal succession tax.

for state needs, any tax of any kind. In fact, the Act of 1916, as amended by the Act of March 3, 1917, in our opinion, does not attempt to tax the transfer of anything but the net amount of assets, after all charges, under state laws, including state taxes, have been paid.

Tax—succession—power of Congress.

—Federal tax—deduction of state tax.

Section 201 of the Federal Statutes reads: "Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States:" (Here follows

the scale of percentage based upon amounts.)

Section 202 prescribes what shall be included in the gross value of estates.

Section 203 reads:

"That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, *and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.* . . ."

The remainder of the section deals with the method of determining the net amount to be considered in dealing with nonresidents.

Section 204 provides that the tax shall be paid within one year after decedent's death, and the penalties that shall accrue for failure to do so.

Section 205 prescribes the reports that shall be made by the representatives of estates, beginning thirty days after qualifying, and its terms are very elastic, depending upon the difficulties which may be encountered.

Section 206 authorizes the collector or deputy collector of internal revenues to make the reports, where the estates are not represented, or such representative fail to do so.

Section 207 deals with the recovery of deficiencies in payments and with the refunding by the Commissioner of Internal Revenue of overpayments.

Section 208 subjects the property of the estate to sale for the payment

of the tax, and provides, inter alia: "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of *taxes, debts, or other charges against the estate*, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent *the tax shall be paid out of the estate before its distribution.*"

And § 209 reads: "That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, *except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.*" (Italics by the court.)

We are of the opinion that Congress intended, in arriving at the "net estate," to have deducted all charges, whether due as debts of the estate or imposed by the state law, such as taxes, etc., and that this intention is clearly indicated by the use of the words in ¶ 1 of subsection (a), § 203 (above quoted): "Such other charges against the estate, as are allowed by the laws of the jurisdiction." Even if there were doubt as to whether "other charges" included taxes, the last sentence of § 208 above quoted, giving one who has paid the Federal tax, or out of whose share the same has been collected, the right to be reimbursed out of the remainder of the estate before distribution, or from the portion of those "whose interest is subject to equal or prior liability for the payment of taxes, debts, or

other charges against the estate," seems to put the matter beyond question; for "taxes" and "other charges" are here placed in the same class. And in creating a lien upon the estate for the payment of the tax, the 209th section specifically excludes from its operation "such part . . . as is used for the payment of charges against the estate and expenses of administration," thus demonstrating the purpose to have such claims against the property arising under the state law prime the Federal tax.

Then again, as pointed out by the attorney for the tax collector herein, the Congress could not impose upon that part which comes to the state any tax,—the power to tax being equivalent to the power to destroy,—for the reason which we have above mentioned; that is, it would be an invasion upon state sovereignty, and we must assume that Congress did not intend to exceed its powers under the Constitution.

It is true that the tax purports to be assessed against the estate, but in truth and in fact it is not, but upon the transfer thereof to those whom the law or the decedent has given it. If it were upon the estate itself, the same would be a direct tax and the statute would be in conflict with the Federal Constitution, requiring all direct taxes to be levied according to population. Article 1, § 2, cl. 3; article 1, § 9, cl. 4. What it really seeks to do is merely to concentrate the collection of the tax upon the net mass of the estate at its source, and as a matter of convenience, before being distributed. However, it is none the less a tax upon the transfer to each individual of his part of the decedent's estate.

Then again, until the point is reached when the property or estate becomes susceptible of transfer under the state law, the latter having the right to say when and under

what circumstances it shall pass, there is no transfer, and therefore nothing upon which the Federal tax can operate.

Instead of being imposed on the transfer of the estate in globo like the Federal tax, our law (Act 109 of 1906) provides: "There is now and shall hereafter be levied . . . on all inheritances, legacies, and other donations mortis causa . . . a tax of . . . per centum on the amount or the actual cash value thereof at the time of the death of the decedent." § 1.

Like the Federal law, it provides for exemptions and deductions in figuring the amount due. Section 3 makes it unlawful for anyone to take possession or dispose of any property of a party deceased, without an order of court as otherwise provided in the act. It further provides the proceeding (§ 4) by which the amount of the tax shall be determined, and requires that the court having jurisdiction shall render judgment therefor. Section 5 provides that the succession representative shall pay the amount of the tax "on each inheritance, legacy, or donation, out of the funds comprised therein, if sufficient," and, if there be not sufficient funds, that the property comprising such inheritance legacy or donation shall be sold to pay the tax due thereon. And § 16 reads: "Each inheritance or legacy is indivisible, and must be accepted or renounced for the whole; and the heir or legatee shall not be entitled to be placed in possession of the same, and *shall be without right or capacity to alienate any part thereof, until the tax on the whole shall have been fixed and paid*, or until it shall have been judicially determined, in the manner herein provided, that no part of the same is subject to the tax imposed by this act."

In other words, the estates of all deceased persons, under this (state) statute are, in effect, placed in custodia legis, without right in the heirs to take or possess any part thereof until the state's share, if any, has been first ascertained and either paid out of the res or by the heir. If paid out of the mass (payment being a condition precedent to its passing), as would be the case if

—character of
Federal tax.

paid by the succession representative or from the proceeds of the things inherited, or donated, then the residue alone would be transferred, and that portion which went to the state could not be said to have ever been transferred to the heir. If the heir paid it out of his pocket, the right to reimbursement would be in the nature of a "charge allowed by the law of the jurisdiction" upon the estate, or at least his part thereof; for, as we have heretofore shown, while the Federal statute in some of its expressions purports to tax the estate, still it does nothing of the kind, and what it meant to say, and did say, was that all local charges against the thing on which it was levying (the transfer) should be computed and deducted before calculating the tax.

We have discussed thus at length the Federal tax for the purpose of showing, first, that in our opinion the same does not and could not affect or control the state in any manner in the imposition of its own taxes; and, second, that Congress did not so intend. Hence, whatever amount has been paid to the tax col-

lector of the United States is a matter between it and the heirs or succession representative, and cannot be considered in fixing the amount of inheritance tax due the state. The statute fixes it in this case at 2 per centum upon the amount of the actual cash value of each inheritance or donation at the time of the death of the decedent. The judgment of the lower court so decreed, and it is accordingly affirmed.

Petition for rehearing denied April 4, 1921.

NOTE.

There are two general theories upon the question whether the Federal estate tax is to be deducted and state inheritance or succession taxes computed only on the balance, or whether the state tax is to be computed without deduction of the Federal tax. The decision in *Re Gheens*, ante, 685, that the state tax is to be computed without deduction, is in accord with what may be termed the minority view. The authorities on this question are reviewed in the note in 7 A.L.R. 714, and the supplementary note, post, 702.

OLD COLONY TRUST COMPANY, Exr., etc., of Charles L. Willoughby,
Deceased, Appt.,

v.

FRED J. BURRELL, State Treasurer and Receiver General.

Massachusetts Supreme Judicial Court — May 31, 1921.

(— Mass. —, 131 N. E. 321.)

Tax — deduction of Federal tax.

1. The Federal estate tax should be deducted in fixing the value of the estate for taxation, under a state statute imposing a tax upon property which shall pass by will.

[See note on this question beginning on page 702.]

—inheritance—when fixed.

2. A statute imposing a tax upon property which shall "pass by will" requires valuation for taxation at the
16 A.L.R.—44.

time of the vesting of the right, and not of its enjoyment in possession.

[See 26 R. C. L. 232; see note in 13 A.L.R. 127.]

—deduction of foreign inheritance taxes.

3. Foreign inheritance taxes which must be paid before the executor can reduce the property to possession are legitimate expenses of administration which may be deducted in fixing the value of the estate for the assessment of a local inheritance tax.

[See 26 R. C. L. 230.]

—deduction of real estate taxes.

4. Taxes upon real estate, assessed before death of testator but payable afterwards, are a charge of administration which may be deducted in fixing the value of the estate for inheritance taxation.

APPEAL by petitioner from a decree of the Probate Court for Norfolk County (Flint, J.) dismissing a petition filed for the abatement of a portion of an inheritance tax paid under protest. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. Weston Allen, Attorney General, and Maynard Teall, Assistant Attorney General, for appellee:

While other states may impose inheritance taxes upon the descent of property within their respective jurisdictions, such imposition cannot operate to diminish the amount due to Massachusetts under her Inheritance Tax Statute, and while the Federal government may, if it will, impose an estate tax, yet the tax so imposed cannot operate to diminish the inheritance tax due to Massachusetts except so far as it is imposed on account of property within its jurisdiction.

Peirce v. Boston, 3 Met. 520; Bradford v. Storey, 189 Mass. 104, 75 N. E. 256; Atty. Gen. v. Stone, 209 Mass. 186, 95 N. E. 395; Atty. Gen. v. Rafferty, 209 Mass. 321, 95 N. E. 747; Kinney v. Treasurer (Kinney v. Stevens) 207 Mass. 368, 35 L.R.A. (N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902; Atty. Gen. v. Barney (Swift ex rel. State Treasurer v. Barney) 211 Mass. 134, 39 L.R.A. (N.S.) 1024, 97 N. E. 750; Kingsbury v. Chapin, 196 Mass. 533, 82 N. E. 700, 13 Ann. Cas. 738; McCurdy v. McCurdy, 197 Mass. 248, 16 L.R.A. (N.S.) 329, 83 N. E. 881, 14 Ann. Cas. 859; Re De Graff, 24 Misc. 147, 53 N. Y. Supp. 591; Re Pullman, 46 App. Div. 574, 62 N. Y. Supp. 395; Connell v. Crosby, 210 Ill. 380, 71 N. E. 350; Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Week's Estate, 169 Wis. 316, 172 N. W. 732; McDougald v. Low, 164 Cal. 107, 127 Pac. 1027; Re Guiteras, 108 Misc. 487, 178 N. Y. Supp. 559; Re Penfold, 87 Misc. 525, 149 N. Y. Supp. 918; Hooper v. Shaw, 176 Mass. 190, 57 N. E. 361; Hooper v. Bradford, 178 Mass. 95, 59 N. E. 678; Re Bierstadt, 178 App. Div. 836, 166 N. Y. Supp. 168; Re Sherman, 179

App. Div. 497, 166 N. Y. Supp. 19, affirmed in 222 N. Y. 540, 118 N. E. 1078; Sanford's Estate, — Iowa, —, 175 N. W. 506; Wittmann's Estate, 112 Misc. 168, 182 N. Y. Supp. 535; Re Freund, 143 App. Div. 335, 128 N. Y. Supp. 48, affirmed in 202 N. Y. 556, 95 N. E. 1129.

Messrs. Pillsbury, Dana, & Young, for appellant:

The Massachusetts inheritance tax is based only on what the several beneficiaries would actually get under the will, were it not for the Massachusetts inheritance tax itself.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Plunkett v. Old Colony Trust Co. 233 Mass. 471, 7 A.L.R. 696, 124 N. E. 265, Atty. Gen. v. Clark, 222 Mass. 291, L.R.A.1916C, 679, 110 N. E. 299, Ann. Cas. 1917B, 119; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Callahan v. Woodbridge, 171 Mass. 595, 51 N. E. 176; Atty. Gen. v. Laycock, 221 Mass. 146, 108 N. E. 919.

In the case of a residuary legatee the amount which the legatee actually gets is that which remains after all proper charges against the estate have been satisfied.

Plunkett v. Old Colony Trust Co. 233 Mass. 471, 7 A.L.R. 696, 124 N. E. 265; Tomlinson v. Bury, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. 137; People ex rel. George v. Nelms, 241 Ill. 571, 89 N. E. 683; Re Speed, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; Roebbling's Estate, 89 N. J. Eq. 163, 104 Atl. 295; Beals v. State, 139 Wis. 544, 121 N. W. 347.

The Federal estate tax is a proper charge against the residue.

Plunkett v. Old Colony Trust Co.

233 Mass. 471, 7 A.L.R. 696, 124 N. E. 265; *Re Hamlin*, 226 N. Y. 407, 7 A.L.R. 701, 124 N. E. 4; *People v. Northern Trust Co.* 289 Ill. 475, 7 A.L.R. 709, 124 N. E. 662; *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286; *State v. First Calumet Trust & Sav. Bank*, — Ind. App. —, 125 N. E. 200; *Roebeling's Estate*, 89 N. J. Eq. 163, 104 Atl. 295; *State ex rel. Smith v. Probate Ct.* 139 Minn. 210, 166 N. W. 125; *Knight's Estate*, 261 Pa. 537, 104 Atl. 765; *Sanford's Estate*, — Iowa, —, 175 N. W. 506; *Week's Estate*, 169 Wis. 316, 172 N. W. 732.

The local real estate tax in Illinois is a proper charge against the residue. *Morrison v. Moir Hotel Co.* 204 Ill. App. 433; *Re Brundage*, 31 App. Div. 348, 52 N. Y. Supp. 362; *Re Hazard*, 228 N. Y. 26, 126 N. E. 345.

Pierce, J., delivered the opinion of the court:

Charles L. Willoughby died January 9, 1919, a resident of Brookline in this commonwealth. His will and codicil were allowed, and the petitioner was appointed executor thereof by a decree of the probate court of Norfolk county, on February 26, 1919. The property of the testator at his death was worth approximately \$1,527,000, and consisted of real estate in Massachusetts worth \$22,000, real estate in Illinois worth \$875,000, and securities and other personal property approximately worth \$630,000. The securities included stock in corporations organized under the laws of Illinois, New Jersey, and Wisconsin.

As executor, and under the authority conferred upon such persons by article 14 of the will, the petitioner paid out of the residue of the estate to the state of Illinois an inheritance tax assessed upon the rights of the several beneficiaries under the will to succeed to real and personal property situated in Illinois; it paid to the state of New Jersey the inheritance tax assessed upon the rights of the several beneficiaries to succeed to certain shares of stock in New Jersey corporations; it paid to the state of Wisconsin the inheritance tax assessed upon the rights of the several

beneficiaries to succeed to certain shares of stock in a Wisconsin corporation; it paid to the state of Illinois, or to Cook county in that state, a tax upon the specifically devised real estate in that state, assessed under the Illinois Real Estate Tax Law prior to but payable after the death of the testator; and it also paid to the collector of internal revenue at Boston an estate tax assessed under title 4 of the United States Revenue Act of 1918 (Comp. Stat. §§ 6336½a-6336½k).

All these taxes were included in an affidavit of debts and expenses filed with the commissioner of corporations and taxation for the commonwealth, the executor claiming that all these taxes paid by it from residue should be treated by the Massachusetts tax commissioner as debts and expenses of the estate, and deducted from the residue before the tax due under the Massachusetts Inheritance Tax Law upon the residue of the estate was computed. The commissioner refused to deduct any part of the taxes paid under the inheritance tax laws of Illinois, New Jersey, and Wisconsin, as also 57.29 per cent of the taxes paid upon the Illinois real estate and under the Federal Estate Tax Law, this percentage being determined by the proportion which said real estate, amounting in value to \$875,000, bore to the testator's total property, amounting in value to \$1,527,451.22. The commissioner assessed the Massachusetts inheritance tax upon the residue in accordance with his ruling upon the question of deductions. If those rulings were wrong the sum of \$7,022.54 was improperly assessed. The petitioner paid the tax assessed under protest as to the sum of \$7,022.54, and in accordance with the provisions of Stat. 1909, chap. 490, part 4, § 20, now Gen. Laws, chap. 65, § 27, filed its petition for abatement in the probate court for the county of Norfolk, and that court decreed that the petition be dismissed. The case is before this court on appeal from the decree of the probate court.

The question presented by the appeal is whether the commissioner should have deducted from the estate upon which the tax upon the residue was to be computed, the amounts which the petitioner paid to other states in which the decedent had property at his death, the amount paid the United States under the Federal Estate Tax Law, and the whole amount paid of taxes assessed upon foreign real estate when such tax was assessed before, but was payable after, the death of the testator.

Stat. 1909, chap. 490, pt. 4 § 1, formerly Stat. 1907, chap. 563, § 1, now Gen. Laws, chap. 65, § 1, provides that "all property within the jurisdiction of the commonwealth . . . belonging to inhabitants of the commonwealth . . . which shall pass by will . . . shall be subject to a tax."

Stat. 1907, chap. 563, § 6, Stat. 1909, chap. 490, pt. 4, § 6, Gen. Laws, chap. 65, § 13, in part provide as follows, as respects the value of the property of the estate for taxation: "Except as hereinafter provided, said tax shall be assessed upon the actual value of the property at the time of the death of the decedent."

The phrase of Stat. 1909, chap. 490, pt. 4, § 1, "which shall pass by will," marks the time of the vesting of the right, and not the time of its enjoyment in possession, or the time when the property, or the amount of the property less debts and charges of administration, passes; as it does the time when the tax shall be computed upon the amount of property which has passed. *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176. The rights of all parties, including the right of the commonwealth to its tax, vest at the death of the testator. *Kingsbury v. Chapin*, 196 Mass. 533, 538, 82 N. E. 700, 13 Ann. Cas. 738. The statement in *Hooper v. Shaw*, 176 Mass. 190, at 191, 57 N. E. 361, "that these words most naturally signify the property which

the legatee actually would get were it not for the state tax imposed by the sentence in which the words occur," as pointed out in *Hooper v. Bradford*, 178 Mass. 95, 98, 59 N. E. 678, is not authority for any contention that the time when the legatee gets possession is the time for the valuation.

As the property passes to the beneficiaries for the purpose of taxation, with the death of the testator, and as the tax must be computed on the value of the property after the deduction of all existing lawful charges, debts, and expenses of administration (*Hooper v. Bradford*, 178 Mass. 95, 59 N. E. 678; *Howe v. Howe*, 179 Mass. 546, 55 L.R.A. 626, 61 N. E. 225; *McCurdy v. McCurdy*, 197 Mass. 248, 252, 16 L.R.A. (N.S.) 329, 83 N. E. 881, 14 Ann. Cas. 859; *Pierce v. Stevens*, 205 Mass. 219, 91 N. E. 319; *Baxter v. Treasurer*, 209 Mass. 459, 95 N. E. 854; *Hill v. Treasurer*, 227 Mass. 331, 116 N. E. 509), it follows that the question whether the inheritance taxes of other states, the local taxes laid on land in foreign states, and the United States estate tax are to be deducted, is resolved into the question whether the several payments were made to relieve the estate from a general charge upon it, to discharge debts or other obligations of the decedent, or to defray the legal expenses of administration.

As regards the inheritance taxes imposed by the states of Illinois, New Jersey, and Wisconsin, the executor does not claim that they were paid because they were a general estate charge or debts of the decedent, but contends that the payment of them is a proper charge of administration, because the beneficiaries who received the taxed property would have had a claim against it as executor if the property received was reduced in amount by reason of the failure of the executor to pay such taxes in the manner provided by the will of the testator. *Sherman v. Moore*, 89 Conn. 190, 93 Atl. 241; *Corbin v. Townshend*, 92 Conn. 501, 103 Atl. 647. It would seem to

**Tax-inheritance
—when fixed.**

(— *Mass.* —, 181 N. E. 321.)

be plain, in the absence of the authorization of the will, that the charge upon the succession of the foreign property was a tax which the executor was required to pay in order to reduce that property to possession, for the purposes of administration and distribution (see *Van Beil's Estate*, 257 Pa. 155, 101 Atl. 316); and equally plain that under the will the executor could not properly leave the burden of the foreign tax to remain where it

fell, without a violation of its legal obligation to the beneficiaries. It follows that the refusal of the commonwealth to deduct the amount paid by the executor, in discharge of the inheritance taxes imposed by other states, was error.

The tax assessed upon land in Illinois, prior to, but payable after, the death of the testator, was not a charge upon the general estate; nor was it a debt of the testator or of his estate, in the absence of an express statute of which we have no evidence. *Peirce v. Boston*, 3 Met. 520; *Appleton v. Hopkins*, 5 Gray, 530; *Boston v. Turner*, 201 Mass. 190, 87 N. E. 634; *New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, 27 Sup. Ct. Rep. 137; *People v. Dummer*, 274 Ill. 637, 643, 113 N. E. 934. It was, however, a liability and an obligation of the estate upon which it was assessed, which the owner in his lifetime, or the executor of the owner, must discharge or suffer if he would save the loss of that property. "Terra debit, homo solvit." It would seem to be a matter of indifference whether the procedure of recovery is

that of an action in personam or in

rem. In either case the burden of the obligation is a charge of administration.

The United States estate tax should have been wholly deducted. In its nature such a tax is a charge upon the net estate transferred by death, and not upon the succession resulting from death. *Hooper v. Shaw*, 176 Mass. 190, 57 N. E. 361; *Plunkett v. Old Colony Trust Co.* 233 Mass. 471, 475, 7 A.L.R. 696, 124 N. E. 265; *Re Hamlin*, 226 N. Y. 407, 7 A.L.R. 701, 124 N. E. 4; *People v. Northern Trust Co.* 289 Ill. 475, 7 A.L.R. 709, 124 N. E. 662; *Corbin v. Baldwin*, 92 Conn. 99, 101 Atl. 834, Ann. Cas. 1918E, 932; *Knight's Estate*, 261 Pa. 537, 104 Atl. 765. The estate upon the death is, to the extent of the tax, instantly depleted. *People v. Bemis*, 68 Colo. 48, 189 Pac. 32; *United States v. Perkins*, 163 U. S. 625, 630, 41 L. ed. 287, 289, 16 Sup. Ct. Rep. 1073.

The decree of the Probate Court must be reversed, and the cause re-committed for action in accordance with this opinion.

Ordered accordingly.

NOTE.

The decision in the reported case (*OLD COLONY TRUST CO. v. BURRELL*, ante, 689), is in accord with the majority of courts in holding that the Federal estate tax is to be deducted before computing the state tax. The authorities on this question are reviewed in the note in 7 A.L.R. 714, and supplement thereto, post, 702.

RE ESTATE OF HENRY MILLER, Deceased.

STATE OF CALIFORNIA et al., Appts.

California Supreme Court (In Banc)—January 18, 1921.

(— Cal. —, 195 Pac. 413.)

Tax — inheritance — deduction of Federal tax.

1. In computing a state succession tax which is to be upon the clear market value of the interest transferred, the estate tax imposed by the Federal government upon the estate of the person from whom the property devolved is to be deducted.

[See note on this question beginning on page 702.]

— tax of sister state — deduction.

2. A succession tax exacted upon stock of a corporation by the state of its domicile should be deducted before assessing the succession tax imposed by the state of the domicile of the legatees, into which the stock or its value passes for distribution.

— transfer inter vivos — effect.

3. Under a statute providing for appraisal of future or contingent estates for purposes of inheritance taxation immediately after the death of the

decedent, the taxable interest under a transfer in contemplation of death which creates a life estate in testator with remainder to beneficiaries should be determined as of the date of testator's death, so that, in case the beneficial interest is reduced by inheritance taxes levied under statutes of other jurisdictions enacted after the transfer was made, such taxes should be deducted, although, when a transfer is made inter vivos, it is liable for tax as determined by the law in effect when it is made.

APPEAL by the state and state comptroller from an order of the Superior Court for the City and County of San Francisco (Dunne, J.) determining and fixing the amount of inheritance tax payable upon the estate of Henry Miller, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. U. S. Webb, Matthew Brady, Robert A. Waring, H. C. Lucas, and Heartley F. Peart for appellants.

Messrs. Edward F. Treadwell and Forrest A. Cobb, for respondents.

The amount of the Federal tax should be deducted before computing the state inheritance tax.

Hooper v. Shaw, 176 Mass. 190, 57 N. E. 361; Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647; Corbin v. Baldwin, 92 Conn. 99, 101 Atl. 834, Ann. Cas. 1918E, 932; Knight's Estate, 261 Pa. 537, 104 Atl. 765; People v. Pasfield, 284 Ill. 450, 120 N. E. 286; State ex rel. Smith v. Probate Ct. 139 Minn. 210, 166 N. W. 125; Roebling's Estate, 89 N. J. Eq. 163, 104 Atl. 295; People v. Bemis, 68 Colo. 48, 189 Pac. 32; People v. Northern Trust Co. 289 Ill. 475, 7 A.L.R. 709, 124 N. E. 662; State v. First Calumet Trust & Sav. Bank, — Ind. App. —, 125 N. E. 200; Re Kennedy, 157 Cal. 517, 29 L.R.A. (N.S.) 428, 108 Pac. 280; Re Williams,

23 Cal. App. 285, 137 Pac. 1067; Re Hite, 159 Cal. 392, 32 L.R.A. (N.S.) 1167, 118 Pac. 1072, Ann. Cas. 1912C, 1014; Northern Trust Co. v. Lederer, 257 Fed. 812, affirmed in — C. C. A. —, 262 Fed. 52.

The Nevada inheritance tax, being levied by the state controlling the stock in question, is, if valid, a charge that must be paid before the beneficiaries could come into possession of the stock, and should therefore be deducted.

Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647.

Olney, J., delivered the opinion of the court:

This is an appeal by the state and the state comptroller, in whose charge is the matter of collecting inheritance taxes, from a portion of a common order and judgment entered in three different proceedings

determining and fixing the inheritance taxes payable upon the death of one Henry Miller. Miller was a resident of California, and died testate October 14, 1916. On April 17, 1913, he had executed a deed of trust to Nellie Miller Nickel and J. Leroy Nickel, assigning to them as trustees approximately 120,000 shares of the capital stock of Miller & Lux Company, a Nevada corporation. It is conceded that the transfer was made in contemplation of death, and is subject to tax under our Inheritance Tax Law in effect at the time of transfer. The controversy is solely as to the amount of the tax.

Immediately prior to the transfer, but not going into effect until afterwards, the state of Nevada adopted an Inheritance Tax Law (Statutes of Nevada for 1913, p. 411), and thereafter, and prior to Miller's death, the United States adopted the existing Federal Tax Act. Revenue Act of 1916, title 2, 39 Stat. at L. pp. 777-780, chap. 463, Comp. Stat. §§ 6336½a-6336½m, Fed. Stat. Anno. Supp. 1918, pp. 305-310. Under these laws, the United States makes claim for taxes in the amount of nearly \$4,000,000 on the transfer mentioned, and the state of Nevada makes claim for some \$48,000. The validity of both these claims is in contest and as yet undetermined. Such being the situation, the trustees named, when it came to fixing the inheritance taxes on the transfer under the California law, claimed that in case the claims of the United States and Nevada should be finally upheld, the amount of those claims as established should be deducted from the value of the stock transferred in order to obtain the value upon which the California tax should be computed. The claim of the state and the state comptroller, on the other hand, was that no such deduction should be made. The lower court sustained the contention of the trustees, and the order or judgment appealed from provides, among other things, for such deduction to the extent that the

validity of the claims of the United States and Nevada may be finally established. It is from this portion of the order and judgment that the appeal is taken.

We are, of course, not concerned here with the validity of the claims of the United States and Nevada. We are concerned only with the result upon the amount of tax due the state of California, in case those claims are valid and finally so established. For the purposes of discussion, then, we may assume their validity. It will also simplify somewhat the discussion of the primary question involved if we assume that it is not material that the transfer was made prior to Miller's death, and prior to the going into effect of both the Nevada and the United States tax acts. Our discussion will therefore, for the time being, be on the basis of a transfer by inheritance or will occurring upon Miller's death. It should also be noted that shortly after Miller's death the California law was amended so as to provide expressly that no deduction should be made because of the Federal tax. This amendment, however, very plainly cannot affect the question as to what was the law before its adoption, and that question must be determined as if the amendment had not been made.

The California act (Stat. 1911, p. 713) contains no provision as to how the principal upon which the tax is to be computed is to be ascertained other than that it is designated as the "clear market value" of the "beneficial interest" transferred, and that there are provisions which plainly imply that the decedent's debts and the commissions of executors are to be deducted to ascertain this "clear market value." In this connection it should be noted that this designation of the principal upon which the tax is to be computed is one common to the inheritance tax acts of many other states, and, in particular, is the designation in the acts under consideration, in most of the decisions from other states which we subsequently cite.

But while this is the designation in our act, and the only provisions for deductions are for the deduction of debts and executors' commissions, the plain purpose of the act was that the clear market value of the beneficial interest transferred should be its net clear value. This has been the construction given it in actual administration and by the courts (*Re Kennedy*, 157 Cal. 517, 29 L.R.A. (N.S.) 428, 108 Pac. 280; *Re Hite*, 159 Cal. 392, 32 L.R.A. (N.S.) 1167, 113 Pac. 1072, Ann. Cas. 1912C, 1014), and the deduction of expenses of administration, sums allowed by way of family allowance, and the value of property set aside as a family homestead, as well as of debts, has been sanctioned and has been commonly made. The primary question, or, rather, questions, in the present case, are, therefore: (1) In determining the net clear value of the beneficial interest transferred, should the Federal estate tax be deducted? and (2) for the same purpose should the Nevada inheritance tax on the stock of a Nevada corporation owned by a resident of this state at the time of his death be also deducted? These two questions are not the same, and we shall consider first that concerning the Federal tax.

The solution is found in the different natures of the two taxes, the California tax and the Federal tax. The California tax is a succession tax, a tax on the beneficial interest of each beneficiary or heir. If there be more than one beneficiary or heir there is a separate tax on the interest of each, computed on its net clear value, and chargeable against it. The provisions of the law are substantially the same as those of the previous Inheritance Tax Act of 1905 (Stat. 1905, p. 341), which was under consideration in *Re Kennedy*, previously referred to. The question there presented was whether a homestead set apart for the widow of the testator out of his estate, in the course of probate, should be deducted in order to determine the amount upon which she, as resid-

uary legatee, should pay the inheritance tax. It was held that it should be deducted because of the nature of the tax, the court saying at page 526 of 157 Cal.: "The provisions of our Tax Act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir. It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes, and never can be distributed to him."

The Federal tax under the Act of 1916, on the other hand, is not a succession tax, but an estate tax; not a tax on what comes to the beneficiaries or heirs, but upon what is left by the decedent. In this respect it differs from the legacy tax imposed by the United States War Revenue Act of 1898 (30 Stat. 448). The Act of 1916 entitles the tax an "estate tax," and in terms imposes it upon the net estate of the decedent as a unit. It is not apportioned among the various transferees, and bears no relation to the separate amounts which they are to receive. The distinction between a succession tax and an estate tax is a recognized distinction, and, so far as we are aware, it has been held without exception that the Federal tax under the Act of 1916 is of the latter character. It is not possible, in our judgment, to take any other reasonable view of it.

The nature of the Federal tax is discussed in *Roebing's Estate*, 89 N. J. Eq. 163, and it is said at page 166, 104 Atl. 296: "To be more precise, it is imposed upon the estate transferred by death, and not upon the succession resulting from death. The distinction is well defined and recognized in countries where both kinds of tax exist. The Federal tax resembles the probate duty of the

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Act of 1862, chapter 119 (12 Stat. at L. 483), which was payable by the executor out of the estate, while the legacy duty therein provided for (at page 485) was payable by the beneficiaries. The tax occupies the same field of death duty as does the 'estate tax' in England. By the Finance Act of 1894 an estate duty is levied upon the principal value of all property, real or personal, which passes on the death of a person, and is imposed upon the estate, and is payable by the executor as an administration expense. In addition to this tax, there are also a legacy tax, and a succession duty upon the realty, payable by the recipients. Speaking of the death duty, Mr. Hanson in his opening chapter (Hanson, *Death Duties*, 6th ed.) says: "The new duty imposed by the Finance Act 1894, and called estate duty, supersedes probate duty; but the key to the construction of the Finance Act 1894 and the amending act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the property in respect of which an interest ceased by reason of the death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty, which have no real connection with the subject."

See also to the same effect, *Corbin v. Townshend*, 92 Conn. 501, 103 Atl. 647; *Knight's Estate*, 261 Pa. 537, 104 Atl. 765; *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286; *State ex rel. Smith v. Probate Ct.* 139 Minn. 210, 166 N. W. 125; *People v. Bemis*, 68 Colo. 48, 189 Pac. 32; *State v. First Calumet Trust & Sav. Bank*, — Ind. App. —, 125 N. E. 200, and *Northern Trust Co. v. Lederer* (D. C.) 257 Fed. 812, affirmed in *Lederer v. Northern Trust Co.* — C. C. A. —, 262 Fed. 52.

The state tax, then, being a suc-

cession tax,—a tax upon what the transferee receives,—and the Federal tax being an estate tax,—a tax upon what the decedent leaves,—there would seem to be no escape from the conclusion that the Federal tax must be deducted in order to determine the amount upon which the state tax should be levied, since it is plain that what the transferee receives is only the portion of what the decedent left which remains after the Federal tax is taken. We might apply here the language from *Re Kennedy*, already quoted, that "it would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court [in this case by operation of law] to other purposes, and never can be distributed to him."

We might also say in the language of *People v. Pasfield*, supra, 284 Ill. 454, 120 N. E. 288: "The legatees and distributees cannot, in any sense, be held to have 'received' any part of the duty that is paid to the government by the executor or trustee or administrator as such estate tax, and there is no language in the act that will permit a construction that the duty is levied upon each share of the legatees or distributees of the decedent, as was given the Federal Act of 1898 by the court in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. The Federal Estate Tax Act of September 8, 1916, necessarily operated to lessen, by the amount of such tax, the clear value of the beneficial interest which passed to the heirs and legatees in the instant case, and prevented their receiving any part of that tax, and the ruling of the county court that the same should be deducted before computing the state tax was correct."

The identical question presented here as to whether the Federal tax

should or should not be deducted in computing a succession tax has been presented in a number of other jurisdictions, and the overwhelming weight of authority is that it should be deducted. It was so held in all of the cases we have cited above as to the nature of the Federal tax. The discussion of the question by many of them is full and convincing, and makes unnecessary here anything more than the rather brief discussion we have given to it.

We are cited to but three authorities as holding to the contrary. While one of them is not in point, the other two are, and it may not be amiss as to the latter to point out wherein we think they are in error. The case to which we have referred as not in point is *Re Sanford*, 188 Iowa, 833, 175 N. W. 506. It is not in point, for the reason that the Iowa statute, unlike ours, particularly specifies what should be deducted before computing the tax, and that nothing else should be deducted, and the Federal tax did not come within any of the deductions authorized. It is upon this peculiarity of the statute that the decision goes.

The two cases referred to which are in point are *Re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed in 222 N. Y. 540, 118 N. E. 1078, and *Re Bierstadt*, 178 App. Div. 836, 166 N. Y. Supp. 168, which may be considered as one, and *Week's Estate*, 169 Wis. 316, 172 N. W. 732. The New York case or cases go apparently upon the ground that the Federal tax is unconstitutional, and upon the authority of *Re Gihon*, 169 N. Y. 443, 62 N. E. 561. The question as to the constitutionality of the Federal tax is not presented here, and, as we have said, its validity must be assumed. As to the authority of *Re Gihon*, the two later New York decisions under discussion fail to recognize the difference between the Federal legacy tax under the law of 1898, which was involved in *Re Gihon*, and the Federal estate tax under the Law of 1916, which was involved in them.

The legacy tax of 1898 was a succession tax, as its name would indicate, and it is upon this fact that the decision in *Re Gihon* is rested. It is said: "In our judgment the vital error of this argument [the argument for the deduction of the Federal legacy tax] lies in the assumption that the 'taxes are primarily payable out of the estate.' The Federal tax is of exactly the same nature as the state tax—a tax not on property, but on succession; that is to say, a tax on the legatee for the privilege of succeeding to property."

The decision, therefore, cannot be considered as authority for not deducting an estate tax, and affords no justification for the later cases in so holding. On the contrary, the implication from it is that such a tax should be deducted.

As to the Wisconsin case, it proceeds solely upon the proposition that the statute makes no express provision for any deduction whatever. It recognizes the fact that this ground would forbid a deduction of any sort from the gross value of the estate left by the decedent, even a deduction of expenses of administration; and yet it also recognizes that it was the established practice in Wisconsin to make a deduction for expenses of administration, and, by expressly refusing to disturb that practice, confirms it. We cannot follow it to such inconsistent and irreconcilable results. It is the settled law of this state that the inheritance tax is imposed upon the net clear market value of what the transferee receives, and that to ascertain this the value of what he does not receive, in contemplation of law, must be deducted from the value of what the decedent left. The application of this principle plainly requires the deduction of the Federal estate tax.

As to the deduction of the Nevada tax, the question is quite different, and its correct answer by no means so certain. Very little attention is paid to it by counsel on either side, undoubtedly because of the small

amount of tax claimed as compared with the amount of tax claimed by the United States. But the Nevada tax, like our own, is a succession tax, a tax on what the transferee receives, and it is quite permissible to have two taxes on the same thing, and ordinarily, where such taxes are levied, neither is to be deducted in computing the other.

In support of their position, counsel for the trustees advance the reasoning and authority of *Corbin v. Townshend*, 92 Conn. 501, 103 Atl. 647, and *Van Beil's Estate*, 257 Pa. 155, 101 Atl. 316. That reasoning is that the tax of the foreign state "must be paid before the executor or administrator can reduce the [foreign] bonds or stock to possession. These cannot be transferred until the [foreign] state tax is paid, and the value of the security so transferred is reduced by the amount of the tax which the executor or administrator has had to pay." *Corbin v. Townshend*, *supra*. This reasoning is hardly sufficient. The stocks and bonds cannot, of course, be transferred until the tax is paid, and the administrator or executor must pay it. But this is true of the tax by the state of the decedent's domicile as well. The point is that while each tax must be paid, and paid by the administrator or executor, both are a tax on the same thing,—the interest of the transferee,—and both are chargeable against it and finally paid out of it. If the two taxes were levied under concurrent or equal authority, we would have little hesitation in holding that, without express provision to the contrary in the statute, neither should be deducted in computing the other. Such was the situation and ruling in *Re Gihon*, *supra*, where the two taxes involved were the Federal legacy tax under the Law of 1898 and the state succession tax. It is manifest that in such a case both the Federal government and the state have equal and concurrent authority, and no reason appears why the tax of one should be deducted in computing the tax of

the other. *Hooper v. Shaw*, 176 Mass. 190, 57 N. E. 361, holds to the contrary, but we fail to appreciate the reasons it advances for so doing.

But there is, we believe, a difference between two succession taxes, one Federal and one state, and two succession taxes, both state,—one imposed by the state having actual control over the subject-matter of the transfer, and the other imposed by the state of the domicile of the decedent. The two states do not have equal and concurrent authority in such a case. The authority of the state having actual control of the subject-matter, either because it is personal property within its limits, or because, as in this case, it is the stock of one of its corporations, is, of necessity, the superior. The state of the decedent's domicile can deal with the property only after the requirements of the state of its actual situs are satisfied. Putting it another way and concretely, the stock of Henry Miller in the Nevada corporation comes into his California estate, there to be administered upon and taxed, only after the requirements of Nevada are complied with, and the only thing over which California secures authority is what remains after Nevada has taken its tax. It would seem reasonable to say under such circumstances that, so far as California is concerned, the value of the interest transferred by death, or in contemplation of death, is the value of the corporate stock after the Nevada tax ^{-tax of sister state—deduction.} had been paid.

This, we believe, is the justification of *Corbin v. Townshend* and *Van Beil's Estate*, which hold that the foreign tax should be deducted. It is a reason hinted at in both, and may in fact be the thought which underlies them, too briefly expressed to be entirely clear to us. *Re Penfold*, 216 N. Y. 171, 110 N. E. 499, Ann. Cas. 1916A, 783, is a decision to the contrary, but it proceeds solely on the authority of *Re Gihon*, which, because of the dis-

inction stated, we do not think in point. At any rate, for the reasons given, we are ready to follow the authority of *Corbin v. Townshend* and *Van Beil's Estate*, and to hold in this case that the Nevada tax should be deducted.

There remains only the question as to whether or not the conclusion so reached as to both the Federal and the Nevada tax is affected by the circumstances that the particular transfer under consideration was not made by death, but inter vivos and in contemplation of death only, and that, when the transfer was made, neither the Federal nor the Nevada act was in force. It is the settled law in this state, as well as in other jurisdictions, that when a transfer is made inter vivos its liability for tax is determined by the law then in effect, even though the tax be not payable until the death of the transferor. *Hunt v. Wicht*, 174 Cal. 205, L.R.A.1917C, 961, 162 Pac. 639; *Re Felton*, 176 Cal. 663, 169 Pac. 392; *Nickel v. State*, 179 Cal. 126, 175 Pac. 641.

. With this proposition as a premise, counsel for the state argue that, upon the making of the transfer here involved, there vested in the state the right to the tax imposed by the statute then in force, and that this right cannot be divested by a subsequent statute of another jurisdiction. This we may concede; but, conceding it, the question still remains as to the method of computing the amount of the tax, the right to which so vested. This is the real question in the case. It is evident that, if the tax is by our statute to be computed on the value of the property as of the date of transfer, then to permit this value to be reduced by the amount of taxes imposed subsequently by other sovereignties would be to reduce the tax from what our statute provides shall be collected. On the other hand, if our statute provides that the valuation is to be made as of the date of death of the transferor, then the valuation which our own statute calls for is one that must take into

account valid burdens then existing upon the beneficial interests transferred, and which have the effect of taking from the beneficiaries a portion of those interests, and it is wholly immaterial that such burdens were or were not imposed at or prior to the time of transfer. They exist at the time of death, when the valuation is to be made, and reduce the value as of that time, and it is this value which our statute calls for. The question, therefore, presents itself as to whether, under our own statute, the tax in this case is to be computed upon the value of the beneficial interests transferred as of the date of transfer, or as of the date of the death of Miller, the transferor.

When the dates of transfer and death are the same,—that is, in the usual case, where the transfer is by death,—the question does not arise, and the statute plainly contemplates a valuation as of the joint date of transfer and death. There is no declaration in the statute as to what shall be the rule when the dates are not the same; i. e., when a taxable transfer is made prior to the death of the transferor. The statute, however, does contain a provision which closely approaches a declaration that the valuation of future, contingent, or limited estates, created by the transfer, shall be as of the date of death. Such estates were created by the transfer here involved. The beneficial interests under the trust were a life estate in Miller, with remainder over to his daughter and her husband for their lives, and to the survivor of them for his or her life, with remainder over in fee. The provision of the statute referred to is the portion of § 5 reading (the italics being ours): "When any *grant, gift, legacy, devise or succession* upon which a tax is imposed by section one of this act shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the en-

tire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised *immediately after the death of the decedent*, and the market value thereof determined, in the manner provided in section fifteen of this act. . . . " Stat. 1911, p. 713.

This provision is plainly one for the valuation of future, contingent, or limited estates. It appropriately requires an appraisal, both of the property as a whole out of which such estates are carved, and of the particular estates into which it is carved. Grammatically, the "market value thereof," as those words are used, would refer to the market value of the property as a whole, but a consideration of the purpose of the provision, and of the character of the estates with which it is dealing, makes it evident that it is the market values of the particular estates which are to be determined in the manner provided by § 15. It must be computed, and the method is these values upon which the tax of their ascertainment is what the section is seeking to provide for. Section 15, in turn, appropriately provides that the value of future, contingent, or limited estates is to be determined in accordance with the mortality tables.

The provision of § 5, particularly significant upon the point under discussion, is that the appraisal in such cases, whether the taxable transfer be by death or inter vivos, be made "immediately after the death of the decedent." This, of course, is literally a provision as to the time of actually making the appraisal, not as to the time as of which it shall be made. It is also true that it is possible, when a transfer has been made preceding the death of the transferrer, to appraise estates dependent upon his death as of the date of transfer and not as of the date of actual death although that death has already taken place. For example, in this case, it would be possible to appraise the life estate

of Miller's daughter and her husband, and of the subsequent remainder in fee, by going back to the date of transfer, disregarding the actual date of Miller's death, and taking in place of it the date of his probable death, according to the mortality tables, and upon this basis computing the value of the life estate which he provided for himself, and of the life estates and the remainder which were to follow. But such method would not be a natural or reasonable one. At the time when the statute requires the appraisal to be made, the death upon which the estates to be valued depend has actually occurred, and the natural and reasonable method of computing their value would be to take the actual date of death, rather than one determined by mortality tables, which might be very different, and the use of which would produce a correspondingly different result from the existing and known actuality. We think it fairly certain, therefore, that when the statute provides that in such cases as the present the appraisal is to be made immediately after the death of the transferrer, it contemplates and requires that the appraisal be on the basis of the actual date of his death, and therefore, of necessity, as of that date.

We should, perhaps, say that the conclusion so reached, based, as it is, on the particular provisions of § 5 as to the appraisal of future, contingent, or limited estates, does not involve a determination of the question as to whether it is the date of transfer, or the date of death of the transferrer, as of which the appraisal should be made in cases of taxable transfers inter vivos which do not create estates of that particular character. That question is not involved here, and should not be determined. It is worthy of note, however, that in a case recently argued before us, where the question is involved, the position of the state, contrary to that which it must necessarily take here, was that the property was to be valued as of the

date of death of the transferrer, and also that it was conceded on behalf of the transferee, who was contending that the valuation there should be as of the date of transfer, that if the estates created had been future, limited, or contingent estates, § 5 would require their appraisal as of the date of the death of the transferrer.

Since, then, the appraisal in this case must be made under our statute as of the date of Miller's death, and at that time the Federal and Nevada statutes had gone into effect, and the net clear value of the beneficial interests transferred had been re-

duced by the amounts of any valid taxes under those statutes, it is this ^{-transfer inter vivos-} reduced value which

our statute prescribes shall be taken as the basis of computation. It follows that it is not material that the transfer was made before the going into effect of the Federal and Nevada statutes, and that the conclusion reached upon a discussion of the case as one of a transfer by death remains unaffected.

Judgment and order affirmed.

We concur: Angellotti, Ch. J.; Shaw, J.; Sloane, J.; Wilbur, J.; Lawlor, J.; Lennon, J.

ANNOTATION.

Deduction of Federal estate tax before computing state tax.

The earlier cases on this question are discussed in the annotation in 7 A.L.R., at page 714.

The decisions in the reported case (*RE MILLER*, ante, 694), and *OLD COLONY TRUST CO. v. BURRELL* (reported herewith) ante, 689, are in accord with the view, sustained by the majority of courts, that the amount paid the Federal government for inheritance or estate tax is an expense of administration which should be deducted from the estate, and the state tax computed on the balance. This is the view taken also in *People v. Bemis* (1920) 68 Colo. 48, 189 Pac. 32, and *Bugbee v. Roebeling* (1920) — N. J. —, 111 Atl. 29, decided since the date of the earlier note and *RE INMAN* (reported herewith) ante, 675.

On the contrary in *Re Wittmann* (1920) 112 Misc. 168, 182 N. Y. Supp. 535, and *Re Canda* (1921) 114 Misc. 161, 185 N. Y. Supp. 908, affirmed on this point in (1921) 197 App. Div. 597, 189 N. Y. Supp. 917, it was held, in

accord with the New York doctrine as shown in the earlier note, that the Federal inheritance tax is not deductible as an administration expense. The estate of a nonresident was involved in *Re Wittmann*, but the court states that the same rule is applicable to the estate of a nonresident as is applicable in the case of a resident, in this regard. That the Federal tax is not deductible before computing the state tax is the view adopted in Louisiana (see *RE GHEENS* (reported herewith) ante, 685), and in Rhode Island (*Hazard v. Bliss* (1921) — R. I. —, 113 Atl. 469).

In *Re Sanford* (1919) 188 Iowa, 833, 175 N. W. 506, the Federal inheritance tax was held not deductible on the express ground that the deductions enumerated in the Iowa statute did not include the Federal inheritance tax. As to deduction of state estate or succession tax before Federal tax, see *New York Trust Co. v. Eisner*, ante, 660. W. A. E.

PEOPLE OF THE STATE OF ILLINOIS
v.

LUCIUS J. LOVE, Plff. in Err.

Illinois Supreme Court — June 22, 1921.

(298 Ill. 304, 131 N. E. 809.)

Constitutional law — discrimination against chiropractic.

1. Requiring four years of study to obtain a license to practise chiropractic, when licenses are issued to members of other schools of healing upon graduation from a school in good standing, regardless of the prescribed term of study, is unconstitutional.

[See note on this question beginning on page 709.]

Physician and surgeon — invalidity of prescription of qualifications for license — effect on penalty.

2. No penalty can be assessed against one practising chiropractic without a license where the statute fixing the qualifications necessary to obtain a license is invalid.

— right to exact learning as condition of practice.

3. As a condition to the practice of healing, the state may exact a certain degree of skill and learning.

[See 21 R. C. L. 354.]

Constitutional law — profession as property within constitutional protection.

4. One's profession or occupation is property within the meaning of the constitutional provision as to due process of law, and is involved in the right to liberty and the pursuit of happiness.

[See 6 R. C. L. 266.]

Trial — constitutionality of statute — question for court.

5. Whether or not a statute is constitutional is never a question for the jury.

Physician and surgeon — application for license — chiropractic — recommendation by medical men.

6. Requiring an applicant for a license to practise chiropractic, to accompany his application with letters of recommendation as to his moral and professional character from reputable medical men or osteopaths, is unreasonable.

[See 21 R. C. L. 357.]

Courts — power to review rules of board of health.

7. Courts may review the rules and regulations of the board of health with respect to licensing applicants for leave to practise the healing art, to determine whether they are reasonable, unreasonable, or discriminatory.

[See 12 R. C. L. 1273.]

ERROR to the Vermilion County Court (Graham, J.) to review a judgment convicting defendant of treating human ailments without license in alleged violation of the Medical Practice Act. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Acton & Acton and Love & Kilgore, for plaintiff in error:

The right to labor and enjoy the rewards thereof is a natural right which may not be unreasonably interfered with by legislation.

1 Bl. Com. p. 124; Josma v. Western Steel Car & Foundry Co. 249 Ill. 508, 94 N. E. 945; Rhinehart v. Schuyler, 7 Ill. 473; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136.

The legislative power in prescribing conditions to the right to practise in treating ailments is limited by the condition that it must be reasonable.

30 Cyc. 1548; State v. Vandersluis, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789; State v. Gardner, supra; People v. Kane, 288 Ill. 235, 123 N. E. 265.

The legislature cannot pass special laws, or laws discriminating against citizens.

Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Millett v. People, 117 Ill. 294, 57

Am. Rep. 869, 7 N. E. 631; *Soon Hing v. Crowley*, 113 U. S. 705, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *State v. Gravett*, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325.

The jury had the right to say whether the law is constitutional.

Schnier v. People, 23 Ill. 29; *People v. Zurek*, 277 Ill. 624, 115 N. E. 644.

The law in question is unconstitutional.

People v. Kane, 288 Ill. 235, 123 N. E. 265; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1112.

Messrs. Edward J. Brundage, Attorney General, Floyd E. Britton, Assistant Attorney General, John H. Lewman, and Ray Carter, for the People.

The Medical Practice Act of Illinois, which requires a license of one practising the business of a chiropractor, is constitutional.

People v. Kane, 288 Ill. 235, 123 N. E. 265; *People v. Gordon*, 194 Ill. 560, 88 Am. St. Rep. 165, 62 N. E. 858, 15 Am. Crim. Rep. 540.

The exercise of the police powers of the state is nowhere more proper and necessary than in regard to the practice of medicine.

Williams v. People, 121 Ill. 84, 11 N. E. 881; *People v. Kane*, 288 Ill. 235, 123 N. E. 265; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State v. Knowles*, 90 Md. 646, 49 L.R.A. 695, 45 Atl. 877; *Little v. State*, 60 Neb. 749, 51 L.R.A. 717, 84 N. W. 248, 15 Am. Crim. Rep. 549; *Allopathic State Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809.

The legislature possesses full power to surround chiropractic with restrictions similar to those touching medicine, surgery or osteopathy.

People v. Kane, 288 Ill. 235, 123 N. E. 265; *State v. Johnson*, 84 Kan. 411, 41 L.R.A. (N.S.) 539, 114 Pac. 390; *State v. Smith*, 233 Mo. 242, 33 L.R.A. (N.S.) 179, 135 S. W. 465.

Stringency of qualification is not ground for holding a statute unconstitutional.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State v. Knowles*, 90 Md. 646, 49 L.R.A. 695, 45 Atl. 877; *Little v. State*, 60 Neb. 749, 51 L.R.A. 717, 84 N. W. 248, 15 Am. Crim. Rep. 549.

Whether the rules and regulations of the department of registration and education are uniform and reasonable,

and in accordance with the law, is a question for the court.

Kettles v. People, 221 Ill. 221, 77 N. E. 472; *People v. Kane*, 288 Ill. 235, 123 N. E. 265; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995.

The constitutionality of a law is a judicial question, and not a question for the jury.

People v. Kane, 288 Ill. 235, 123 N. E. 265; *People v. Schenck*, 257 Ill. 384, 44 L.R.A. (N.S.) 46, 100 N. E. 994, Ann. Cas. 1914A, 1129; *State v. Main*, 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. Rep. 35, 37 Atl. 80; *Franklin v. State*, 12 Md. 236; *Jurelich v. People*, 223 Ill. 484, 79 N. E. 181.

Duncan, J., delivered the opinion of the court:

Plaintiff in error, Lucius J. Love, graduated April 1, 1920, from the Palmer School of Chiropractic, located at Davenport, Iowa, and incorporated May 24, 1907. That institution has a full two-year course prescribed, which covers anatomy, physiology, hygiene, symptomatology, histology, chiropractic analysis, chiropractic nerve-tracing and palpation, and other studies. He took the full two-year course in that institution prior to his graduation. There is no chiropractic school or college in this country that has a four-year course of study, and so far as this record shows no other school or college that has more than a two-year course. Plaintiff in error's previous training for his profession consisted of a common-school education and also of more than three years' high school work. He and his wife, who is also a graduate of the same chiropractic school, opened an office May 3, 1920, in Danville, Illinois, and practised as chiropractors for the treatment of human ailments without the use of drugs and surgery. Previous to beginning his practice he made application to the department of registration and education to ascertain what was necessary for him to do to be examined and licensed to practise his profession. He received from the superintendent of registration instructions which the law and that department prescribe as prerequisite to being admitted to such an

examination. Among such instructions received by him was a rule or regulation of that department in this language: "This application [referring to his application for examination and license] must be accompanied by letters of recommendation with regard to the moral and professional character of the applicant from at least two reputable medical men or osteopathic physicians who live in Illinois, or, if from nonresidents of the state, such letters must be indorsed by reputable medical men or osteopathic physicians of Illinois."

Being advised that the requirements of the Illinois law to obtain his license were void because unreasonable, discriminatory, and unconstitutional, he began practice as a chiropractor and treated a number of patients for various ills according to the methods of chiropractors. He was convicted and sentenced to pay a fine of \$50 and costs of prosecution in the county court of Vermilion county on October 22, 1920, on an indictment charging him with treating human ailments without the use of drugs or medicine and without operative surgery and without a license, in violation of § 22 of the Medical Practice Act, approved June 25, 1917. He has prosecuted this writ of error direct to this court, the constitutionality of a statute being involved.

Section 22 of the Medical Practice Act provides that any person who, not being then licensed to practise to treat human ailments without the use of drugs or medicines and without operative surgery, shall treat human ailments by such methods, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$200, or confined in the county jail not more than one year, or punished by both such fine and imprisonment, in the discretion of the court. There is no question of the violation of said section by plaintiff in error. His main defense in this case is that

16 A.L.R.—45.

§ 5 of the act, which fixes the minimum standards of professional education required to practise medicine and surgery in all their branches and for treating human ailments without the use of drugs or medicine or operative surgery is invalid because unreasonable and discriminatory, violative of § 1 of article 2 of the Constitution of Illinois, and also of the due process clause of the 14th Amendment to the Federal Constitution. That section, so far as material to the issues in this case, provides as follows:

"Sec. 5. Minimum standards of professional education are fixed as follows:

"1. For the practice of medicine and surgery in all their branches:

"(a) For an applicant, who is a graduate of a medical college prior to July 1, 1922, that he is a graduate of a medical college deemed to be reputable and in good standing at the time of his graduation and completed a course of study in such medical college in accordance with the laws to regulate the practice of medicine and the rules of the state board of health established and in force at the time of graduation. . . .

"2. For the practice of any system or method of treating human ailments without the use of drugs or medicines, and without operative surgery; that the applicant is a graduate of a professional school, college or institution teaching the system of treating human ailments for which the applicant desires to be licensed, which requires as a prerequisite to graduation four years' course of instruction, the time elapsing between the beginning of the first year and the ending of the last, or fourth year to be not less than forty months, and which is deemed to be reputable and in good standing."

Laws 1917, p. 580.

If the section fixing the requisite qualifications of plaintiff in error to obtain a license to practise his pro-

Physician and surgeon—invalidity of prescription of qualifications for license—effect on penalty.

fession is invalid, there can be no penalty under § 22 imposed against him under this indictment. This is so because §§ 2, 3, and 4 of the act provide, in substance, that no person shall practise medicine and surgery or any of the branches thereof or any system or method of treating human ailments, without the use of drugs or medicine or surgery, without a license so to do; and no person shall, except as otherwise provided in the act, hereafter be licensed to practise medicine, or any other system or method of treating human ailments, unless he shall pass a satisfactory examination conducted by the department of registration and education, and shall make application, submit evidence verified by oath and satisfactory to the department that he is twenty-one years of age or over, of good moral character, and has the professional and preliminary education required by the act. If he has not the professional qualifications required by the statute, he cannot, under said sections, even be admitted to an examination; and that was the substance of the information plaintiff in error received when he applied to the department of registration and education for examination.

Chiropractic is a drugless method of treating ailments of the human body, chiefly by manipulations of the spinal column with the hand. The theory of this system, as explained in this record, is that, when the spinal column is in all its parts in place and performing its proper functions, and the nerves running therefrom to the various organs and parts of the body are undisturbed and performing their functions, many, but not all, of the ills to which the human body is susceptible, do not and cannot take place. To state it differently and more understandingly, the theory of this science is that, if any of the vertebrae of the spine are seriously affected or partially dislocated, such

affections or subluxations generally cause disturbances in various organs and parts of the body by reason of the fact that the nerves coming from the part of the spinal column affected or partially dislocated are impinged upon or pinched, and cannot by reason thereof perform their proper functions. It is claimed by the advocates of this system that these disturbances or bodily ills can be, and are many times, completely cured by the chiropractor by manipulating the spine with the hand and thereby removing the seat of the trouble. It is not claimed that all ills and diseases of the human body can be cured by this science or relieved, but that such ills and diseases as are caused by injuries and subluxations of the spinal column may be thus relieved and cured.

It is not the province of the courts to extol or belittle chiropractic, osteopathy, or medicine and surgery. They are all now established as useful professions, and as time has progressed it has been thoroughly demonstrated that all of them have accomplished, and are daily accomplishing, the relief and cure of human ailments. Constantly comes proof before the courts that chiropractic, which apparently is a limited practice of osteopathy, does enable the chiropractor to relieve and cure many of the ailments of human beings, and that the practice of this science is in no way deleterious to the human body. That is the proof in this record, and such is the proof that has been made in many other cases that have been reviewed by courts of last resort. *Medical Examiners v. Freenor*, 47 Utah, 430, 154 Pac. 941, Ann. Cas. 1917E, 1156; *State v. Smith*, 233 Mo. 242, 33 L.R.A. (N.S.) 179, 135 S. W. 465; *State v. Johnson*, 84 Kan. 411, 41 L.R.A. (N.S.) 539, 114 Pac. 390; *Norman v. Hastings*, — Tenn. —, 231 S. W. —, not yet [officially] reported. In the last case cited, as shown by a certified copy of the opinion filed in this case, the supreme court of Tennessee said of

chiropractic: "This science of healing is well developed and recognized in many jurisdictions, and many believe in its efficacy."

The court further said that chiropractors cannot be classed along with charlatans and fakers, and that it is not suggested that the practice of the science is in any way deleterious to the human body. The statute now in question recognizes such science as a useful and legal method of treating human ailments, and prescribes what are deemed the necessary professional education and other qualifications to practise such method of healing. We must therefore in this consideration treat chiropractic as a useful and lawful business, science, or profession, and not as one dangerous or unlawful in its exercise, and subject to abatement or destruction by unreasonable and arbitrary requirements, but as a profession or business that may be regulated by provisions prescribing reasonable requirements of those who apply to practise that profession, without unlawful or unjust discrimination.

As one means of protecting the community against the consequences of ignorance and incapacity, the state may exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; its possession being generally ascertained upon an examination of the parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. This exercise of the police power of the legislature is particularly necessary and permissible in

—right to exact learning as condition of practice.

the profession of medicine and surgery and in the profession of the practice of the law. 6 R. C. L. 220. The right to follow either one of these professions is one of the fundamental rights of citizenship. A person's business, profession, or

occupation is at the same time "property," within the meaning of the constitutional provision as to due process of law, and is also included in the right to liberty and the pursuit of happiness. Butcher's

Constitutional law—profession as property within constitutional protection.

Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

The power of the legislature to impose restrictions on a lawful calling or profession must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. It is the right and power of the legislature to make reasonable requirements with reference to examination and qualifications to practise medicine, such as will keep parties who practise this profession abreast with the progress of the times. Courts can only interfere when such provisions and laws become arbitrary and unreasonable, and not in a spirit of advancing the science and benefiting and protecting the people among whom it is practised. In this case it was a question for the court, and not for the jury, to determine the validity of the statute. The question whether or not a statute is constitutional is never

a question for the jury. 23 Am. & Eng. Enc. Law, 2d ed. 552. Courts hesitate to declare an act unconstitutional, and it must be clearly so to justify the courts in doing it; but where a statute violates the due process clause of the 14th Amendment, or does not impose upon all persons of like age, sex, and condition the same restrictions in their business or profession, it is the duty of the court to declare the act void.

Trial—constitutionality of statute—question for court.

The supreme court of Ohio, in the case of State v. Gravett, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325, declared a

legislative enactment void which discriminated against osteopaths by requiring them to hold diplomas from a college which required four years of study as a condition to their obtaining limited certificates, which would not permit them to prescribe drugs or perform surgery, and which did not require such time and study from those contemplating the regular practice as a condition to their obtaining unlimited certificates for the practice of medicine and surgery. For like reasons we must hold that § 5 of the statute now in question is void, because it unlawfully

Constitutional law—discrimination against chiropractic.

and unjustly discriminates against one class of physicians, or those desiring to become physicians, by requiring that, before they can practise treating human ailments without the use of drugs, medicine, or operative surgery, they must be graduates of a professional school, college, or institution teaching that system which requires as a prerequisite for graduation a four-year course of instruction, while for one who desires to practise medicine and surgery in all their branches the only professional education required is that he be a graduate of a medical college prior to July 1, 1922, deemed to be reputable and in good standing at the time of his graduation, and has completed a course of study in such college in accordance with the law and the rules of the state board of health established and in force at the time of his graduation. It is sufficient under this section if the medical college was in good standing and reputable at the time of his graduation, no matter whether it prescribed a two-year, three-year, or four-year course.

We are not prepared to hold that requiring four years' professional education before a chiropractor or osteopath is allowed to practise his profession is unreasonable or unjust. Such a question is a question, in the first instance, for the legislature, and the legislature is presumed

to have investigated the question for itself in ascertaining what is best for the good of the profession and for the people among whom such profession is practised; but the legislature cannot discriminate against chiropractors or osteopaths as to the time of professional education required, where no reason can be perceived for such discrimination. The act itself discloses clearly that there is an unjust discrimination against chiropractors and osteopaths. Section 11 of the act provides that the examination of those who desire to practise under the limited certificate shall be of the same character as that required of those who desire to practise medicine and surgery in all their branches, excepting therefrom materia medica, therapeutics, surgery, obstetrics, and theory and practice. Surely, then, there is no reason for providing that the limited professional education of one class of physicians shall be greater or for a longer time than for those practising medicine and surgery in all their branches.

The regulation of the department of registration and education, to the effect that plaintiff in error and his class of physicians are required to accompany their application by letters of recommendation with regard to their moral and professional character from at least two reputable medical men or osteopathic physicians, is arbitrary and unreasonable. The prejudice existing against chiropractors by medical men and osteopaths is known to be intense and in many cases very unreasonable. For a chiropractor to have to conform to such a regulation would in all probability result in his being excluded from any examination whatever by reason of his inability to obtain such a certificate, although he might be able to establish a good moral character and a good professional standing by good, competent men in his own or other professions or callings outside of the medical profession.

Physician and surgeon—application for license—chiropractic—recommendation by medical men.

Such rules and regulations of the board are subject to review by the courts, to determine whether or not they are reasonable or unreasonable and discriminatory.

Courts—power to review rules of board of health.

People v. Kane, 288 Ill. 235, 123 N. E. 265.

Other questions are presented in

the record, on the admission of evidence and in the giving of and refusing instructions, that we do not deem necessary to consider. The court should have held the act in question unconstitutional, and have so instructed the jury.

The judgment of the County Court is reversed.

ANNOTATION.

Constitutionality of statute prescribing conditions of practising medicine or surgery as affected by question of discrimination against particular school or method.

I. General rule, 709.

II. Application of rule, 709.

III. Limitation of rule, 711.

I. General rule.

In the exercise of the power to regulate the treatment of disease, regulations need not be uniform with respect to all methods and systems of practice, but distinctions may be made and schools or methods of practice may be exempted from regulation or subjected to peculiar regulations so long as the discrimination is not arbitrary or unreasonable.

United States.—Crane v. Johnson (1917) 242 U. S. 339, 61 L. ed. 350, 37 Sup. Ct. Rep. 176, Ann. Cas. 1917B, 796.

California.—Ex parte Gerino (1904) 143 Cal. 412, 66 L.R.A. 249, 77 Pac. 166; People v. Jordan (1916) 172 Cal. 391, 156 Pac. 451; Ex parte Bohannon (1910) 14 Cal. App. 321, 111 Pac. 1039.

Louisiana.—Allopathic State Medical Examiners v. Fowler (1898) 50 La. Ann. 1358, 24 So. 809.

Maryland.—Keiningham v. Blake (1919) 135 Md. 320, 8 A.L.R. 1066, 109 Atl. 65.

Montana.—State v. Dodd (1915) 51 Mont. 100, 149 Pac. 481.

Ohio.—State v. Marble (1905) 72 Ohio St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 Ann. Cas. 898; Shaw v. State (1919) 11 Ohio App. 486.

Texas.—Germany v. State (1911) 62 Tex. Crim. Rep. 276, 137 S. W. 130, Ann. Cas. 1918C, 477.

II. Application of rule.

Exception of certain schools or methods.

It has been held that a statute providing that every person wishing to practise medicine in the state shall first get a certificate from the state board of medical examiners, but expressly excepting a legally licensed osteopathic practitioner, is not unconstitutional as denying equal protection of the law, as osteopaths are not authorized to practise medicine or surgery within the meaning of the statute regulating the practice of medicine and surgery, but are confined in their treatment to the use of the hands or mechanical appliances. State v. Dodd (1915) 51 Mont. 100, 149 Pac. 481.

A statute providing that all persons who attempt to practise or who hold themselves out as practising any system or mode of treating the sick without a license shall be guilty of a misdemeanor, but expressly exempting persons healing by means of prayer, has been held to be constitutional, and not discriminatory as against other drugless healers. People v. Jordan (1916) 172 Cal. 391, 156 Pac. 451.

So, in Ex parte Bohannon (1910) 14 Cal. App. 321, 111 Pac. 1039, a statute enacted to regulate the practice of medicine and surgery, and excepting any kind of treatment by prayer, was held to be constitutional. The court said: "If prayer can be regarded as practising medicine and as an immunity, the act allows every person, man,

woman, or child such immunity and the right to pray for the sick and afflicted, and that is the only way that disease can be treated by prayer. Whether such treatment avails anything or not is not for us to say; but the privilege of practising such treatment or such supplication is granted and allowed to all."

Likewise it has been held that a statute which provides that applicants desiring to practise medicine or drugless healing must first pursue a prescribed course of study and pass an examination, but which expressly exempts from the provisions any kind of treatment by prayer, is not unconstitutional as discriminating against a person who does not heal by prayer but instead heals by using faith, hope, and a process of mental suggestions and mental adaptation. *Crane v. Johnson* (1917) 242 U. S. 339, 61 L. ed. 350, 37 Sup. Ct. Rep. 176, Ann. Cas. 1917B, 796.

Special regulation of certain schools or methods.

In *Shaw v. State* (1919) 11 Ohio App. 486, the statute (General Code, §§ 1274-1 to 1274-7) regulating the practice of limited branches of medicine was attacked as unreasonably discriminating between those desiring to practise limited branches of medicine and the osteopaths, in that it required an examination in more subjects of those desiring to practise the so-called limited branches than was required of the osteopaths in another statute. The court held that osteopathy was not regarded by the statute as one of the limited branches of medicine and surgery, and that therefore the statute was not unconstitutional as discriminating in favor of those desiring to practise osteopathy.

A statute excluding osteopaths from the classification of physicians, by prohibiting them from giving birth and death certificates, has been held to be constitutional. *Keiningham v. Blake* (1919) 135 Md. 320, 8 A.L.R. 1066, 109 Atl. 65.

Requiring qualifications inconsistent with school or method.

In *State v. Marble* (1905) 72 Ohio

St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 Ann. Cas. 898, a statute which required every person, before entering on the practice of medicine or surgery, to pass a certain examination and to obtain a certificate from the board of medical registration and examination, was held not to be unconstitutional as discriminating against the Christian Science method of healing, although it did not prescribe any certain examination for the Christian Scientists, but did prescribe the qualifications under which osteopaths might practice. The court said: "We fail to find anything in the act that discriminates against Christian Science. It does not provide for a special examination and limited certificate for the Christian Science practitioner, but he may obtain a certificate to practise medicine upon the same conditions as any other person, and there is nothing in the act requiring him to use the knowledge after he acquires it. . . . To admit that a practitioner may determine what treatment he will give for the cure of disease, and that the state may examine him only respecting such treatment, would be to defeat the purpose of the statute and to make effective legislation of this character impossible."

A similar rule was applied in *Germany v. State* (1911) 62 Tex. Crim. Rep. 276, 137 S. W. 130, Ann. Cas. 1913C, 477, wherein a statute which required a person to pass an examination in certain medical subjects, and to obtain a certificate from the state medical board before entering on the practice of medicine was attacked as discriminating against the practice of massage treatment in that it failed to provide a board to which one could apply for a license to practise such treatment. It was held that the statute was not discriminatory, as the state medical board had authority to grant a certificate for such treatment. The court added: "We know of no higher duty a government has than to protect the life and health of its citizens, and, if experience has shown that no man should be permitted to treat disease who has not a knowledge

of the subjects named in the Medical Practice Act, the legislature not only had the power, but it was its duty, to pass a law protecting the citizens of the state. The law does not attempt to say how one shall treat disease. This is left to the sound judgment of the practitioner. All it says is that he must have a knowledge of certain given subjects before he shall undertake to practise. If the defendant desires to treat those who are sick, let him demonstrate he has a knowledge of the subjects named in the law, and he can treat disease in the manner that is by him deemed best."

Requiring examination by practitioners of another school.

In *Allopathic State Medical Examiners v. Fowler* (1898) 50 La. Ann. 1358, 24 So. 809, it appeared that an act was passed which created a board of medical examiners to pass on the qualifications of applicants for admission to the medical profession. The examiners were to be appointed from names of physicians to be furnished by the allopathic and homeopathic medical societies. The defendant was sought to be enjoined by the examiners from practising the profession, not having submitted to an examination and therefore not being in possession of a certificate. He defended on the ground that the act was unconstitutional as discriminating against the eclectic school of medicine. It was held that as the act merely prescribed that the board of examiners should be composed of physicians appointed from the homeopathic and allopathic societies, it in no way discriminated against the eclectic school of medicine and therefore was not unconstitutional. A like conclusion was reached under a similar state of facts in *Ex parte Gerino* (1904) 143 Cal. 412, 66 L.R.A. 249, 77 Pac. 166, wherein it also ap-

peared that a statute which provided that an applicant to practise medicine should present a diploma from a school recognized by the Association of American Medical Colleges was sought to be held unconstitutional because the association was composed of colleges teaching the allopathic system of medicine, and was therefore discriminatory against all other schools of medicine. In holding the statute to be constitutional the court said: "Whether or not the Association of American Medical Colleges is composed of those only which teach the allopathic branch of that profession, we cannot say; but, admitting it to be so, we cannot say that there is in this provision of the law, thus understood, an arbitrary or unjust discrimination against other schools. Surely they would not claim the right to have their adherents admitted to practise the profession upon a less degree of proficiency in the preparatory studies than is required of those in the regular school."

III. Limitation of rule.

A statute which unreasonably discriminates between methods of practice in the treatment of disease is unconstitutional. Thus, a statute which provides that an applicant, to be entitled to a certificate to practise osteopathy, shall have a diploma from a college which requires four years of study, but which requires no definite time of study of those desiring to practise general medicine, is discriminatory as to those desiring to practise osteopathy and in contravention of the 14th Amendment to the Constitution of the United States. *State v. Gravett* (1901) 65 Ohio St. 289, 87 Am. St. Rep. 605, 55 L.R.A. 791, 62 N. E. 325. And see the reported case (*PEOPLE v. LOVE*, ante, 708). L. W. B.

F. L. MAYTAG, Plff. in Err.,
v.
F. I. CUMMINS.

United States Circuit Court of Appeals, Eighth Circuit—July 8, 1919.

(171 C. C. A. 110, 260 Fed. 74.)

Slander — liability of slanderer for repetition.

1. The injury caused by repetition of a slander is not the natural and probable consequence of the utterance of the slander so as to render the slanderer liable for the repetition.

[See note on this question beginning on page 726.]

— repetition — liability.

2. The repetition of a slander renders one liable for the damages thereby inflicted upon the person slandered.

[See 17 R. C. L. 319.]

Evidence — of repetition of slander.

3. In an action to recover damages for slander, evidence of voluntary and unauthorized repetition thereof by strangers, and of current reports and rumors thereof, is not admissible.

[See 17 R. C. L. 434.]

Appeal — admission of evidence subsequently withdrawn — new trial.

4. A new trial should be granted for the erroneous admission of evidence which is subsequently withdrawn from the jury, if the reviewing court perceives from an examination of the record that it made such a strong impression upon the minds of the jurors that subsequent withdrawal probably failed to eradicate its injurious effect.

[See 20 R. C. L. 267.]

(Stone, C. J., dissents in part.)

ERROR to the District Court of the United States for the District of South Dakota (Elliott, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for alleged slander. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Sanborn, Carland, and Stone, Circuit Judges.

Messrs. Frank R. Aikens, Harold E. Judge, and Charles P. Bates, for plaintiff in error:

Defendant because of the admission in evidence of the current reports, notwithstanding the subsequent action of the court in instructing the jury to disregard such testimony, was seriously prejudiced and prevented from having a fair and impartial trial.

McBride v. Ledoux, 111 La. 398, 100 Am. St. Rep. 491, 35 So. 615; Elmer v. Fessenden, 151 Mass. 359, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; Bassell v. Elmore, 48 N. Y. 564; Hastings v. Stetson, 126 Mass. 329, 30 Am. Rep. 683; Carpenter v. Ashley, 148 Cal. 422, 83 Pac. 444, 7 Ann. Cas. 601; Victorian R. Comrs. v. Coultas, 8 Eng. Rul. Cas. 412, note; Burt v. Advertiser Newspaper Co. 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1; Zurawski v. Reichmann, 116 Iowa, 388,

90 N. W. 69; McDuff v. Detroit Evening Journal Co. 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671; Hereford v. Combs, 126 Ala. 369, 28 So. 582; Turner v. Hearst, 115 Cal. 394, 47 Pac. 129; Leonard v. Allen, 11 Cush. 241; Simmons v. Holster, 13 Minn. 249, Gil. 232; Austin v. Bacon, 49 Hun, 386, 3 N. Y. Supp. 587; Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692.

Whenever there is good reason to believe that the adverse party has been prejudiced by the introduction of incompetent testimony, notwithstanding it was subsequently stricken out and the jury duly cautioned, a new trial should be granted.

5 Jones, Ev. § 895; 2 Enc. U. S. Sup. Ct. Rep. 343; Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; Throckmorton v. Holt, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474; Waldron v. Waldron, 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383; Juergens v. Thom, 39 Minn. 458, 40 N. W. 559; Sulkowski v. Zynda, 160

Mich. 7, 136 Am. St. Rep. 414, 124 N. W. 536; *Boyd v. Haberstumpf*, 129 Mich. 137, 88 N. W. 386; *State v. Yates*, 99 Minn. 461, 109 N. W. 1070; *Smith v. Russ*, 22 Wis. 439; *Winkley v. Foye*, 33 N. H. 171, 66 Am. Dec. 715; *Erben v. Lorillard*, 19 N. Y. 299; *Furst v. Second Ave. R. Co.* 72 N. Y. 542.

Counsel for one of the parties cannot claim for a witness the privilege accorded him of refusing to answer a question on the ground that it might incriminate him to answer it.

State v. Mungeon, 20 S. D. 612, 108 N. W. 552; *Morgan v. Halberstadt*, 9 C. C. A. 147, 20 U. S. App. 417, 60 Fed. 592; *Re O'Shea*, 166 Fed. 180; *Re Knickerbocker S. B. Co.* 136 Fed. 956; *London v. Everett H. Dunbar Corp.* 103 C. C. A. 130, 179 Fed. 506.

No rule is more salutary, no principle is more vital to the security of the life, liberty, and property of the citizen, than that which prohibits the repetition of the narratives of strangers, whether verbal or written, to determine issues between litigants, and prescribes that only after due notice, and opportunity for cross-examination of the very parties whose statements are offered, and then only under the solemnity of an oath or affirmation, shall their stories be evidence.

Nevada Co. v. Farnsworth, 42 C. C. A. 505, 102 Fed. 573; *Lake County v. Keene Five Cents Sav. Bank*, 47 C. C. A. 464, 108 Fed. 505; *Woolsey v. Haynes*, 91 C. C. A. 341, 165 Fed. 391; *Salem News Pub. Co. v. Caliga*, 75 C. C. A. 673, 144 Fed. 965.

Messrs. Shull, Gill, Sammis, & Stillwill, and *E. E. Wagner*, for defendant in error:

The admission of the testimony regarding "current reports" was not error.

Kidder v. Bacon, 74 Vt. 263, 52 Atl. 322; *Nott v. Stoddard*, 38 Vt. 25, 83 Am. Dec. 633; *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516; *Merchants' Ins. Co. v. Buckner*, 39 C. C. A. 19, 98 Fed. 222; *Newell, Slander & Libel*, 3d ed. 1115, 1116; 25 Cyc. 506; *Williams v. Fulks*, 113 Ark. 82, 167 S. W. 93.

Defendant was not prejudiced because the plaintiff was allowed to testify that his daughter had at one time told him that she overheard a conversation on the train between two men who sat behind her, with reference to the charges that had been made by defendant.

Ott v. Murphy, 160 Iowa, 730, 141 N. W. 463; *Chesley v. Thompson*, 137 Mass. 136; *Enquirer Co. v. Johnston*, 18 C. C. A. 628, 34 U. S. App. 607, 72 Fed. 443; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123; *Morey v. Morning Journal Asso.* 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. Rep. 730, 25 N. E. 161; *Brooks v. Harison*, 91 N. Y. 83; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Flam v. Lee*, 116 Iowa, 289, 93 Am. St. Rep. 242, 90 N. W. 70.

It is proper in cases of slander to show not only that the slanderous statements were untrue, but that the accused knew them to be untrue, and that he had refused to make retraction.

Klewin v. Bauman, 53 Wis. 244, 10 N. W. 398; *Barnes v. Campbell*, 60 N. H. 27; *McKee v. Ingalls*, 5 Ill. 30; *Behee v. Missouri P. R. Co.* 71 Tex. 424, 9 S. W. 449; *Newell, Slander & Libel*, 411; 25 Cyc. 523; *Smith v. Harrison*, 1 Fost. & F. 565; *Lanius v. Druggist Pub. Co.* 20 Mo. App. 12.

Sanborn, C. J., delivered the opinion of the court:

This is an action for damages for slander. During September, October, November, and a part of December, 1914, *F. I. Cummins*, the plaintiff below and so termed herein, was the assistant general manager, and was discharging the duties of traffic manager, and *F. L. Maytag*, the defendant below and so called herein, was the president, of the *South Dakota Central Railroad Company*. *Mr. Kirby* and *Mr. McArthur* were stockholders and directors of that company, and *Mr. Kirby* was its general counsel. On March 5, 1915, the plaintiff sued *Maytag*, the defendant, for \$100,000 damages for publishing certain alleged slanders of him. The defendant answered by denying many of the averments of the complaint and by pleading that the alleged slanders were privileged communications made to the officers of the railroad company, to enable them to protect its interests. The complaint set forth five alleged causes of action. Two of them were dismissed before the case was submitted to the jury.

The material averments of the three which went to the jury were:

(1) That on or about December 18, 1914, at Sioux Falls, South Dakota, in the office of Mr. Kirby, in the presence and hearing of Mr. Kirby and Mr. McArthur, the defendant, Maytag, made this false statement, wilfully and maliciously, to Mr. Cummins: "I have conclusive evidence that you stole a large amount of coal shipped to the South Dakota Central Railway Company, and diverted the proceeds to your own use. My suspicions have covered a period of several months, and have been confirmed by a report of an investigation instituted by the Interstate Commerce Commission at the time said investigators came to Sioux Falls in the fall of the year 1913;" (2) that in Chicago, Illinois, on or about November 20, 1914, the defendant, Maytag, said to E. T. Radcliffe, "How long will it take to check up the records on the fifty-two carloads of coal that Cummins has gotten away with;" and (3) that on or about December 17, 1914, at Sioux Falls, South Dakota, he falsely and maliciously said to E. L. Crimmens, "There has been a systematic steal going on down there (meaning down at the headquarters of the South Dakota Central Railway Company in the city of Sioux Falls, or in its yards and terminals in said city), and I have evidence that he has taken the coal from this list (meaning a list of cars defendant held in his hand at said time) of cars, and that the coal in these cars has been stolen by Cummins."

The trial of the action occupied five days. In the course of it evidence was introduced tending to prove that the defendant had made the statements alleged in the complaint, that after the dates when he was alleged to have made them third persons, without his authority or request, repeated them, and stated that Maytag had made them, and that rumors and reports to that effect were current in Sioux Falls. All the evidence of these repetitions of the defamatory statements, of the reports of such third persons that Maytag had made such state-

ments, and of the current rumors and reports, was objected to by counsel for the defendant on the grounds that they were hearsay, that they were not traceable to or binding upon him, and that they were incompetent and immaterial. These objections were overruled, exceptions were taken to this ruling, and for several days testimony of these repetitions of the slanderous charges by unauthorized third persons, of their statements that Maytag had made them, and of the current reports and rumors of them was poured into the ears of the jury-men. At the close of the trial, however, the court on motion of counsel for the defendant, struck all this testimony from the record and directed the jury to disregard it.

Counsel for the defendant, Maytag, assigned the rulings admitting this evidence as error, and contend that the injurious effect of it was not cured by the final ruling upon, and direction regarding it. There are seventy other alleged errors assigned. But if the admission of this evidence was error, and if the endeavor of the court to withdraw it failed to extract the vice of its admission, there must be a new trial, and this assignment will therefore first be considered.

Is it, then, the law that evidence of the voluntary and unauthorized repetition of a slander and of rumors and reports thereof by third persons, and not under the control of and without the request of the originator, is admissible in an action against him for damages caused by his utterance of it to others? Counsel for Mr. Cummins contend that this question should be answered in the affirmative: (1) Because the originator of a slander is responsible for the natural and probable consequences of his utterance of it; and (2) because whether the subsequent unauthorized repetition, reports, and rumors are such a consequence is a matter of fact ordinarily to be determined by a jury. Let the proposition that the originator of a slander is responsible

for the natural and probable consequences of his utterance of it be conceded. Then the question becomes, Is it the law that the voluntary and unauthorized repetition of a slander by third persons, current rumors and reports thereof, and damages flowing therefrom, are not, as a matter of law, the natural or probable consequences of the original utterance of the slander, and that therefore evidence thereof is not admissible in an action for damages against the originator? Or is it the law that the question whether or not the voluntary and unauthorized repetition of a slander by third persons, current rumors and reports thereof, not connected by evidence with the originator of the slander, and the damages flowing from such repetitions, rumors, and reports, are the natural and probable consequences of the original utterance, is an issue of fact that should ordinarily be submitted to a jury, and therefore evidence of such unauthorized repetitions, rumors, and reports, and the damages therefrom, is admissible in evidence against the defendant in an action for slander?

The court below, at the close of the trial, evidently after a searching examination and careful consideration of this matter, decided that the first question must be answered in the affirmative and the second in the negative.

In an action at law this is a court for the correction of errors of law of the trial court exclusively, and the question here is whether or not the court below, by making this ruling, fell into an error of law. The question it became the duty of that court to decide, and that it now becomes the duty of this court to determine, was not a new one. It was a question which had been repeatedly adjudged by the courts of England and of this country. It was not, and it is not, what in the opinion of the court below, or of this court, the rule on this subject ought to be if no rule had ever been made by controlling authority or by the general consensus of judicial opin-

ion. But the question was and is: (1) Had the rule of law on this subject become established by the weight of respectable authority, or the consensus of judicial opinion, when the court below made its ruling? And, if it had been so established, was the ruling of the court below in accordance with such weight of authority or judicial opinion? If it was, that ruling ought not to be held to be erroneous because it was the duty of the court below so to rule, and because a settled and certain rule of law on such a subject as that here in question is far more conducive to the administration of justice than conflicting authorities and that uncertainty which makes it impossible for laymen or lawyers to know what the rule is.

Counsel for the plaintiff, Cummins, in support of their contention that the rule of the court below on this subject is erroneous, insist that their view is supported by these authorities: *Merchants' Ins. Co. v. Buckner*, 39 C. C. A. 19, 98 Fed. 223; *Williams v. Fulks*, 113 Ark. 82, 167 S. W. 93; *Moore v. Stevenson*, 27 Conn. 14; *Zier v. Hofflin*, 33 Minn. 66, 53 Am. Rep. 9, 21 N. W. 862; *Rice v. Cottrell*, 5 R. I. 340; *Nott v. Stoddard*, 38 Vt. 28, 88 Am. Dec. 633; *Smith v. Moore*, 74 Vt. 81, 52 Atl. 320, 321; *Davis v. Starrett*, 97 Me. 568, 55 Atl. 519. In the citation, discussion, and treatment of these and other authorities, counsel fail to notice and consider the wide distinction between the line of materiality of evidence in actions for libel and the line of materiality in actions for slander which results from the fact, among others, that the written or printed instrument which contains the libel proves it, and proof of the circulation or repetition of that writing or print does not, so far as it proves what the libel was, run counter to the basic rule against hearsay, while evidence of the repetition of a slander, or of rumors or reports thereof by third persons to whom the originator never uttered it, is incompetent, under

the rule against hearsay, to prove what the alleged slander was, because the repetitions, reports, and rumors are necessarily either simple or multiple hearsay, either hearsay or hearsay of hearsay. *Lake County v. Keene Five-Cents Sav. Bank*, 47 C. C. A. 464, 108 Fed. 511. This distinction will be further considered later.

We turn to the consideration of the authorities. In addition to those which have been cited, attention is called to the facts that in *McBride v. Ledoux*, 111 La. 398, 100 Am. St. Rep. 491, 35 So. 615, it was held that there was no responsibility for an unauthorized repetition of a communication which was privileged when it was made by the defendant, and that in *Wheaton v. Beecher*, 79 Mich. 443, 44 N. W. 927, the court left to the jury the question whether or not the defendant procured the publication of the defamation in a newspaper when he communicated it to a reporter, but these two cases failed to rule the issue of law here under consideration. And decisions to the effect that, when the defendant publishes a libel in a newspaper, pamphlet, or magazine, evidence of the extent of the circulation thereof may be proved, such as *Palmer v. Mahin*, 57 C. C. A. 41, 120 Fed. 737, *Bigelow v. Sprague*, 140 Mass. 425, 427, 5 N. E. 144, *Fry v. Bennett*, 28 N. Y. 324, 330, *Dalton v. Calhoun County*, 164 Iowa, 193, 145 N. W. 498, Ann. Cas. 1916D, 695, and *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 630, are also irrelevant, because the extent of such circulation is the result of the publication and of the damage therefrom, which the defendant directly causes by the publication he makes or procures. Turning, then, to the authorities cited as directly ruling the legal issue in hand against the court below, a careful perusal of the opinions of the courts in those cases discloses these facts: *Merchants' Ins. Co. v. Buckner*, 39 C. C. A. 19, 98 Fed. 223, was an action for a libel contained in a letter sent by the defendant to the address-

ee, the secretary of the local board of an insurance company, with the intention on the part of the defendant, which appeared on the face of the letter, that the secretary should communicate its contents to the members of the board. *Moore v. Stevenson*, 27 Conn. 14, was an action for a libel published in a newspaper by the defendant. *Zier v. Hofflin*, 33 Minn. 66, 53 Am. Rep. 9, 21 N. W. 862, was an action for a libel published in a newspaper by the defendant. In these three cases the courts held that in these actions for libel, not for slander, the question whether or not the repetition or circulation of the libel, which the terms of the letter in the first case, and the fact that the defendants published the libels in the newspapers in the other two cases, showed that they caused and intended to cause, and the damages therefrom, were the natural and probable consequences of the original publications, was a question of fact for the jury, and they admitted evidence thereof. In *Zier v. Hofflin*, supra, the case of *Miller v. Butler*, 6 Cush. 71, 74, 52 Am. Dec. 768, decided in 1850, is cited. In that case two defendants sent a libelous private letter to one Bartlett, and the Massachusetts court held that the defendants were responsible "for the natural and probable publicity that would be given to the libel by sending it to Bartlett; not for Bartlett's acts, but for the tendency and consequences of their own acts, in putting the libel into circulation."

But this decision has been overruled by the Massachusetts supreme court and the weight of respectable authority, even in actions for libel, runs counter to the decisions just reviewed, and sustains the rule applied to this action of slander by the court below. Thus, in *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 247, 13 L.R.A. 97, 28 N. E. 6, decided in 1891, the trial court, in charging the jury, said: "[The defendant] is not responsible for the injurious act of another in publishing, but he is under obligation to the

plaintiff to take into account and into consideration what will be the natural and probable consequences of his act in putting the libel into circulation. To that extent he is responsible, and only to that extent."

Of this charge the supreme judicial court of Massachusetts in a unanimous opinion, delivered by Judge Holmes (now Mr. Justice Holmes of the Supreme Court), said: "The general proposition laid down is correct, no doubt, if rightly understood, and it was applied to libel, under what circumstances and with what meaning does not appear, in *Miller v. Butler*, 6 Cush. 71, 74, 52 Am. Dec. 768. But if applied to libel or slander without further explanation, it is likely to be misleading, and, when put as a qualification of the ruling asked, hardly can fail to be so. The meaning which naturally would be conveyed to the jury is that, although a particular republication cannot be recovered for, damages may be enhanced by the general probability of unlawful republications. This is not the law. Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual. *Hastings v. Stetson*, 126 Mass. 329, 331, 30 Am. Rep. 683; *Shurtleff v. Parker*, 130 Mass. 293, 296, 39 Am. Rep. 454; *Hayes v. Hyde Park*, 153 Mass. 514, 12 L.R.A. 249, 27 N. E. 522; *Leonard v. Allen*, 11 Cush. 241, 246."

And the general rule, even in libel cases, seems to be that the publisher of a libel is not liable for the voluntary republication or repetition thereof by others without his request or authority, or for current rumors or reports thereof, or the damages therefrom. *Gough v. Goldsmith*, 44 Wis. 262, 265, 28 Am. Rep. 579; *McDuff v. Detroit Evening Journal Co.* 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671, 673; *Age-Herald Pub. Co. v. Waterman*,

188 Ala. 272, 287, 66 So. 25, Ann. Cas. 1916E, 900; 25 Cyc. 506, note 82.

But this action is for slander, not for libel; for spoken, not for written or printed, words. Evidence of repetition by third persons without the request of the originator, and of rumors and reports of the scandal, is, as to the substance and form of the alleged slander, hearsay, or hearsay of hearsay, and it falls under the ban of the rule against hearsay, while the form and substance of a libel are legally evidenced by the writing or print that contains it. The injurious natural and probable consequences of slander are far less than those of libel. Slander is but the utterance of words. That utterance is ordinarily made in the hearing of one or of a few persons. That utterance is often—it is probably not too much to say that it is generally—made in private, in confidence, in the faith that it will not be, and the intention that it shall not be, repeated. This belief and intention are not without foundation in reason and in law.

It is an illegal act to repeat a slander, an act for the damages from which the victim of the repetition may maintain an action against the repeater. The basic legal presumption on which law and the general action of mankind are based is that men will refrain from unlawful acts, will obey the law, and discharge their duties, and the great majority do so. So it is that the legal presumption is that a slander will not be repeated, and that its unauthorized repetition, and current rumors and reports of it, and the damages therefrom, are not to be anticipated by the originator, and are not the natural or probable consequences thereof. But the proximate cause of such damages is the illegal intervening repetition, or the making by third persons of the current reports and rumors, which turn aside the natural sequence of events and isolate the damages from the

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unauthorized repetition from those from the original slander. Again, a slander is preserved in no fixed or permanent form. It ordinarily soon fades out and is forgotten like the sound that carries it. But one who publishes a libel in a newspaper or pamphlet which circulates among many people, or even in a private letter, thereby places it in permanent form where it will be more likely to continue in existence and to be read by many people, and where he causes it to be published in a newspaper or magazine he thereby evidences his intention that the readers shall read it, so that the natural and probable effect of publishing a libel is far more permanent, extensive, and injurious to the victim than the mere speaking of the words it contains to one or more persons. These striking differences in the line between material and immaterial evidence in actions of libel and slander, and in the difference between the natural and probable consequences of them, are evidenced in the decisions of the courts and in the textbooks.

Thus, Odgers in his 5th edition of his work on Slander & Libel, at page 177, states the distinction in this way: "If I am in any way concerned in the making or publishing of a libel, I am liable for all the damages that ensue to the plaintiff from its publication. But if I slander A., I am only liable for such damages as result directly from that one utterance by my own lips. If B. hears me and chooses to repeat the tale, that is B.'s own act, and B. alone is answerable should damages to A. ensue."

Newell, in the 3d edition of his book on Slander & Libel, published in 1914, which is the latest and most authoritative American textbook on this subject at hand, states the rule on that subject in actions for libel, and the marked difference between that rule and the rule in actions for slander in the same terms.

When we turn to the decisions of the courts on the subject under con-

sideration, only five authorities in actions for slander have been cited, or have come to our attention, which seem to sustain the position that the ruling of the court below was erroneous. These are *Williams v. Fulks*, 113 Ark. 82, 85, 167 S. W. 93, *Rice v. Cottrel*, 5 R. I. 340, 342, *Nott v. Stoddard*, 38 Vt. 25, 28, 88 Am. Dec. 633, *Smith v. Moore*, 74 Vt. 81, 52 Atl. 320, 331, and *Davis v. Starrett*, 97 Me. 568, 55 Atl. 519. But *Williams v. Fulks* does not rule the question. While, at page 85 of 113 Ark., the supreme court of that state held that evidence of the fact that the slander had been generally circulated in the community as the result of the slanderous words was competent to show the extent of the damages, it added: "The question whether the defendants are responsible for damages resulting from mere repetition by other persons is not properly raised in this case, and the court will not undertake to decide it."

The four other cases run directly counter to the ruling of the court below, and to the rule established and sustained by the authorities, which follow: *Townshend, Slander & Libel*, § 114; *Ward v. Weeks*, 7 Bing. 211, 215, 331, 131 Eng. Reprint, 81, 83; *Hastings v. Stetson*, 126 Mass. 329, 331, 30 Am. Rep. 683; *Stevens v. Hartwell*, 11 Met. 542, 549; *Elmer v. Fessenden*, 151 Mass. 359, 362, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208; *Terwilliger v. Wands*, 17 N. Y. 54, 59, 72 Am. Dec. 420; *Olmsted v. Brown*, 12 Barb. 657, 661, 665; *Fowles v. Bowen*, 30 N. Y. 20, 22; *Bassell v. Elmore*, 48 N. Y. 561, 564; *Carpenter v. Ashley*, 148 Cal. 422, 426, 83 Pac. 444, 7 Ann. Cas. 601; *Prime v. Eastwood*, 45 Iowa, 640, 644; *Zurawski v. Reichmann*, 116 Iowa, 388, 389, 90 N. W. 69; *Hereford v. Combs*, 126 Ala. 369, 380, 28 So. 582, 585; *King v. Sassamann*, — Tex. Civ. App. —, 54 S. W. 304; *Cameron v. Cockran*, 2 Marv. (Del.) 166, 42 Atl. 457.

In *Leonard v. Allen*, 11 Cush. 241, 246, a judgment in an action for slander, in that the defendant

charged the plaintiff with burning a schoolhouse, was reversed because evidence was admitted that after the fire it was currently reported in the neighborhood that the defendant had charged the plaintiff with the burning, and the supreme judicial court of Massachusetts said: "The objection arises from the want of proof that the defendant had circulated those charges which were abroad generally in the community. The evidence, so far as it went to connect the defendant with them, was mere hearsay. It proved the existence of current reports that the defendant had made such a charge, but it went no further."

This statement is equally true of the evidence of the repetitions, rumors, and reports in the case at bar.

In *Carpenter v. Ashley*, 148 Cal. 422, 426, 83 Pac. 444, 7 Ann. Cas. 601, the supreme court of that state held that the trial court rightly excluded from the evidence newspaper articles which purported to state slanderous words the defendant was charged with having spoken.

In *Hastings v. Stetson*, 126 Mass. 329, 331, 30 Am. Rep. 683, Chief Justice Gray, afterwards Mr. Justice Gray of the Supreme Court, delivering, in 1879, the unanimous opinion of the supreme judicial court of Massachusetts, stated the law on this subject in these words: "It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the persons slandered, and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander."

It is the endeavor of writers of textbooks to state the rules of law as they have been established by the decisions of the courts at the times

they respectively write. Newell, in the 3d edition of his work on Slander & Libel, published in 1914, stated the rule on this subject as he found it to be at that time, in the words of Chief Justice Gray, which have just been quoted.

The result of this review of authorities on this subject is that, when the trial court ruled that the law was that the voluntary and unauthorized repetition of the slander, without the request

Evidence—of
repetition of
slander.

or intention of the originator, by persons over whom he had no control, the current reports and rumors thereof, and the damages flowing therefrom as a matter of law were not the natural or probable consequences of the original slander, that evidence thereof was not admissible against the defendant, and instructed the jury to disregard it, there had been four decisions to the contrary, one from Rhode Island (*Rice v. Cottrill*, 5 R. I. 340, 342, rendered in 1858), two from Vermont (*Nott v. Stoddard*, 38 Vt. 25, 28, 88 Am. Dec. 633, and *Smith v. Moore*, 74 Vt. 81, 52 Atl. 331, rendered in 1855 and 1902, respectively), and one from Maine (*Davis v. Starrett*, 97 Me. 568, 55 Atl. 519, rendered in 1903), while the rule of law which the trial court announced and applied had been the law in all the courts in England ever since the decision in *Ward v. Weeks*, in 1830, had been declared by Chief Justice Gray in 1879, in *Hastings v. Stetson*, 126 Mass. 329, 331, 30 Am. Rep. 683, and by Mr. Newell in 1914, to be too well settled to be questioned, and had been adopted, sustained, and applied to the trials of actions in slander by the courts of the populous communities of New York, Massachusetts, California, Iowa, Texas, Alabama, and Delaware. In view of this great weight of authority, of this general consensus of judicial opinion and adjudication which established and maintained the rule of law which the court below followed and applied in its final ruling, that ruling cannot be held to

be error, but must be affirmed as the law of this case.

The unavoidable result of this conclusion is that the rulings of the court below during the progress of the trial admitting the evidence of the repetitions, rumors, and reports of the slander during the several days occupied in the introduction of evidence were erroneous, and the defendant demands a new trial on that account. The only answer to that demand is that the admission of this evidence was not prejudicial to him, because at the close of the trial the court on his motion withdrew it and instructed the jury to disregard it.

The general rule is that if evidence has been erroneously admitted during the trial, the error of its admission is cured by its subsequent withdrawal before the close of the trial or by a clear peremptory instruction to the jury to disregard it. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; *Specht v. Howard*, 16 Wall. 564, 21 L. ed. 348; *Washington Gas-light Co. v. Lansden*, 172 U. S. 534, 555, 43 L. ed. 543, 551, 19 Sup. Ct. Rep. 296; *Turner v. American Security & Trust Co.* 213 U. S. 257, 267, 53 L. ed. 788, 792, 29 Sup. Ct. Rep. 420; *Union Pac. R. Co. v. Thomas*, 81 C. C. A. 491, 152 Fed. 365, 371; *Balaklala Consol. Copper Co. v. Reardon*, 136 C. C. A. 186, 220 Fed. 585, 587; *Oates v. United States*, 147 C. C. A. 207, 233 Fed. 201, 204; *Looker v. United States*, 153 C. C. A. 618, 240 Fed. 932, 935.

But there is an exception to this rule. It is that, where the appellate court perceives from an examination of the record that the inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal or the instruction to disregard it probably failed to eradicate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case, and a new trial should be

Appeal—admission of evidence subsequently withdrawn—new trial.

granted. *Waldron v. Waldron*, 156 U. S. 361, 381, 383, 39 L. ed. 453, 458, 459, 15 Sup. Ct. Rep. 383; *Armour & Co. v. Kollmeyer*, 16 L.R.A. (N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; *Chicago, M. & St. Paul R. Co. v. Newsome*, 98 C. C. A. 1, 174 Fed. 394, 396; *Knickerbocker Trust Co. v. Evans*, 110 C. C. A. 347, 188 Fed. 549, 566, 567. This case clearly falls under the exception. One of the chief purposes of providing a judge learned in the law to preside over trials by jury, and one of the principal duties of such a presiding judge, is to exclude from the evidence, and consequently from the knowledge and consideration of the jury, matters which his learning, experience, and judgment enable him to know are irrelevant and immaterial to the issues on trial. Such matters tend to draw the attention of the jury away from a consideration of the real issues to a contemplation of other questions, and unconsciously to lead them to render their verdict on the real issues in accordance with their views upon false issues. *Knickerbocker Trust Co. v. Evans*, 110 C. C. A. 347, 188 Fed. 549, 566, 567. Trials of actions for slander and libel are peculiarly susceptible to evil influences from irrelevant and immaterial matters, as are all actions which excite unusual personal feeling or public interest, so that it is peculiarly desirable that such matters should not creep into the evidence in cases of this character. The record in this case discloses the fact that much immaterial and irrelevant evidence, aside from the testimony relative to the repetitions, rumors, and reports of the slander, was introduced in evidence before the jury, and that for several days a great mass of evidence on the latter subject was daily accumulating in their hearing under the erroneous first ruling of the court upon this subject. The result of this trial was a verdict against the defendant in this action for slander for the unusually large sum of \$22,500. A careful review of the record leaves no doubt that the im-

material and irrelevant matter introduced in evidence before the jury made so strong an impression upon their minds that its evil effect was not and could not be eradicated by the court's attempted withdrawal and its instruction to disregard it, and that this irrelevant matter enhanced the amount of the verdict and deprived the defendant of a fair trial.

There are many other alleged errors assigned by the defendant, but, under the rule of law here affirmed, the course of a new trial will differ so radically from that of the trial that has been considered that even if some of these alleged errors are well assigned they are not likely to be committed again, and it would be a useless task to state and review them now. Let the judgment below be reversed, and let a new trial be granted.

Stone, C. J., concurring:

I concur in the result because I agree that the evidence of repetition in this case was such that, under the present circumstances, its effect could not be removed from the jury even by the clear, forcible charge of the court, and this left in their minds the effect of the evidence, with no aid in properly considering it from the court through the charge, or counsel through argument.

I dissent from the rule that one who originates a slander cannot be held for damages arising from repetitions which are the natural and probable consequences of the original utterance. The majority opinion bases this rule upon two grounds, to wit: First, that it is a settled rule of law; and, second, that there exists a difference between libel and slander which cannot justify the rule in cases of slander. I am unable to assent to such views.

Of twelve witnesses ten were interrogated along the same line, which may be illustrated by the following from the testimony of witness Crimmen:

Q. Was it reported, and did you

hear the reports, on the streets of Watertown and Sioux Falls, during the month of December, 1914, that Mr. Maytag had charged Mr. Cummins with stealing coal, or words to that effect?

A. Yes, sir; I did.

The interrogation of the other two was as follows:

C. A. Wooley: Following the 18th day of December, 1914, and in the early part of 1915, was it currently reported in Sioux City, to your knowledge, that Mr. Cummins had been discharged from the South Dakota Central Railway Company because of being charged with irregularities in connection with the loss of coal?

A. I heard the statement. Yes, sir.

A. E. Ayres: Q. On or about that time, Mr. Ayres, did you hear rumors in Sioux Falls to the effect that Mr. Cummins had been discharged by reason of having been charged by Mr. Maytag with theft or stealing coal and other property from the railroad company?

A. I heard that Mr. Cummins had been discharged for a cause, but I didn't hear by what agency or by whom.

Q. What was the cause, as you heard it?

A. Shortage in his accounts.

The decisions are in conflict as to whether evidence of unauthorized and unprivileged repetitions of a defamation by third parties, or evidence of rumors and reports along the line of the defamatory statements is admissible, as affecting the amount of damages. The cases excluding such evidence are based upon the theory that damage flowing from such repetitions, rumors, or reports is not the proximate result of the original utterance, unless authorized or intended by defendant. This is an application to the law of defamation of the general rule that the intervention of an independent illegal act breaks the causal chain, since the defendant cannot be held to have anticipated

and (without other evidence thereof) intended the unlawful act of another as the consequence of his wrong. The rejection of the above character of evidence in defamation cases is followed in England, Alabama, California, Massachusetts, New York, and Wisconsin. *Ward v. Weeks*, 7 Bing. 211, 131 Eng. Rep. 81; *Age-Herald Pub. Co. v. Waterman*, 188 Ala. 272, 287, 66 So. 16, Ann. Cas. 1916E, 900; *Hereford v. Combs*, 126 Ala. 369, 380, 28 So. 582; *Carpenter v. Ashley*, 148 Cal. 422, 426, 83 Pac. 444, 7 Ann. Cas. 601; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1 (opinion by Mr. Justice Holmes); *Elmer v. Fessenden*, 151 Mass. 359, 362, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208 (opinion by Mr. Justice Holmes); *Shurtleff v. Parker*, 130 Mass. 293, 296, 39 Am. Rep. 454; *Hastings v. Stetson*, 126 Mass. 329, 331, 30 Am. Rep. 683; *Leonard v. Allen*, 65 Mass. 241; *Stevens v. Hartwell*, 11 Met. 542; *Bassell v. Elmore*, 48 N. Y. 561, 564; *Fowles v. Bowen*, 30 N. Y. 20; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Austin v. Bacon*, 49 Hun, 386, 3 N. Y. Supp. 587; *Olmsted v. Brown*, 12 Barb. 657; *Gough v. Goldsmith*, 44 Wis. 262, 28 Am. Rep. 579. None of the above cases is based upon any presence of hearsay evidence, nor any difference between libel and slander affecting this question. The sole ground is as stated above. That this is the only ground is further shown by such cases as *Fowles v. Bowen*, 30 N. Y. 20, 22, cited above and in the majority opinion, where the originator of the slander was held liable when the repetition was lawful, being privileged. The Delaware case (*Cameron v. Corkran*, 2 Marv. 166, 42 Atl. 454) cited in the majority opinion was from the superior court. The two Iowa cases cited (*Zurawski v. Reichmann*, 116 Iowa, 388, 90 N. W. 69, and *Prime v. Eastwood*, 45 Iowa, 640) do not hold that such evidence is never admissible, but that it is inadmissible unless "the circumstances under which it was repeat-

ed" be shown, clearly intimating that under some circumstances it would be admissible. The Texas case cited (*King v. Sassaman*, — Tex. Civ. App. —, 54 S. W. 304) contained no such question. The point there was one of variance between words said and those proven. As to that, the court said defendant was liable for what he had actually said, not for what others might say he had said. The opposed doctrine that such evidence is admissible in defamation cases is based upon the theory that defendant is responsible for the natural and probable consequences of his utterance, and whether the subsequent repetition or rumor is such a consequence is a matter of fact ordinarily to be determined by the jury. This view is supported in the Federal courts (Arkansas, Connecticut, Minnesota, and Rhode Island). *Merchants' Ins. Co. v. Buckner*, 39 C. C. A. 19, 98 Fed. 222 (6th C. C. A., opinion by Mr. Justice Day); *Williams v. Fulks*, 113 Ark. 82, 167 S. W. 93; *Moore v. Stevenson*, 27 Conn. 14; *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9; and *Rice v. Cottrel*, 5 R. I. 340. In *McBride v. Ledoux*, 111 La. 398, 100 Am. St. Rep. 491, 35 So. 615, it was held that there was no responsibility for an unauthorized repetition of a communication which was privileged when made by defendant. In *Wheaton v. Beecher*, 79 Mich. 443, 44 N. W. 927, it was left to the jury to determine whether the defendant "procured" the publication of the defamation in a newspaper when he communicated it to a reporter of that paper. With the decisions of respectable jurisdictions conflicting, I see no reason for deciding that the matter has been authoritatively settled. This very case illustrates the doubtfulness of the question, for a capable trial judge first admitted and then excluded this testimony. While the question was not and is not a settled one, yet, if it were true that all of the courts which had spoken had been one way, that should not control in this jurisdiction, where

there had never been any expression, if that view of the law were regarded as incorrect. Not infrequently Federal courts refuse to follow earlier expressions of the highest courts of a state within the same territorial jurisdiction. If this conflict of law in the same jurisdictional limits is justifiable because it is the duty of each court to decide the law as its wisdom and conscience dictate, how much more should this be done where the authority relied upon is entirely from outside. This is peculiarly so in actions sounding in tort. Men may deal with titles and make contracts in view of what they think the law to be, as established by decisions, but they do not commit torts on any such basis. As no decision controlling in this circuit exists, and as decisions outside the circuit conflict, this seems to me an instance where the justice of the contending views should be examined and a decision reached on that basis alone.

While recognizing the plausibility of the rule rejecting this evidence and the high authority supporting that view, I cannot think that it is correct. All compensatory damages are based upon injury actually suffered by the plaintiff because of defendant's wrongful act and the amount of such damages by the extent of the injury. The injury from defamation is, as to extent, unique in one important feature. Usually the extent of injury depends almost entirely upon the extent of the circulation of the defamation. This has been recognized in this court (Palmer v. Mahin, 57 C. C. A. 41, 120 Fed. 737, 746) and in other jurisdictions, including some which hold third party repetitions, rumors, and reports inadmissible. Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144 (opinion by Mr. Justice Holmes); Fry v. Bennett, 28 N. Y. 324, 330; Dalton v. Calhoun County, 164 Iowa, 187, 193, 145 N. W. 498, Ann. Cas. 1916D, 695; and Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628. The very decisions which exclude this evidence, when "unau-

thorized" by the defendant, concede its importance and approve its admission if it is affirmatively shown that the defendant authorized or "intended" the repetition, rumor, or report. Clearly there should be very substantial reason for excluding evidence so vitally bearing upon the important inquiry as to the extent of injury and ensuing damages. The most fundamental rule in the law of proximate cause would not only sanction but compel the admission of this character of evidence. That rule is that a wrongdoer is answerable for the natural and probable results of his act, or, as often expressed, for such results as he might reasonably have anticipated. Certainly the repetition of a defamation, or its growth into a rumor or current report, is a natural and probable result of its utterance and to be reasonably anticipated. That unfortunate result as surely follows and spreads as do the ever-widening circles from a stone thrown into water. The human weakness to repeat the unusual, the salacious, and the scandalous is an ever-present agency which common knowledge recognizes as needing only the impetus of a defamatory statement to awaken into full activity. The actually existing, well-known tendency and result should not, in my judgment, be obliterated by any presumption that persons will not commit an unlawful act by repeating slander. Why, then, should one who starts a false, malicious attack upon the character of a man or woman, with full knowledge that it will spread like wildfire, be held innocent of the general conflagration?

The reason given for this unusual freedom from responsibility is that there is a corollary to the above general rule, to the effect that the intervention of an independent wrongful agency breaks the legal causal connection, and that the unprivileged repetition of a defamation is such an agency. Such a rule exists, and such a repetition is an independent wrongful agency. There is a prima facie ground,

therefore, for the application of the rule. But nowhere is it more important to apply the basic axiom that "reason is the soul of the law" than when a rule of law, apparently applicable to a set of facts, results in seeming injustice. This necessity is accentuated when the set of facts under consideration is not merely vagrant and unusual, but is typical of a large and important class of frequent recurrence. The reason and history of this rule require examination to determine whether a situation possibly within its letter is within its real intent and spirit.

Sedgwick in his work on Damages, 9th ed. § 111b, has well said that "the legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time or space; it is purely practical, the reason for distinguishing between proximate and remote causes being a purely practical one."

The practical reason for treating the intervention of a wrongdoer as an insulation breaking the causal connection is that such wrongdoer is nearer to the resulting injury, may himself be held in damages therefor, and the plaintiff should not be given a duplicate recovery. The origin and usual application of this rule connect it with the common character of tort where the injury is a single occurrence, as harm to person or property. As so applied, this rule ordinarily accords well with the demands of justice. We are not concerned here with instances where the fault of the intervening wrongdoer was simply non-action in failing to nullify the effect of the wrongful act before it reached the plaintiff. However, a well-known exception or parallel rule is that, where the original wrongdoer intended the result actually brought about by the intervening wrongdoer, he is liable. The considerations of practical justice forming these rules seem to be as follows: That plaintiff should be allowed one complete recovery for an injury wrongfully inflicted; that

this requisite is ordinarily sufficiently afforded when it is given against the active wrongdoer nearest in the causal sequence to the injury, without looking further back; that it is unjust to permit a wrongdoer, who intended the injury and foresaw the intervention of the later wrongdoer, to escape liability. Keeping in mind these practical reasons for practical rules designed to work justice, the application of those rules to the tort of defamation may be tested. Having in view cause and effect, this tort is often unlike any other. Unless the entire claimed damage is special, the plaintiff is seeking to recover for the general damage done to his reputation. Knowing, as reasonable men, that this depends largely upon how widely the defamation has been spread, how can the jury intelligently gauge that damage, or how can the court later rule upon the justice of the amount of verdict if there be denial of all evidence upon that point? How is the plaintiff to be accorded his complete recovery, or how is the defendant to be protected against excessive recovery, if neither party can show the extent of the injury? Another suggestion bearing upon the practical, substantial justice of the situation is this: The wider the circulation, the greater the damage, yet there is a correspondingly increasing difficulty, often impossibility, of the plaintiff being able to locate, for purposes of legal satisfaction, all or any appreciable number of the talebearers whose busy tongues have been set wagging to his grievous injury by defendant's act. Leonard, C., in *Bassell v. Elmore*, 48 N. Y. 561, 568. So that, if the theory of the rule that responsibility ceases with the injury to his reputation in the minds of those to whom defendant communicated the defamation is really carried into practice, the plaintiff could require of the defendant but a minimum of the injury he had received. Yet everyone knows that none of this entire injury would have been received, had not the defendant set

rolling the growing ball of defamation which has finally crushed the fairest one of plaintiff's possessions. The publication may have been made under circumstances designed and shaped to prevent or confine its further circulation, and such are for the jury to consider. On the other hand, if intent is to govern, why exclude the operation of a fundamental principle used throughout the law in determining intent, namely, that one is presumed to know and to intend the natural and probable consequences of his act. The question here is not of punitive damages and evil motive, but of compensatory damages and legal intent. Since the defamer must know, what all men know, that the natural and probable consequence of publishing a defamation is its repetition and wide circulation, he should be held to intend that result and be held responsible for it. If he is thus responsible, the measure of that responsibility lacks a gauge of fact, unless the extent of that repetition or circulation can be shown.

Here an honorable man has been, the jury found, falsely and maliciously branded as a felon by his employer, and in connection with that employment. The charge meets him when he seeks employment, shames his children among their schoolmates, ruins his credit, and blights the well-earned reputation of a lifetime. Defendant made the statement to seven different persons, of whom four testified affirmatively that they did not believe the charge, one denies hearing such a charge, and two were not witnesses. If defendant is liable only for the injury done plaintiff's reputation in the minds of these seven persons, the court would be puzzled, even under the existing liberal rule as to amount of verdicts in defamation cases, in upholding the jury assessment of \$22,500. The effect upon these seven hearers is not the gist of plaintiff's injury. It is: That having before borne a good name, thereafter this charge originated by defendant became common rumor,

so that it was widely known that defendant had made such an accusation, and that because thereof, he (plaintiff) sought employment in vain, he suffered anguish on account of his children being shamed among their schoolmates, his credit was ruined, and his reputation besmirched. Whether this rule be applicable where the defendant is a mere conveyer of the defamation, as distinguished from the originator thereof, we need not inquire, because here the defendant was the originator. Nor do I think it necessary that the testimony show that any of the particular persons named in the petition as hearing the slander repeated it to others. Defendant is shown to have been the originator of the slander, and the repetitions covered by the testimony gave him as the origin. He sent out the poison, and it traveled everywhere under the sanction of his name. I cannot doubt that the rumors and reports which injured plaintiff are parts of the stream of which he alone was the source. To hold that this cannot be shown, nor defendant be held responsible therefor does not meet my ideas of justice. As said by Leonard, C., in *Bassel v. Elmore*, 48 N. Y. 561, 568: "A slanderous charge gets in circulation and is many times repeated until it often becomes impossible to trace it so that it shall appear to have been carried directly from the slanderer to the person from whom the pecuniary injury has been sustained by the party complaining. The rule is entirely too favorable for the malicious slanderer. He should be held responsible when it can be proven, as in this case, that the slander uttered did come to the knowledge of some person, who acted upon it to the pecuniary injury of the plaintiff."

It is suggested that in this regard there is a difference between libel and slander, which justifies a difference in rule. No case suggests such a difference, and I see no basis therefor. Material divergencies

based on differences between libel and slander should be sparingly made, and only where the basis therefor is very clear, because, as said by Judge Cooley in his work on

Torts, 3d ed. p. 366, "Slander and libel are different names for the same wrong accomplished in different ways." Also see Newell's Slander & Libel, 3d ed. § 29.

ANNOTATION.

Liability of one responsible for original libel or slander for its repetition by third persons.

- I. Introductory, 726.
- II. The author not liable for the repetition:
 - a. In general, 727.
 - b. Libel cases, 727.
 - c. Slander cases, 728.

I. Introductory.

This annotation excludes criminal cases; it also excludes slander (or libel) of title.

The cases generally seem to agree theoretically that he who publishes a libel or utters a slander is responsible for the natural and probable consequence of such publication or utterance. They differ widely, however, as to what may be considered as the natural and probable consequence. In regard to repetitions it is probably correct to say that the conflicting results of the cases rest in general upon a fundamental difference of opinion, some of the courts holding that repetition of a libel or slander is not a natural and probable consequence of its original publication or utterance, while other courts take the opposite view.

It has been deemed convenient to arrange the cases, as far as feasible, according to the results. It may be observed, however, that the cases cited in subd. III. are not, in every instance, opposed to those cited in subd. II., since the facts of a particular case may be such as to take it out of the general rule of a jurisdiction. The authorities are not very helpful as to a practical solution of the difficulty of the situation.

An English authority (18 Laws of England (Halsbury) 667) states four exceptions to the English rule that the original speaker of a slander is not responsible for its repetition: (1)

- III. The author liable for the repetition:
 - a. In general, 734.
 - b. Libel cases, 734.
 - c. Slander cases, 737.
- IV. Moral duty to repeat, 740.
- V. Miscellaneous, 741.

Authorization, (2) intention, (3) natural result, and (4) moral duty to repeat. The first exception requires no comment; of the second, it might be observed that in practice intention must be judged largely by conduct, and, of the third, that the difficulty lies in its application; the fourth exception seems to break down in practice (see *infra*, IV.).

Not much practical attention seems to have been paid to the obiter suggestion that the utterer of a slander ought to be responsible for its innocent repetition by others, made in *Keenholts v. Becker* (1846) 3 Denio (N. Y.) 346, *infra*, V. And see also *Bassell v. Elmore* (1872) 48 N. Y. 561, *infra*, V.

The question of hearsay referred to in the reported case (*MAYTAG v. CUMMINS*, ante, 712) is discussed in but few cases. See *Cyrowski v. Polish-American Pub. Co.* (1917) 196 Mich. 648, 163 N. W. 58, *infra*, III. a; *Donaldson v. Roberson* (1916) 15 Ala. App. 354, 73 So. 223, *infra*, III. c, under "Reports of the slander;" and *Leonard v. Allen* (1853) 11 Cush. (Mass.) 241, *id.*

The supposed distinction between libel and slander as to liability for repetitions, emphasized in the majority opinion in the reported case (*MAYTAG v. CUMMINS*) and denied in the minority opinion, does not seem much discussed in the cases. See *King v. Patterson* (1887) 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705, *infra*, III. b, and *Ratcliffe v. Evans* [1892] 2 Q. B.

(Eng.) 524, 61 L. J. Q. B. N. S. 535, 66 L. T. N. S. 794, 40 Week. Rep. 578, 56 J. P. 837, *infra*, III. b, under "General loss of business."

It will be seen that an attempt has been made throughout this annotation to specify whether, in the various cases, the libel or slander was actionable *per se* or not.

It has been suggested in at least one case that the responsibility for repetition in slander should, in general, depend upon the answer to the question whether the slander is actionable *per se*. Thus, in *Southwestern Teleg. & Teleph. Co. v. Long* (1916) — Tex. Civ. App. —, 183 S. W. 421, it was held that, where the words are slanderous *per se*, the slanderer must be held to have reasonably anticipated their repetition. Followed in *Southwestern Teleg. & Teleph. Co. v. Wilkins* (1916) —Tex. Civ. App. —, 183 S. W. 429.

In *Southwestern Teleg. & Teleph. Co. v. Long* (Tex.) *supra*, the court said, *inter alia*: "In slander *per se*, proof of actual damages is not required. Why? Because the law not only reasonably anticipates, but conclusively presumes, damages in such case. What damages? Principally to reputation, by reason of which the person slandered suffers mental anguish from shame and mortification and the loss of the society of good people. It would be no defense to prove in such case that the slander was uttered in the presence of only two or three persons, who did not believe it, and had so informed the plaintiff, and that in fact neither of them had repeated the slander. The slandered person, knowing human nature, as every person is presumed to know, would nevertheless suffer mental anguish in anticipation that such slander would probably be repeated and become current in the future. It is the anticipation of such fact which causes the major portion of the mental suffering in such case. Ought a party who utters words so derogatory as to constitute slander *per se* be held to have reasonably anticipated that they would be repeated? We think so. We think that the fact that the law conclusively presumes damages from the utterance of a slan-

der *per se*, even though in the presence of but one person, who did not believe it, shows that the slanderer must be held to have reasonably anticipated its repetition, from which, as experience shows, may arise the only injury suffered. Any person with sufficient intelligence to be guilty of slander ought, in the light of common experience, to anticipate the repetition of such slander, and the injurious consequence thereof."

II. *The author not liable for the repetition.*

a. *In general.*

The reader will understand that the *contra* cases are cited *infra*, III.

b. *Libel cases.*

Some of the cases hold that the author of a libel is not responsible for its voluntary and unauthorized repetition.

Alabama.—*Age-Herald Pub. Co. v. Waterman* (1914) 188 Ala. 272, 66 So. 272, Ann. Cas. 1916E, 900.

California. — *Turner v. Hearst* (1896) 115 Cal. 394, 47 Pac. 129.

Illinois. — *Clifford v. Cochrane* (1882) 10 Ill. App. 570.

Indiana.—*Sourbier v. Brown* (1919) 188 Ind. 554, 123 N. E. 802 (*arguendo*).

Maryland.—*Coffin v. Brown* (1901) 94 Md. 190, 55 L.R.A. 732, 89 Am. St. Rep. 422, 50 Atl. 567.

Massachusetts.—*Burt v. Advertiser Newspaper Co.* (1891) 154 Mass. 238, 18 L.R.A. 97, 28 N. E. 1.

Michigan.—*McDuff v. Detroit Evening Journal Co.* (1890) 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671.

Wisconsin. — *Gough v. Goldsmith* (1878) 44 Wis. 262, 28 Am. Rep. 579.

Of the foregoing libel cases (omitting the *arguendo* Indiana case) all seem to have been for words actionable *per se*, except (1) the Wisconsin case, where the words were considered not actionable *per se*, and (2) the Alabama case, where it does not seem clear whether the words were considered actionable *per se*, or not.

Where a newspaper published words libelous *per se* about the plaintiff, an attorney, it was held that the plaintiff could not show his mental suffering

by giving evidence of what his clients and other persons had said to him about the publication, or what persons in the street had said about it, as "it is well settled that the damages must be the direct result of the defendant's libel, and not of any mere repetition of it by others." *Turner v. Hearst* (1896) 115 Cal. 394, 47 Pac. 129, *supra*.

It was held in *Coffin v. Brown* (1901) 94 Md. 190, 55 L.R.A. 732, 89 Am. St. Rep. 422, 50 Atl. 567, *supra*, that a printed circular containing a letter libelous per se cannot be admitted in evidence, in an action for the libel, to enhance the damages because of the republication in circular form, where there is nothing to show that the writer or addressee authorized the republication, since the jury cannot be authorized to assume that fact, although the addressee is chairman of the central committee of a political party opposed to the election of a candidate whose defeat the letter advocates, and that a statement by the court in admitting the circular letter, to the effect that the circular was the natural effect of sending the letter under the circumstances, is reversible error, as tending to lead the jury to believe that the question of defendant's responsibility for the republication is settled by the court.

In *Burt v. Advertiser Newspaper Co.* (1891) 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1, *supra*, quoted from in the reported case (*MAYTAG v. CUMMINS*, ante, 712), it was held that damages from the publication of a libel cannot be enhanced by the republication thereof by other persons, even if there was a general probability of its republication.

In *Gough v. Goldsmith* (1878) 44 Wis. 262, 28 Am. Rep. 579, *supra*, where the letter in question was not libelous per se, and the plaintiff alleged special damages in loss to his business as attorney, and the alleged damage was from the fact that the addressee of the letter showed it to others, it was held that the special damage was not the legal and natural consequence of sending the letter in question, there being nothing to warrant the inference that the defendant

desired or intended that anyone other than the addressee should see it.

It has been held that he who publishes a libel in a newspaper is not responsible for its publication in other newspapers. *Age-Herald Pub. Co. v. Waterman* (1914) 188 Ala. 272, 66 So. 272, Ann. Cas. 1916E, 900, *supra*; *Clifford v. Cochrane* (1882) 10 Ill. App. 570, *supra*; *Sourbier v. Brown* (1919) 188 Ind. 554, 123 N. E. 802 (*arguendo*); *McDuff v. Detroit Evening Journal Co.* (1890) 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671, *supra*.

In *Age-Herald Pub. Co. v. Waterman* (Ala.) *supra*, where it does not appear whether the court considered the words to be actionable per se or not, it was held that the plaintiff could not show that he sustained special damages by reason of repetitions in other newspapers for which the defendant was not responsible, nor might he show that he heard persons discuss the matter published of the plaintiff.

In *Clifford v. Cochrane* (1882) 10 Ill. App. 570, *supra*, it was alleged that the defendant gave an "interview" to a reporter of a Chicago newspaper, uttering words libelous per se of the plaintiff, an architect in San Francisco, which was republished in a San Francisco newspaper, and that the plaintiff, in consequence, lost his employment as architect of a public building in San Francisco; it was held on the pleadings that the defendant was not liable for the San Francisco republication.

In *McDuff v. Detroit Evening Journal Co.* (1890) 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671, *supra*, it was held to be error in an action for a newspaper libel, where the words were actionable per se, to admit evidence of a subsequent publication in the editorial columns of a newspaper of another state.

c. Slander cases.

There are numerous cases where it has been held that the author of a slander is not responsible for its voluntary unauthorized repetition.

United States.—*MAYTAG v. CUMMINS* (reported herewith) ante, 712.

Alabama.—*Hereford v. Combs*

(1899) 126 Ala. 369, 28 So. 582; Donaldson v. Roberson (1916) 15 Ala. App. 354, 73 So. 223.

California.—Carpenter v. Ashley (1906) 148 Cal. 422, 83 Pac. 444, 7 Ann. Cas. 601.

Delaware.—Cameron v. Corkran (1895) 2 Marv. 166.

Indiana.—Cates v. Kellogg (1857) 9 Ind. 506.

Iowa.—Prime v. Eastwood (1877) 45 Iowa, 640; Zurawski v. Reichmann (1902) 116 Iowa, 388, 90 N. W. 69; German Sav. Bank v. Fritz (1907) 135 Iowa, 44, 109 N. W. 1008 (arguendo); Schaffhauser Bros. v. Hemmer (1911) 152 Iowa, 200, 131 N. W. 6; Mills v. Flynn (1912) 157 Iowa, 477, 137 N. W. 1082.

Maryland.—Dicken v. Shepherd (1864) 22 Md. 399.

Massachusetts.—Stevens v. Hartwell (1846) 11 Met. 542; Leonard v. Allen (1853) 11 Cush. 241; Hastings v. Stetson (1879) 126 Mass. 329, 30 Am. Rep. 683; Shurtleff v. Parker (1881) 130 Mass. 293, 39 Am. Rep. 454; Elmer v. Fessenden (1889) 151 Mass. 359, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208.

New York.—Terwilliger v. Wands (1858) 17 N. Y. 54, 72 Am. Dec. 420; Schoepflin v. Coffey (1900) 162 N. Y. 12, 56 N. E. 502 (arguendo); Olmsted v. Brown (1852) 12 Barb. 657; Pettibone v. Simpson (1873) 66 Barb. 492; Austin v. Bacon (1888) 49 Hun, 386, 3 N. Y. Supp. 587.

Texas.—See King v. Sassaman (1899) — Tex. Civ. App. —, 54 S. W. 304.

England.—Rutherford v. Evans (1829) 4 Car. & P. 74; Ward v. Weeks (1830) 7 Bing. 211, 131 Eng. Reprint, 81, 4 Moore & P. 796, 9 L. J. C. P. 6; Tunncliffe v. Moss (1850) 3 Car. & P. 83; Barnett v. Allen (1858) 1 Fost. & F. 125, 3 Hurlst. & N. 376, 157 Eng. Reprint, —, 27 L. J. Exch. N. S. 412, 4 Jur. N. S. 488; Dixon v. Smith (1860) 5 Hurlst. & N. 450, 157 Eng. Reprint, 1257, 29 L. J. Exch. N. S. 125; Parkins v. Scott (1862) 1 Hurlst. & C. 153, 158 Eng. Reprint, 839, 31 L. J. Exch. N. S. 331, 8 Jur. N. S. 593, 6 L. T. N. S. 394, 10 Week. Rep. 562; Clarke v. Morgan (1877) 38 L. T. N. S. 354. See also

Michael v. Spiers & Pond (1909) 25 Times L. R. 740.

Of the foregoing slander cases (omitting arguendo cases), the following would appear to have been for slanders actionable per se:

United States.—MAYTAG v. CUMMINS (reported herewith) ante, 712.

Alabama.—Hereford v. Combs (1899) 126 Ala. 369, 28 So. 582; Donaldson v. Roberson (1916) 15 Ala. App. 354, 73 So. 223.

California.—Carpenter v. Ashley (1906) 148 Cal. 422, 83 Pac. 444, 7 Ann. Cas. 601.

Iowa.—Prime v. Eastwood (1877) 45 Iowa, 640; Schaffhauser Bros. v. Hemmer (1911) 152 Iowa, 200, 131 N. W. 6 (apparently); Mills v. Flynn (1912) 157 Iowa, 477, 137 N. W. 1082.

Maryland.—Dicken v. Shepherd (1864) 22 Md. 399 (probably).

Massachusetts.—Leonard v. Allen (1853) 11 Cush. 241; Hastings v. Stetson (1879) 126 Mass. 329, 30 Am. Rep. 683.

Texas.—King v. Sassaman (1899) — Tex. Civ. App. —, 54 S. W. 304.

England.—Rutherford v. Evans (1829) 4 Car. & P. 74, and Tunncliffe v. Moss (1850) 3 Car. & K. 83.

The following were for slanders not actionable per se: Cates v. Kellogg (1857) 9 Ind. 506; Stevens v. Hartwell (1846) 11 Met. (Mass.) 542; Terwilliger v. Wands (1858) 17 N. Y. 54, 72 Am. Dec. 420; Olmsted v. Brown (1852) 12 Barb. (N. Y.) 657; Pettibone v. Simpson (1873) 66 Barb. (N. Y.) 492; Ward v. Weeks (1830) 7 Bing. 211, 131 Eng. Reprint, 81, 4 Moore & P. 796, 9 L. J. C. P. 6; Dixon v. Smith (1860) 5 Hurlst. & N. 450, 157 Eng. Reprint, 1257, 29 L. J. Exch. N. S. 125; Parkins v. Scott (1862) 1 Hurlst. & C. 153, 158 Eng. Reprint, 839, 31 L. J. Exch. N. S. 331, 8 Jur. N. S. 593, 6 L. T. N. S. 394, 10 Week. Rep. 562; Clarke v. Morgan (1877) 38 L. T. N. S. (Eng.) 354; Michael v. Spiers & Pond (1909) 25 Times L. R. (Eng.) 740. In the other foregoing cases the matter is not clear.

It is held in the reported case (MAYTAG v. CUMMINS, ante, 712), where the words were actionable per se, that the plaintiff in slander may not give

evidence of voluntary and unauthorized repetitions of the slander, and of rumors and reports thereof by third persons not under the control of and without the request of the originator.

In an action for slander brought by a druggist against a physician for words spoken regarding the making of a prescription, it was held that the plaintiff might not ask a person, in whose presence the words were spoken, whether she repeated them to anyone, as the defendant was not responsible for the repetition, as it was not the natural result of the original utterance. *Cameron v. Corkran* (1895) 2 Marv. (Del.) 166, 42 Atl. 454, *supra*, where it was claimed that the words were actionable per se, and they may have been so.

In *Shurtleff v. Parker* (1881) 130 Mass. 293, 39 Am. Rep. 454, *supra*, where it is not clear whether the words were actionable per se or not, it was held in slander that a minister who uttered the words in preaching at a meeting of his own church was not responsible for repetitions of the words.

In *Austin v. Bacon* (1888) 49 Hun, 386, 3 N. Y. Supp. 587, *supra*, where it does not appear whether the words were considered slanderous per se or not, it was held to be error to allow evidence that there were, subsequently, reports in circulation affecting the character of the plaintiff and similar to the slander, as the defendant was not liable for repetitions.

Where slanderous words are not actionable per se, no action will lie against the original utterer of the slander for damage resulting from a repetition of it, unauthorized by him. Therefore, where the defendant imputed adultery to the plaintiff's wife in his absence, and she voluntarily repeated the slander to her husband, whereby he refused to cohabit with her, it was held that no action was maintainable against the defendant. *Parkins v. Scott* (1862) 1 Hurlst. & C. 153, 158 Eng. Reprint, 839, *supra* (following *Ward v. Weeks* (1830) 7 Bing. 211, 131 Eng. Reprint, 81, 4 Moore & P. 796, 9 L. J. C. P. 6, *infra*, next heading). Four judges wrote concurring

opinions. *Bramwell, B.*, said, *inter alia*: "If a man makes a slanderous statement to another, and he thinks fit to communicate it to a third person, it is not reasonable to hold that the first speaker is responsible for the ultimate consequences. If I make a slanderous statement to a man, and do not desire nor authorize him to repeat it, but nevertheless he does so, he ought to do it upon his own responsibility, and I ought not to be liable for the consequences of his wrongful act. Mr. O'Brien contends that the repetition of the slander to the husband was the natural and inevitable consequence of uttering it; and that it was the duty of the wife to communicate it to her husband. I think not."

In *Speight v. Gosnay* (1890) 7 Times L. R. (Eng.) 239, the defendant apparently made an imputation against the chastity of the plaintiff, an unmarried woman, to the plaintiff's mother, who repeated it to the plaintiff, who repeated it to her fiancé, who thereupon refused to marry her. It was held that the defendant was not responsible for the repetition leading to the special damage.

In *King v. Sassaman* (1899) — Tex. Civ. App. —, 54 S. W. 304, *supra*, where the words were slanderous per se, the case is not clearly reported; it was said that the defendant in slander is responsible only for reports circulated and published by himself, and not for those circulated by others. The case is not considered as a material authority on the subject, if indeed it related to more than punitive damages, in *Southwestern Teleg. & Teleph. Co. v. Long* (1916) — Tex. Civ. App. —, 183 S. W. 421, *supra*, *l. b.*

Repetition not the natural and probable result.

Repetition is not the natural and probable result of a slander. *MATTAS v. CUMMINS* (reported herewith) *ante*, 712 (where the slander was actionable per se); *Hereford v. Combs* (1899) 126 Ala. 369, 28 So. 582 (the same); *Prime v. Eastwood* (1877) 45 Iowa, 640 (the same); *Hastings v. Stetson* (1879) 126 Mass. 329, 30 Am. Rep. 683 (the same); *Terwilliger v. Wands* (1858) 17 N. Y. 54, 72 Am. Dec.

420 (where the words were not actionable per se); *Olmsted v. Brown* (1852) 12 Barb. (N. Y.) 657 (apparently the same); *Ward v. Weeks* (1830) 7 Bing. 211, 131 Eng. Reprint, 81, 4 Moore & P. 796, 9 L. J. C. P. 6 (the same); *Parkins v. Scott* (1862) 1 Hurlst. & C. 153, 158 Eng. Reprint, 839, 31 L. J. Exch. N. S. 331, 8 Jur. N. S. 593, 6 L. T. N. S. 394, 10 Week. Rep. 362 (the same); *Schoepflin v. Coffey* (1900) 162 N. Y. 12, 56 N. E. 502 (arguendo). See also *Cameron v. Corkran* (1895) 2 Marv. (Del.) 166, 42 Atl. 454; *Michael v. Spiers & Pond* (1909) 25 Times L. R. (Eng.) 740.

In *Hastings v. Stetson* (1879) 126 Mass. 329, 30 Am. Rep. 683, supra, where the words were actionable per se, it was held that, in slander the defendant was not liable for repetition by third persons, and that it was error to leave to the jury the question whether the repetition was a necessary and proximate, or a natural and necessary, result of the language used by the defendant. The court said: "It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action, or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person slandered; and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander."

Where the words were not slanderous per se, it was held that the special damages arising by repetition of the words by a third person are not a natural legal consequence of the first speaking (and the repeater is alone liable). *Terwilliger v. Wanda* (1858) 17 N. Y. 54, 72 Am. Dec. 420, supra.

In *Schoepflin v. Coffey* (1900) 162 N. Y. 12, 56 N. E. 502, in holding that the uttering of words not actionable per se, at Albany, in the presence both of the local manager of the Associated Press and of a reporter of a large metropolitan newspaper, was not a publication of a libel, the court ob-

served that the utterance was, at most, a mere slander, and that the utterer was not responsible for the publication of it in the newspapers, and said: "It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural, and probable consequence of the original slander or libel. . . . The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. . . . The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and therefore the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander."

In *Ward v. Weeks* (1835) 7 Bing. 211, 131 Eng. Reprint, 81, supra, where the words were not considered to be actionable per se, the plaintiff in slander alleged special damages and proposed to show that the defendant spoke the slanderous words to one who repeated them, as the words of the defendant, to one who thereupon refused credit to the plaintiff for goods; the plaintiff was thereupon nonsuited. The court said, in refusing to set aside the nonsuit: "Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorized communication cannot

be considered as the necessary consequence of the original uttering of the words. For no effect whatever followed from the first speaking of the words to Bryce; if he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage."

In *Michael v. Spiers & Pond* (1909) 25 Times L. R. (Eng.) 740, 101 L. T. N. S. 352, supra, where the words were considered as not actionable per se, the court seemed to think that the defendant, who charged the plaintiff with being drunk on licensed premises, was not responsible for the repetition of the words to the plaintiff's father, saying: "The father of a person charged with being drunk is one of the last persons to whom I think it natural that such an imputation should be repeated by a third person."

Reports of the slander.

The plaintiff may not show that there is a rumor or report in the neighborhood that the defendant has made the slanderous speech or charge. *MAYTAG v. CUMMINS* (reported herewith) ante, 712; *Hereford v. Combs* (1899) 126 Ala. 369, 28 So. 582; *Donaldson v. Roberson* (1916) 15 Ala. App. 354, 73 So. 223; *Prime v. Eastwood* (1877) 45 Iowa, 640; *Leonard v. Allen* (1853) 11 Cush. (Mass.) 241. See also *Zurawski v. Reichmann* (1902) 116 Iowa, 388, 90 N. W. 69.

In an action for slander for words accusing the plaintiff of perjury it was said and held: "It was improper to permit the plaintiff to prove that it was generally circulated in the community in which he lived that the defendant had charged him with swearing to a lie, or that the report was generally circulated in that community, in the absence of proof that the defendant himself, or someone else at his instance, caused the charge to be circulated. The defendant can only be held liable for the damages occasioned by his own communication. . . . They who repeat his defama-

tory words are liable for the wrong committed by them, but the originator of the slander is only liable for such damages as result directly from his own utterances." *Hereford v. Combs* (1899) 126 Ala. 369, 28 So. 582, supra.

In *Donaldson v. Roberson* (1916) 15 Ala. App. 354, 73 So. 223, supra, it was held that a woman, suing for words actionable per se, may not testify that she had heard a report that the defendant had spoken the words, either on the theory of special damages,—for the law in such case presumes such damages,—nor on any theory of mental distress, as the defendant was not liable for the repetition unless shown to be responsible for it, and it was also held that the question violated the hearsay rule.

In *Leonard v. Allen* (1853) 11 Cush. (Mass.) 241, supra, it was held that the plaintiff could not, in slander for accusing the plaintiff of burning a schoolhouse, show that it was currently reported in the neighborhood that the defendant had charged the plaintiff with burning the schoolhouse. The court said: "It was supposed to be so [admissible] for the purpose of showing that the plaintiff was injured by the charges of the defendant being put into general circulation. But the objection arises from the want of proof that the defendant had circulated those charges, which were abroad generally in the community. The evidence, so far as it went to connect the defendant with them, was mere hearsay. It proved the existence of current reports that the defendant had made such a charge, but it went no further."

Where the words spoken were actionable per se "the court was right in excluding certain newspaper articles purporting to state what the defendant had said; he was not responsible for those articles, and they were not admissible evidence against him." *Carpenter v. Ashley* (1906) 148 Cal. 422, 83 Pac. 444, 7 Ann. Cas. 601.

General loss of business.

In slander, for words spoken of the plaintiff as to his business, it has been held that general loss of business may not be shown. *Schaffhauser Bros. v.*

Hemmer (1911) 152 Iowa, 200, 131 N. W. 6 (where the words were actionable per se); Dicken v. Shepherd (1864) 22 Md. 399 (where it seems probable that the words were actionable per se).

Thus, in *Schaffhauser Bros. v. Hemmer* (Iowa) supra, it was held, in slander for charging that the plaintiffs used their hotel as a house of ill fame, that the plaintiffs might not show general decline in business after the slander.

In *Dixon v. Smith* (1860) 5 Hurlst. & N. 450, 157 Eng. Reprint, 1257, 29 L. J. Exch. N. S. 125, where a physician's character was attacked, the words apparently being considered not actionable per se, it was held in slander on the subject of damages that it was error to admit evidence of a general loss of business, the court stating that the decline could not have arisen from the speaking of the slanderous words to the person to whom it was proved they had been spoken, and said: "For repetitions of the slander the defendant is clearly not responsible."

Special damages due to repetitions.

It has been held, that special damages due to repetitions of the slander cannot be shown. *Cates v. Kellogg* (1857) 9 Ind. 506 (where the words were not actionable per se); *Dicken v. Shepherd* (1864) 22 Md. 399 (infra); *Stevens v. Hartwell* (1846) 11 Met. (Mass.) 542 (words not actionable per se); *Olmsted v. Brown* (1852) 12 Barb. (N. Y.) 657 (the same); *Pettibone v. Simpson* (1873) 66 Barb. (N. Y.) 492 (the same); *Rutherford v. Evans* (1829) 4 Car. & P. (Eng.) 74 (infra); *Tunncliffe v. Moss* (1850) 3 Car. & K. (Eng.) 83 (infra); *Barnett v. Allen* (1858) 1 Fost. & F. 125, 3 Hurlst. & N. 376, 157 Eng. Reprint, 516, 27 L. J. Exch. N. S. 412, 4 Jur. N. S. 488 (infra); *Hirst v. Goodwin* (1862) 3 Fost. & F. (Eng.) 257 (words apparently actionable per se); *Clarke v. Morgan* (1877) 38 L. T. N. S. (Eng.) 354 (words not actionable per se). See also *Michael v. Spiers & Pond* (1909) 25 Times L. R. (Eng.) 740, 101 L. T. N. S. 352 (the same).

Evidence of special damages in slander, as of loss of a customer, cannot

be shown by the customer's evidence that he heard a third party repeat what the latter had heard from the defendant. *Barnett v. Allen* (1858) 1 Fost. & F. 125, 3 Hurlst. & N. 376, 157 Eng. Reprint, 516, 27 L. J. Exch. N. S. 412, 4 Jur. N. S. 488, supra, where the court seemed to think the words might be actionable per se.

The person who originates a slander can only be liable for the special damage occasioned by his own communication of it, and it was error to instruct the jury that the defendant was liable for the plaintiff's loss of the custom of certain persons who heard the words "communicated by those to whom they were spoken, until they reached such persons." *Cates v. Kellogg* (Ind.) supra.

It was held in *Tunncliffe v. Moss* (1850) 3 Car. & K. (Eng.) 83, supra, that the plaintiff did not show special damage from the slander, in that a person refused to employ him on account of it, when such person did not hear the words spoken by the defendant (which accused him of taking a pie out of a pantry).

Similarly, in *Dicken v. Shepherd* (1864) 22 Md. 399, supra, where an action of slander was founded on an alleged injury to the plaintiff in his business, resulting from words spoken of him by defendant, and he alleged special damages, it was held that the proof of such special damage must be limited to the evidence of persons to whom the slanderous words were spoken. (The words indicated insolvency; the case seems to hold that the rule would be the same whether the words were actionable per se or not.) So, in *Rutherford v. Evans* (1829) 4 Car. & P. (Eng.) 74, supra, an action of slander for saying that the plaintiff cheated and defrauded his employer, where the plaintiff sought to show that one refused him credit in consequence of reports he had heard, it was held that proof of special damage must be confined to the evidence of those who had the statements from the defendant himself.

In *Clarke v. Morgan* (1877) 38 L. T. N. S. (Eng.) 354, supra, where the court recognized the logical difficulty,

it was held in slander, where the words were not actionable per se, that, though a general falling off of hospitality to the plaintiff might be shown, the loss of association of named persons, in consequence of having heard from third persons a repetition of the slander, could not be shown.

In *Hastings v. Palmer* (1838) 20 Wend. (N. Y.) 225, where the words were apparently slanderous per se, it was held that the plaintiff could not show special damages in that a witness forbore to employ him as a lawyer on account of hearing that he had done an act such as stated in the slander, without showing that the special injury arose from and was in consequence of the slander.

In *Holwood v. Hopkins* (1601) Cro. Eliz. pt. 2, p. 1787, 78 Eng. Reprint, 1017, in holding that words against a woman's chastity, spoken to her servant, would not sustain an action at common law, although she alleged they had caused the loss of her marriage, it is said: "That if the words had been spoken to him who was in communication to have married her, so as it had appeared that he purposefully intended to hinder the marriage, the action had been maintainable for the loss which she sustained; but when they are spoken generally, although peradventure an hindrance comes by reason of them, yet non constat; and therefore for such collateral hindrance it is not reason the action should lie."

In *Walklin v. Johns* (1891) 7 Times L. R. (Eng.) 292, a person dropped from a club for nonpayment of dues, and whose application for readmission as a lapsed member had been rejected, soon after was proposed as a new member and was rejected. The defendant uttered to the proposer at the club while the election was going on the words complained of, which were not actionable per se. It was held that there was no evidence to sustain the special damage; it was consistent with the evidence that the rejection was for other reasons than the alleged slander.

In *Argent v. Donigan* (1892) 8 Times L. R. (Eng.) 432, it appeared

that while the defendant and his wife were quarreling the plaintiff came into the room, and the defendant then charged him with adultery with the defendant's wife, and it was held that, as the plaintiff's wife was not present, he could not show as special damage loss of consortium, or loss of society of friends, and must be nonsuited.

III. *The author liable for the repetition.*

a. *In general.*

The reader will remember that the contra cases are to be found supra, II.

b. *Libel cases.*

In some of the libel cases the author of the libel has been held responsible for its repetition by another than an agent, as a natural and probable consequence of the publication.

United States.—See *Merchants' Ins. Co. v. Buckner* (1899) 39 C. C. A. 19, 98 Fed. 222 (reversed for error in charge).

Georgia.—*Howe v. Bradstreet Co.* (1910) 135 Ga. 564, 69 S. E. 1082, Ann. Cas. 1912A, 214 (arguendo).

Maine.—*Elms v. Crane* (1919) 118 Me. 261, 107 Atl. 852.

Massachusetts.—*Miller v. Butler* (1850) 6 Cush. 71, 52 Am. Dec. 768.

Minnesota.—*Zier v. Hoffin* (1885) 33 Minn. 66, 53 Am. Rep. 9, 21 N. W. 862.

Nebraska.—*Schmuck v. Hill* (1901) 2 Neb. (Unof.) 79, 96 N. W. 158; *Bigley v. National Fidelity & C. Co.* (1913) 94 Neb. 813, 50 L.R.A.(N.S.) 1040, 144 N. W. 810.

New Jersey.—*King v. Patterson* (1887) 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705.

Ohio.—*Wartenbe v. Sternberger* (1890) 23 Ohio L. J. 113.

(Of the foregoing libel cases, omitting the arguendo case, it would appear that the Minnesota case was for words not necessarily libelous per se, but which might become so from circumstances; it is not clear whether the libel was actionable per se, or not, in the Massachusetts case, and in the first Nebraska case. The other cases were apparently for libels per se.)

"One who publishes a libel is liable for any subsequent publications which

are the natural result of his act." *Schmuck v. Hill* (Neb.) *supra*, where it is perhaps suggested that the words, which are not reported, were libelous *per se*.

If the natural consequence of the publication of a libel is that it should be repeated to certain persons, the original publisher would be liable therefor. *Howe v. Bradstreet Co.* (1910) 135 Ga. 564, 69 S. E. 1082, Ann. Cas. 1912A, 214 (arguendo).

"We adhere to the opinion of Judge Savage in *Davis v. Starrett* (1903) 97 Me. 568, 55 Atl. 516. We hold that the defendant is responsible for such repetitions of the libel and such publicity as are fairly within the contemplation of the original publication, and are the natural consequences of it." *Elms v. Crane* (1919) 118 Me. 261, 107 Atl. 852, *supra*, where the words were libelous *per se*.

One who publishes a libel is responsible for such distribution and general circulation thereof as is the natural result of his act, such as, under the circumstances, he might reasonably suppose would follow as a result of the publication. *Bigley v. National Fidelity & C. Co.* (1913) 94 Neb. 813, 50 L.R.A. (N.S.) 1040, 144 N. W. 810, *supra* (where the words were libelous *per se*).

"Where one publishes a libel in a newspaper, and, without his knowledge, a third person cuts the libel from the paper and sends it to another person, the first is responsible for its being so sent, if the sending it was a natural consequence of its publication in the newspaper, of which the jury are to judge." *Zier v. Hoffin* (1885) 33 Minn. 66, 53 Am. Rep. 9, 21 N. W. 862, *supra*, where the court stated that the words were not necessarily libelous on their face, but might become so from circumstances.

In *Miller v. Butler* (1850) 6 Cush. (Mass.) 71, 52 Am. Dec. 768, *supra*, where the words are not given, but the jury found the letter in question libelous, it was held that the jury could find that the writer of a libelous letter was responsible for its publication by the addressee, if that was a probable consequence of sending the letter. It

may be that this case is no longer law in Massachusetts, in view of the comment made upon it in *Burt v. Advertiser Newspaper Co.* (1891) 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1, as quoted from in the reported case (*MAYTAG v. CUMMINS*, ante, 712).

A recovery may be had for such publication of a *per se* libelous letter as is a natural consequence of putting the letter into circulation, but it was held error to instruct the jury, where the libel was in a letter addressed to the secretary of a certain board of associated insurance agents, that, "on the question of damages, you should also consider the circulation which was given to these libelous words by members of the board, or others," without requiring the jury to find that such circulation was a natural consequence of the act of sending the letter containing the libelous matter to the secretary. *Merchants' Ins. Co. v. Buckner* (1899) 39 C. C. A. 19, 98 Fed. 222, *supra*.

In *Wartenbe v. Sternberger* (1890) 23 Ohio L. J. 113, *supra*, where the libel was a letter written by the defendant in a political campaign in which the plaintiff was a candidate, and was given by the defendant to a messenger of the committee of the party opposed to the plaintiff, and for the purpose of making a written statement of what the defendant had previously charged orally, it was held proper to permit the messenger to testify that he showed the letter to others than the addressee, that it was read at a meeting in the committee room, and that copies were made, etc. (the letter was apparently libelous *per se*).

In *King v. Patterson* (1887) 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705, *supra*, in holding the defendant liable as publishing a false statement in a mercantile agency report, where there was evidence that persons not subscribers of the agency could get access to its reports, the court said: "The injury to the plaintiff from the false report resulted from the manner in which the defendants disseminated their publications. It has been held that damage occasioned by the unauthorized repetition by a third person

of defamatory words uttered orally is too remote to support an action against the original utterer of them, where the words are actionable only by reason of special damage. *Ward v. Weeks* (1830) 7 Bing. 211, 131 Eng. Reprint, 81, 4 Moore & P. 796, 9 L. J. C. P. 6. This case, and the cognate case of *Vicars v. Wilcocks* (1806) 8 East, 1, 103 Eng. Reprint, 244, 9 Revised Rep. 361, have been criticized. 2 Smith, Lead. Cas. 8th ed. 553. The principle held in that case, if sound, has never been applied to written or printed libels, nor is it applicable to defamatory matter published in that manner. The correct principle to apply to such publications is that the original publisher is answerable in law for all the consequences of his wrongful act which were reasonably to be foreseen, and which were the result, in the usual order of things, of such wrongful act."

In *Moore v. Stevenson* (1858) 27 Conn. 14, an action for a libel charging the plaintiff with theft, which the defendant had caused to be published in a certain newspaper, where the plaintiff had alleged as special damage her dismissal from employment, it was held sufficient for her to show that her employer had stated to her that he dismissed her because there were flying reports about her in the newspapers; the jury had a right to presume that the employer had seen the particular newspaper, especially as the defendant made no effort to show that the report had been published in any other paper.

In *Park v. Detroit Free Press Co.* (1888) 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731, where words in a newspaper were actionable per se, it was held that the plaintiff might show that the article had been read by other persons, and that they had called his attention to it.

In a suit against publishers of a newspaper, where the words were libelous per se, it was held that the plaintiff might show, as bearing on his loss of reputation and business as an attorney, statements of third persons not produced as witnesses, relating to remarks made by them, their conduct,

and opinions, as exhibited and expressed by them concerning the plaintiff after some time had elapsed from the publication of the alleged libelous attack. *Cyrowski v. Polish-American Pub. Co.* (1917) 196 Mich. 648, 163 N. W. 58, holding also that this did not transgress the hearsay rule.

General loss of business.

It has been held, in cases of libels per se, that one libeled might show a falling off of business after the publication. *Parker v. Republican Co.* (1902) 181 Mass. 392, 63 N. E. 931; *Williams Printing Co. v. Saunders* (1912) 113 Va. 156, 73 S. E. 472, Ann. Cas. 1913E, 693; *Ingram v. Lawson* (1840) 6 Bing. N. C. 212, 133 Eng. Reprint, 84, 8 Scott, 471, 9 L. J. C. P. N. S. 145, 4 Jur. 151. The court expressed a similar opinion in *Weiss v. Whittemore* (1873) 28 Mich. 366.

Thus, in *Parker v. Republican Co.* (Mass.) supra, where the words were libelous per se concerning the plaintiff, a physician, it was held that he might show a falling off in professional income after the publication, and the conduct and treatment of his patients and acquaintances towards him, and his own feelings.

In *Ingram v. Lawson* (Eng.) supra, in an action by a shipowner who had advertised for freight and passengers, for libel in publishing a statement that his ship was not seaworthy and that she had been sold to carry out convicts, it was held that this was actionable per se, requiring no allegation of special damage, and that the plaintiff could show that, upon the first voyage after the publication, the profits were £1,500 below the average profits of similar voyages.

In allowing evidence of general loss of business in an action for a false statement in a newspaper not actionable per se, the court, after stating that such an action was not one of libel or of slander, said: "A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under

such circumstances that their repetition follows, in the ordinary course of things, from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorized repetition." *Ratliffe v. Evans* [1892] 2 Q. B. (Eng.) 524.

In *Harrison v. Pearce* (1858) 1 Fost. & F. (Eng.) 567, an action by a proprietor of newspapers against a rival newspaper proprietor, for a libel contained in a statement published in the defendant's paper as an advertisement, charging the plaintiff with oppressive conduct towards his printers, it was held that the jury were not bound to take into consideration that other actions were pending against other parties who had published the same libel, but that they might give the plaintiff in this action such damages as they thought had arisen from the decline of circulation, even subsequent to the action, and this as general damage. The evidence that the circulation had declined was objected to, among other grounds, because the decline did not necessarily arise from defendant's publication; but the court admitted the evidence.

c. Slander cases.

In some of the slander cases the author of the slander has been held responsible for its repetition by another than an agent.

Arkansas. — *Williams v. Fulks* (1914) 113 Ark. 82, 167 S. W. 93.

Maine. — *Davis v. Starrett* (1903) 97 Me. 568, 55 Atl. 516.

Nebraska. — *Fitzgerald v. Young* (1911) 89 Neb. 693, 132 N. W. 127.

New Jersey. — *Bahrey v. Poniatishin* (1921) — N. J. L. —, 112 Atl. 481.

Rhode Island. — *Rice v. Cottrel* (1858) 5 R. I. 342.

Texas. — *Southwestern Teleg. & Teleph. Co. v. Long* (1916) — Tex. Civ. App. —, 183 S. W. 421; *Southwestern Teleg. & Teleph. Co. v. Wilkins* (1916) — Tex. Civ. App. —, 183 S. W. 429.

Vermont. — *Nott v. Stoddard* (1865) 38 Vt. 25, 88 Am. Dec. 633; *Smith v. Moore* (1901) 74 Vt. 81, 52 Atl. 320.

England. — *Gillett v. Bullivant* (1846) 7 L. T. 490; *Derry v. Handley* 16 A.L.R.—47.

(1867) 16 L. T. N. S. 263. See also *Riding v. Smith* (1876) L. R. 1 Exch. Div. 91, 45 L. J. Exch. N. S. 281, 34 L. T. N. S. 500, 24 Week. Rep. 487 (not considered an action of slander).

Of the foregoing cases it would appear that all were for slanders *per se*, except the New Jersey case, where the words are not reported, and the English cases, where the words appear to be not actionable *per se*.

In *Williams v. Fulks* (1914) 113 Ark. 82, 167 S. W. 93, *supra*, where the words were slanderous *per se*, it was held that the plaintiff might testify, as showing mental suffering, that after the slander she received postal cards and that her heart was almost broken as the result of the slanderous words; nor was it error to permit the plaintiff's sister to testify that a friend told her of the use of the slanderous words by the defendant, as the objection did not raise the question of responsibility for mere repetition. As this testimony "only had a tendency to show that the slander was generally known, and had been communicated to" the sister by a third person, it was not calculated to augment the damages and could not be prejudicial; nor was it error to permit the plaintiff to show that she was a member of a certain lodge, and was the next highest officer therein, and that, about the time the slander was circulated, she was, without apparent cause, dropped out of line, and not promoted to the highest office; as the jury might fairly have drawn the inference that her failure to attain the office was caused by the slanders circulated against her good name. It was further held that the plaintiff might, for the purpose of showing the extent of the damage, introduce evidence of the fact that the slander had been generally circulated in the community as the result of the utterance of the slanderous words by the defendant. The court followed the ruling by a statement that the question of responsibility for mere repetition was not properly raised and was not decided; this statement being referred to and quoted in the reported case (*MAYTAG v. CUMMINS*, *ante*, 712).

Repetition as the natural and probable consequence.

The repetition of a slander may be the natural consequence of the defendant's original utterance. *Davis v. Starrett* (1903) 97 Me. 568, 55 Atl. 516 (where the words were actionable per se); *Fitzgerald v. Young* (1911) 89 Neb. 693, 132 N. W. 127 (the same); *Rice v. Cottrel* (1858) 5 R. I. 342 (apparently the same); *Southwestern Teleg. & Teleph. Co. v. Long* (1916) — Tex. Civ. App. —, 183 S. W. 421 (the same); *Southwestern Teleg. & Teleph. Co. v. Wilkins* (1916) — Tex. Civ. App. —, 183 S. W. 429 (the same); *Nott v. Stoddard* (1865) 38 Vt. 25, 88 Am. Dec. 633 (the same). See also English cases set out *infra*.

"It is a general principle that everyone is responsible for the natural and necessary consequences of his acts. And it well may be that the repetition of a slander may be the natural consequence of the defendant's original publication. . . . We think it may be said with reason in this case that the repetition of the slander by those to whom it was uttered, and after that by others, may be regarded as fairly within the contemplation of the original slander, and a consequence for which the defendant may be held responsible." *Davis v. Starrett* (1903) 97 Me. 568, 55 Atl. 516, *supra*.

In *Fitzgerald v. Young* (1911) 89 Neb. 693, 132 N. W. 127, *supra*, it was held proper to refuse to instruct the jury that the plaintiff's right of recovery was limited to the words spoken by the defendant to a witness, as a person uttering a slander is responsible for any subsequent publications which naturally result from his act. The court said: "A defamer is not permitted to speak actionable words to a single person, when others are near, and call upon the court in an action for slander to protect him from the consequences of later publications which naturally result from his act. The rule is that 'one who puts a libel in circulation is liable for any subsequent publications which are the natural consequence of his act.' *Schmuck v. Hill* (1901) 2 Neb. (Unof.) 79, 96 N. W. 158. Whether subsequent pub-

lications were the natural consequences of the original slander was a question for the jury. The original publication was fairly proved. That the slander was common report afterward was shown without objection. Plaintiff was permitted to testify that the publications caused her mental suffering. This was not prejudicial error."

The following English cases illustrate the difficulty of justifying them as exceptions to the general English rule; the Irish case is so extraordinary on the facts as to make a fair exception:

In *Gillett v. Bullivant* (1846) 7 L. T. (Eng.) 490, where the defendant made to the plaintiff's father a statement that the plaintiff, who was a governess, had had a child by her employer, and the father repeated this to the employer, who dismissed her, though the charge was false, it was held that the defendant was responsible for the special damages, as the repetition was the natural consequence of the speaking of the words.

In *Derry v. Handley* (1867) 16 L. T. N. S. (Eng.) 263, the defendant was held liable where he imputed unchastity to the plaintiff in presence of a man whose wife shortly afterwards discontinued to employ the plaintiff in her occupation as dressmaker and milliner, as there was a duty in the husband to repeat the words to his wife.

In *Riding v. Smith* (1876) L. R. 1 Exch. Div. (Eng.) 91, where the defendant stated to a person on her way to church, in the hearing of divers persons, that the wife of the plaintiff, who assisted him in carrying on his business, had been guilty of adultery with the recently appointed clergyman, it was held that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop, and that special damage might be proved by general evidence of the falling off of the plaintiff's business, without showing who the persons were who had ceased to deal with the plaintiff, or that they were the persons to whom

the statements were made, the court considering that the action was not an action of slander. Pollock, B., said in his opinion, *inter alia*: "The decision in *Ward v. Weeks* (1830) 7 Bing. 211, 131 Eng. Reprint, 81, 4 Moore & P. 796, 9 L. J. C. P. 6, is not applicable to a case like the present. In that case there was a specific allegation that a particular person, John Bryer, had declined to supply the plaintiff with goods on credit. Tindal, Ch. J., said that such a spontaneous and unauthorized communication as there took place—namely, the repetition of the words, which was the voluntary act of a free agent—could not be considered as the necessary consequence of the original uttering of the words. The facts of this case are different. The words were spoken on a public occasion, when the clergyman was about to read himself in, in order that he might become the incumbent of the parish, and the defendant, in the presence of four persons at least, uttered words with regard to his conduct with the wife of the plaintiff."

In *M'Loughlin v. Welsh* (1846) 10 Ir. L. Rep. 19, an action against a Roman Catholic priest for publicly pronouncing the plaintiff, who was owner of a mill, to be an excommunicated person, the plaintiff examined witnesses to prove that after the excommunication he was avoided by his neighbors, and that his mill was deserted, although the declaration did not specify the names of the persons who so avoided him or deserted his mill. It was held that general evidence of these facts was properly received, on the ground that such evidence was not to be considered as evidence of special damage, but as evidence to show that the consequence which the defendant intended to arise from his act actually happened.

Reports of the slander.

The plaintiff may show that there were reports of the slander in circulation. *Bahrey v. Poniatishin* (1921) — N. J. L. —, 112 Atl. 481 (*infra*); *Nott v. Stoddard* (1865) 38 Vt. 25, 88 Am. Dec. 633 (where the words were actionable *per se*); *Smith v. Moore* (1901) 74 Vt. 81, 52 Atl. 321 (the

same); *Kidder v. Bacon* (1900) 74 Vt. 263, 52 Atl. 322 (the same). See also *Crane v. Darling* (1899) 71 Vt. 295, 44 Atl. 359 (the same).

In *Bahrey v. Poniatishin* (N. J.) *supra*, where the words of the slander are not reported, it was held that the plaintiff might show that witnesses had heard reports circulated concerning the statements made by the defendant regarding the plaintiff; that they had heard them on the street and in the houses; they spoke about it. The court said: "This is admissible on the question of damages, showing the extent of the circulation of the slander for which the defendant is responsible."

In *Nott v. Stoddard* (1865) 38 Vt. 25, 88 Am. Dec. 633, *supra*, where the words charged the plaintiff, a woman, with stealing wood, it was held that it was proper to show that after the slander there was a rumor and report abroad that the defendant had so accused the plaintiff, the court saying: "The defendant is responsible for the necessary consequences of his wrongful act, and this evidence was admissible as tending to show the extent of such consequences; that is, the extent of the report that the defendant had thus accused the plaintiff. Whether evidence would be admissible to show that, after the speaking of the words by the defendant, it was generally reported that the plaintiff was guilty of the crime, is another question, and one which we are not called on to decide."

So, in *Smith v. Moore* (1901) 74 Vt. 81, 52 Atl. 320, *supra*, where the slander charged the plaintiff with being a thief in his employment, it was held that he might show, upon the question of damages, that there was a rumor in the vicinity that the defendant had so accused him.

In *Rice v. Cottrel* (1858) 5 R. I. 342, where the words were apparently slanderous *per se*, it was held that the plaintiff might show, in aggravation of damages, that the slanderous story concerning the plaintiff was current in the place after the time of the defendant's reporting the same, although no evidence directly tracing the current report to the defendant's utterance of the slander was tendered; and

that the plaintiff's practice as a physician immediately declined in value to about two thirds of what it had been before. The court said: "The currency of the slanderous report, following the utterance of it by the defendant, as well as the special injury done by it to the plaintiff in his profession, were, under the declaration, proper subjects of proof to the jury, to enable them to estimate the plaintiff's damages; and the connection, if any, between the words of the plaintiff and the currency of the injurious report, was a matter for the jury, and not for the court, to pass upon."

General loss of business.

The plaintiff may show a decline in business since the publication of the slander. *Rice v. Cottrel* (R. I.) *supra* (where the words were apparently actionable per se); *Browning v. Newman* (1725) 1 Strange, 666, 93 Eng. Reprint, 769 (the same); *Evans v. Harries* (1850) 1 Hurlst. & N. 251, 156 Eng. Reprint, 1197, 26 L. J. Exch. N. S. 31 (*infra*). See also *Davis v. Starrett* (1907) 97 Me. 568, 55 Atl. 516; *Riding v. Smith* (1876) L. R. 1 Exch. Div. (Eng.) 91, 45 L. J. Exch. N. S. 281, 34 L. T. N. S. 500, 24 Week. Rep. 487.

In *Browning v. Newman* (1725) 1 Strange, 666, 93 Eng. Reprint, 769, *supra*, where the words spoken were actionable per se, viz., "You are a thief, and I will prove you so," general evidence of the loss of customers was admitted.

In *Evans v. Harries* (1856) 1 Hurlst. & N. 251, 156 Eng. Reprint, 1197, 26 L. J. Exch. N. S. 31, *supra*, where the words do not appear, it was held that, in an action of slander of the plaintiff in his business of innkeeper, he might show, as special damage, a general loss of custom.

IV. Moral duty to repeat.

There has been an effort by some of the English authorities to justify some of the cases holding the utterer of a slander responsible for its repetition, by the doctrine that there was a moral duty of the hearer to repeat the slander, and that such cases constitute an exception to the rule of nonresponsibility for repetitions. The application

of this doctrine does not seem to be a success.

Thus, there was no responsibility for the repetition of a charge of unchastity made to the plaintiff's mother, who repeated it to the plaintiff, who repeated it to her fiancé, who broke his engagement. *Speight v. Gosnay* (1890) 7 Times L. R. (Eng.) 239. There is no duty in a wife accused of adultery to tell her husband of it; the repetition is not her duty, nor the natural and inevitable consequence of the original utterance. *Parkins v. Scott* (1862) 1 Hurlst. & C. 152, 158 Eng. Reprint, 839, 31 L. J. Exch. N. S. 331, 8 Jur. N. S. 593, 6 L. T. N. S. 394, 10 Week. Rep. 562. So, there is no duty in a husband accused of adultery to tell his wife of it. *Argent v. Donigan* (1892) 8 Times L. R. (Eng.) 432. But the utterer of a charge of unchastity concerning a dressmaker and milliner is responsible for its repetition by the hearer to his wife, who thereupon ceases to employ her, as it was the husband's duty to repeat the words to his wife. *Derry v. Handley* (1867) 16 L. T. N. S. (Eng.) 263. And it is the natural consequence of stating to the father of the plaintiff that she has had a child by the man who employed her as a governess that the father will repeat it to her employer, and if he dismisses her, although the charge is false, the maker of the statement to the father will be responsible for the resulting special damages. *Gillett v. Bullivant* (1846) 7 L. T. (Eng.) 490. And it is the natural consequence of a charge of adultery concerning a woman who assists her husband in his business that his business will be injured, and the utterer will be responsible therefor, as this is not an action of slander. *Riding v. Smith* (1876) L. R. 1 Exch. Div. (Eng.) 91, 45 L. J. Exch. N. S. 281, 34 L. T. N. S. 500, 24 Week. Rep. 487.

The American cases do not seem to contain much about the duty to repeat. In *Elmer v. Fessenden* (1889) 151 Mass. 359, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208, it was held that a person cannot be held liable for an unauthorized repetition of his slander in stating that silk on which employees were

working contained arsenic sufficient to make the work dangerous, on the ground that anyone who heard the report was bound as a moral duty to repeat it to the workmen; as there was no such moral duty.

V. Miscellaneous.

There is an obiter suggestion, that the utterer of a slander ought to be responsible for its innocent repetition by others, which was made in *Keenholts v. Becker* (1846) 3 Denio (N. Y.) 346, by Beardsley, J., where he says: "Where slanderous words are repeated innocently and without an intent to defame, as under some circumstances they may be, I do not see why the author of the slander should not be held liable for injuries resulting from it as thus repeated, as he would be if these injuries had arisen directly from the words as spoken by himself. A different rule should, perhaps, govern where the repetition was itself slanderous, and the injurious consequences arose, in part at least, from the second slander."

In *Bassell v. Elmore* (1872) 48 N. Y. 561, where the words were not slanderous per se, the court said, arguing: "Ordinarily, the repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and therefore, generally, the loss resulting from such repetition does not constitute special damage, and is not attributable to the first publisher. This rule results from the principle that everyone who repeats a slander is responsible for the damage caused by such repetition, and such damage is not the proximate and natural consequence of the first publication of the slander. But if the slander be repeated under such circumstances as to be justifiable and innocent, and not to give a cause of action against the one repeating the same, then the first publisher thereof is generally responsible for the damage caused by such repetition."

The matter would appear to have been simply one of agency in the badly reported case of *Ecklin v. Little* (1890) 3 Times L. R. (Eng.) 366, where it

seems probable that the defendant said to her companion, in the presence of two other ladies, that a lady had told her that the plaintiff, an assistant to a physician, had been divorced, and added, "You had better inquire;" and the companion asked the wife of the plaintiff's employer, and she asked her husband, and the plaintiff was compelled to resign his place. It was held that the defendant intended her companion to repeat the words, and was accordingly responsible.

In *Bree v. Marescaux* (1881) L. R. 7 Q. B. Div. (Eng.) 434, 50 L. J. Q. B. N. S. 676, 44 L. T. N. S. 765, 29 Week. Rep. 858, the defendant, a British subject on a British ship sailing from England to Jamaica, complained to the captain that the third officer, the plaintiff, had misconducted himself towards a lady passenger, and the matter was reported to the home office in England of the company owning the ship, in consequence whereof the plaintiff was dismissed from its service. It was held that the court would not permit service on the defendant in Jamaica, as the "act or thing for which damages" were sought was not "done within the jurisdiction." The court of appeal, in affirming, considered that while the special damage, the discharge, happened in England, and though the affidavit stated that the slander was intended to be transmitted to England, it did not appear that the defendant directed that it should be transmitted.

Where the defendant had written a letter, which was libelous per se, to an official of a railroad company which employed the plaintiff as a conductor, and which dismissed him in consequence of the letter, in holding that it was not error for the plaintiff to show that he had sought employment of other railroad companies which refused to employ him, the court said: "It is true, as claimed by defendant, 'that one who utters a slander is not responsible, either as on a distinct cause of action, or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no

control, and who thereby make themselves liable to the persons slandered.' Newell, *Defamation*, p. 243, § 19. . . . The purpose of offering this evidence was to show an honest effort to obtain employment, and to meet any claim by defendant that plaintiff might, at least, have reduced the damage by going to work elsewhere, which would likely have been urged had he failed to show any effort to seek work. . . . In showing his clearance, thus informing the companies to which he applied that he had been dismissed for conduct unbecoming a conductor, he was but meeting the requirement of these companies. It was not for the purpose of publishing the libelous letter." *Adams v. Cameron* (1915) 27 Cal. App. 625, 150 Pac. 1005, 151 Pac. 286.

In *Beach v. Ranney* (1842) 2 Hill (N. Y.) 309, it was said that, where the words are not slanderous per se, the plaintiff cannot show special damage unless it be the natural and immediate consequence of the speaking of the words.

In *Fowles v. Bowen* (1864) 30 N. Y. 20, it was said that where actionable words are spoken to a man about his clerk, and the hearer writes his partner repeating the slander, this repetition is the natural and probable result of it; but judgment for the plaintiff was reversed on the ground of privilege of the original slander.

Where it was shown that special damage, the discharge of the plaintiff, came from a similar slander uttered to the employer by another, who had stated that the plaintiff himself had told her the fact she repeated, and the jury might have included such special damage in the verdict, the court ordered a new trial. *Wallace v. Rodgers* (1893) 156 Pa. 395, 27 Atl. 163.

The old idea of the repeater of a

slander justifying by giving up the name of the author seems now exploded. In *Stevens v. Hartwell* (1846) 11 Met. (Mass.) 542, the court referred to "one of the resolutions in Northampton's Case (1829) 12 Coke 134, 77 Eng. Reprint, 1408, where it is laid down as a general proposition that, 'if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief, in an action of the case, if the truth be such, he may justify,'" and said: "This was an extrajudicial resolution, and if it is to be understood as an unqualified proposition that in all cases, and under all circumstances, the repetition of slanderous words, stating at the time the name of the author, is justifiable, it has been overruled by the court of King's bench, in *M'Pherson v. Daniels* (1829) 10 Barn. & C. 263, 109 Eng. Reprint, 448, 5 Man. & R. 251, 8 L. J. K. B. 14, and by the court of common pleas, in *Ward v. Weeks* (1830) 7 Bing. 211, 131 Eng. Reprint, 81, 4 Moore & P. 796, 9 L. J. C. P. 6, before cited."

Reference, however, may be made in this connection to *M'Gregor v. Thwaites* (1820) 3 Barn. & C. 24, 107 Eng. Reprint, 643, 4 Dowl. & R. 695, 2 L. J. K. B. 217, 27 Revised Rep. 274, where a newspaper proprietor printed a correct account of the words spoken on a certain occasion, some of which were untrue, and some of which would not have supported an action against the utterer. It was held that the proprietor was liable in libel, although he gave the name of the utterer, but did not say he heard the utterance; as the person libeled must have his action against someone, and even if the utterer could justify the repetition, he must at least offer himself as a witness.

B. B. B.

EDWARD L. SIMON, Appt.,
v.
LONDON GUARANTEE & ACCIDENT COMPANY.

Nebraska Supreme Court — April 30, 1920.

(104 Neb. 524, 177 N. W. 824.)

Libel — false and gratuitous matter not privileged.

1. In an action for libel based on an allegation in a pleading in another action, where it appears that the defamatory matter was wholly gratuitous, irrelevant, and immaterial, that it was well known by defendant to be false and untrue, that it was published without cause or justification and with express malice, it is not privileged.

[See note on this question beginning on page 746.]

— in pleading — malice.

2. Whatever a litigant may properly plead as a cause of action or ground of defense, when relevant or material to the issue, he may plead with or without malice, and in such case the intent with which he pleaded the same cannot be inquired into or become an issue in an action for libel.

[See 17 R. C. L. 335, 336.]

Pleading — relevancy — doubt.

3. Where the relevancy and pertinency of matter alleged in pleading is to be inquired into, all doubt should be resolved in favor of relevancy and pertinency.

Libel — in pleading — privilege.

4. If there is no reason or object in furtherance of justice and fair dealing to use scandalous and libelous matter then when so used it is not privileged.

[See 17 R. C. L. 336.]

— in pleading generally privileged.

5. Allegations in a pleading are privileged, and cannot serve as a basis for a libel suit, unless it clearly appears that the same were not relevant or pertinent.

[See 17 R. C. L. 335, 336.]

Headnotes by ALDRICH, J.

APPEAL by plaintiff from a judgment of the District Court for Lancaster County (Morning, J.) in favor of defendant in an action brought to recover damages for an alleged libel. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. R. J. Greene, for appellant:

A charge of having either leprosy, plague, or a venereal disease, although the exact form of venereal or other disease need not be specified, is actionable per se.

17 R. C. L. § 33, p. 294.

Words not actionable per se are, in many instances, rendered actionable by proof of malice in uttering them.

17 R. C. L. § 65, p. 322.

The statements of parties, counsel, and witnesses in judicial proceedings must be pertinent or relevant to the case in order to be privileged.

17 R. C. L. § 80, p. 333; notes in 104 Am. St. Rep. 119, and 123 Am. St. Rep. 633.

Defamatory statements made in judicial proceedings must be pertinent

and material to the case in order to be privileged.

Dodge v. Gilman, 122 Minn. 177, 47 L.R.A. (N.S.) 1098, 142 N. W. 147, Ann. Cas. 1914D, 894.

Not only is disease resulting or ensuing from accident compensatable, but also disease aggravated, accelerated, developed, or hastened by accident.

Blatt v. Noble, 176 App. Div. 924, 162 N. Y. Supp. 1111; Borgsted v. Shults Bread Co. 180 App. Div. 229, 167 N. Y. Supp. 229; Uhl v. Guarantee Constr. Co. 174 App. Div. 571, 161 N. Y. Supp. 659.

Messrs. Kennedy, Holland, DeLacy, & Horan and Strode & Beghtel, for appellee:

Whatever a party to an action may

allege in his pleading as a cause of action or ground of defense, that is pertinent or material to the charge made, or against which he is defending, can never give rise to a right of action for libel.

Carpenter v. Grimes Pass Placer Min. Co. 19 Idaho, 384, 114 Pac. 42; *Taylor v. Iowa Park Gin Co.* — Tex. Civ. App. —, 199 S. W. 853; *Rogers v. Thompson*, 89 N. J. L. 639, 99 Atl. 389; *Keeley v. Great Northern R. Co.* 156 Wis. 181, L.R.A.1915C, 986, 145 N. W. 664; *Hammer v. Forde*, 125 Minn. 146, 145 N. W. 810; *Dodge v. Gilman*, 122 Minn. 177, 47 L.R.A. (N.S.) 1098, 142 N. W. 147, Ann. Cas. 1914D, 894; *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845; *Kemper v. Fort*, 219 Pa. 85, 13 L.R.A. (N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991; *Myers v. Hodges*, 53 Fla. 197, 44 So. 357; *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274; *Crockett v. McLanahan*, 109 Tenn. 517, 61 L.R.A. 914, 72 S. W. 950; *Gaines v. Aetna Ins. Co.* 104 Ky. 695, 47 S. W. 884; *Union Mut. L. Ins. Co. v. Thomas*, 28 C. C. A. 96, 48 U. S. App. 575, 83 Fed. 803.

If the matter is relevant or pertinent to the subject of inquiry, no action will lie therefor, however false or malicious the matter in fact may be.

Myers v. Hodges, 53 Fla. 197, 44 So. 357; *Kelley v. Great Northern R. Co.* 156 Wis. 181, L.R.A.1915C, 986, 145 N. W. 664; *Koehler v. Du Bose*, — Tex. Civ. App. —, 200 S. W. 238; *La Porta v. Leonard*, 88 N. J. L. 663, L.R.A. 1916E, 779, Ann. Cas. 1917E, 167, 97 Atl. 251; *Hess v. McKee*, 150 Iowa, 409, 130 N. W. 375; *Bartlett v. Christilf*, 69 Md. 219, 14 Atl. 518; *Buschbaum v. Heriot*, 5 Ga. App. 521, 63 S. E. 645; *Hassett v. Carroll*, 85 Conn. 23, 81 Atl. 1013, Ann. Cas. 1913A, 333; *Carpenter v. Grimes Pass Placer Min. Co.* 19 Idaho, 384, 114 Pac. 42.

It is a question of law for the court to determine, whether the alleged defamatory matter in the bill was pertinent to the issues in the suit.

Crockett v. McLanahan, 109 Tenn. 517, 61 L.R.A. 914, 72 S. W. 950; *Myers v. Hodges*, 53 Fla. 197, 44 So. 357; *Carpenter v. Grimes Pass Placer Min. Co.* supra.

Aldrich, J., delivered the opinion of the court:

This is a suit on an alleged libel, consisting of matter stated by defendant in his pleadings and briefs

to this court in another action. The plaintiff sued defendant in a former action under the Employers' Liability Act, alleging that plaintiff at the time of the injury was an able-bodied man. Defendant in answer to this allegation alleged that plaintiff prior to the injury was suffering with gonorrhea and syphilis. Plaintiff makes claim for damages by reason of this allegation, claiming it was false, spurious, gratuitous, and not a matter material to the defense. The trial judge held that the matter pleaded was absolutely privileged, and directed a verdict in favor of the defendant. Plaintiff appeals.

The question to be decided by us is whether this alleged libel is absolutely privileged. The question whether language which would otherwise be libelous per se used in a pleading is privileged, and to what extent it is privileged, is not settled in this state. The law in England and some of the states of this country is that any publication in the course of judicial proceedings, including at least testimony of witnesses, arguments of counsel and pleadings, is absolutely privileged, and that nothing spoken or written, however false or malicious, will support an action for libel. But the prevailing rule in this country is different.

Thus it is obviously a question of law, which the court is to determine, whether the alleged defamatory matter either in the petition or the answer was relevant and pertinent to the issues in the case. The trial judge then determines the materiality, relevancy, and pertinency of this defense as tendered by the defendant, and it is the weight of American authority that a privilege is absolute when the matter tendered is pertinent or material. *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738. In *Carpenter v. Grimes Pass Placer Min. Co.* 19 Idaho, 384, 114 Pac. 43, ^{Libel in pleading—malice.} there is a very able

and philosophical discussion upon the question of privilege in pleading defamatory matter either as a de-

fense or matter in a petition, and as it reflects the doctrine of American authority along this line we have concluded to quote some of the syllabi of that case, and as it is based on reason and sound discretion, we adopt it. The syllabi in that case are as follows:

"Whatever a party to an action may allege in his pleading as a cause of action or ground of defense that is pertinent or material to the charge made, or against which he is defending, can never give rise to a right of action for libel.

"The ends of justice and the public good can be best served by allowing litigants to freely plead any material matter in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter which is neither pertinent nor material to the issue under inquiry.

The privilege of freely pleading matters constituting causes of action or grounds of defense must be exercised in good faith, and the courts will determine, as a matter of law, whether the matter pleaded was in fact pertinent or material to the issue joined.

"Whatever a litigant may properly plead as a cause of action or ground of defense as relevant or material to the issue, he may plead with or without malice, and in such case the intent with which he pleaded the same cannot be inquired into or become an issue in an action for libel."

How far the theory of libel and slander may be used in judicial proceedings is fully set forth in the above quotations. It rests upon the sound principle of law that justice, and the greatest good to the greatest number, can best be served by allowing a pleader the benefit of all material matter, limiting him and holding him accountable only for that which is neither relevant nor pertinent, but it is plain that, even though the matter may be defamatory and malicious, yet, if it is relevant or pertinent to the issues, it is

privileged. Parties acting in good faith should be freely allowed to plead matters constituting a cause of action or ground of defense.

The law affords no protection to him who assails and wantonly besmirches the reputation of his adversaries. We hold that whatever a litigant may properly plead as a cause of action or ground of defense, when it is relevant or pertinent to the issues, is privileged.

The allegation of a pleading becomes privileged only when the same is relevant. In *Sherwood v. Powell*, 61 Minn. 479, 29 L.R.A. 153, 52 Am. St. Rep. 614, 63 N. W. 1103, we have this proposition verified. That case holds that where it appears, from a complaint in an action for libel based on an allegation in a pleading in another action, that the defamatory allegation was wholly gratuitous, irrelevant, and immaterial; that it was well known by defendant to be false and untrue; that it was published without cause or justification and with express malice,—it was not privileged. This states the law as we understand the weight of American authority to be.

In *Hammer v. Forde*, 125 Minn. 146, 145 N. W. 811, is another discussion which is typical of the American rule, wherein it is held that allegations in a pleading are privileged, and cannot serve as a basis for a libel suit, unless it clearly appears that the same were not pertinent, material, or relevant to the controversy in litigation. All doubt should be resolved against the contention that the privilege has been exceeded. Many more cases could be cited in support of this rule.

The consensus of American authority is that if there is no necessary object in furtherance of justice and fair dealing to use scandalous and libelous matter, then, when so used, it is not

—in pleading
generally
privileged.

—false and
gratuitous
matter not
privileged.

—in plead-
ing—privilege.

privileged. The object and purpose of these rules thus discussed is to get at the truth or to discuss certain indispensable facts upon which truth and justice rest. Also in *Kemper v. Fort*, 219 Pa. 85, 13 L.R.A. (N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991, 12 Ann. Cas. 1022, there is a complete discussion that discloses amply the American doctrine on this subject.

Now in applying this law to the facts herein we are met with the proposition that plaintiff alleged in his petition that he was an able-bodied man in good health, and the defendant by way of defense alleged that at the time of the injury plaintiff was in poor health, debilitated and debauched, suffering from venereal diseases, and that the injury complained of was only slight and had no causal relation, but that the real cause was venereal disease. The case came on for trial, and the alleged libel was allowed to remain in the answer. Evidence was taken on this issue of plaintiff's health.

Appellant lays great stress upon the fact that defendant failed to establish this defense, and he cites cases to show that syphilis, accelerated by an injury, may be compensated. But if the incapacity complained of had been shown to be wholly due to the disease, and not to an aggravation of it, it would have been a good defense. At any rate

the matter pleaded was relevant and pertinent.

As hereinbefore stated, allegations in pleadings are privileged if material or pertinent to the controversy in litigation. In order that everyone may feel free to seek justice, he should be allowed to state his cause of action or defense fully, and not be subjected to a lawsuit for so doing, unless he has clearly abused the privilege. For this reason courts favor a liberal rule. "Where the question of the relevancy and pertinency of matters alleged in pleadings is to be inquired into, all doubt should be resolved in favor of relevancy and pertinency." *Kemper v. Fort*, supra. The complaining party must show that the words, though libelous per se, were not relevant or material, and that the author of them was actuated by ill will and malice. These principles are vindicated by the adjudications upon the subject, and are consistent with reason.

Testing the alleged libel by these rules we hold that the matter pleaded was privileged, and that the trial court was right in directing a verdict in favor of defendant. The judgment is affirmed.

Rose and Flansburg, JJ., not sitting.

Petition for rehearing denied.

ANNOTATION.

Relevancy of matter contained in pleading as affecting privilege within law of libel.

I. Generally, 746.

II. Illustrations:

- a. Matter held relevant, 750.
- b. Matter held irrelevant, 753.

I. Generally.

Relevant statements.

It is well settled that if statements made in a pleading in a civil action are relevant to any issue involved in that action they are privileged, and no action for libel can be founded thereon.

United States.—*McGehee v. Insurance Co. of N. A.* (1902) 50 C. C. A. 551, 112 Fed. 853.

Arkansas.—*Mauney v. Millar* (1920) 142 Ark. 500, 219 S. W. 1032.

California.—*Wyatt v. Buell* (1874) 47 Cal. 624; *Hollis v. Meux* (1886) 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. 248; *Gosewisch v. Doran* (1911) 161 Cal. 511, 119 Pac. 656, Ann. Cas. 1913D, 442.

Florida.—*Myers v. Hodges* (1907) 53 Fla. 197, 44 So. 357.

- Georgia.**—*Wilson v. Sullivan* (1888) 81 Ga. 238, 7 S. E. 274; *Conley v. Key* (1895) 98 Ga. 115, 25 S. E. 914.
- Idaho.**—*Carpenter v. Grimes Pass Placer Min. Co.* (1911) 19 Idaho, 384, 114 Pac. 42.
- Illinois.**—*Strauss v. Meyer* (1868) 48 Ill. 385; *Ash v. Zwietusch* (1896) 159 Ill. 455, 42 N. E. 854.
- Indiana.**—*Wilkins v. Hyde* (1895) 142 Ind. 260, 41 N. E. 536.
- Iowa.**—See *Hawk v. Evans* (1889) 76 Iowa, 593, 14 Am. St. Rep. 247, 41 N. W. 368; *Hess v. McKee* (1911) 150 Iowa, 409, 130 N. W. 875.
- Kentucky.**—*Gaines v. Ætna Ins. Co.* (1898) 104 Ky. 695, 47 S. W. 884; *Monroe v. Davis* (1904) 118 Ky. 806, 82 S. W. 450.
- Louisiana.**—*Dunn v. Southern Ins. Co.* (1906) 116 La. 431, 40 So. 786; *Lescale v. Joseph Schwartz Co.* (1907) 118 La. 718, 43 So. 385; *Lebovitch v. Joseph Levy & Bros. Co.* (1911) 128 La. 518, 54 So. 978; *Gardemal v. McWilliams* (1891) 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 So. 106; *Randall v. Hamilton* (1893) 45 La. Ann. 1184, 22 L.R.A. 649, 14 So. 73; *Youree v. Hamilton* (1893) 45 La. Ann. 1191, 14 So. 77; *Wimbish v. Hamilton* (1895) 47 La. Ann. 246, 16 So. 856.
- Maryland.**—*Bartlett v. Christhill* (1888) 69 Md. 219, 14 Atl. 518.
- Michigan.**—*Hart v. Baxter* (1881) 47 Mich. 198, 10 N. W. 198; *Hartung v. Shaw* (1902) 130 Mich. 177, 89 N. W. 701.
- Minnesota.**—*Hammer v. Forde* (1914) 125 Minn. 146, 145 N. W. 810.
- Missouri.**—*Jones v. Brownlee* (1901) 161 Mo. 258, 53 L.R.A. 445, 61 S. W. 795; *McCormick v. Ford Mfg. Co.* (1921) — Mo. —, 232 S. W. 1010.
- Nebraska.**—See the reported case (*SIMON v. LONDON GUARANTEE & ACCI. Co. ante*, 743).
- New York.**—*Link v. Moore* (1895) 84 Hun, 118, 32 N. Y. Supp. 461, 1 N. Y. Anno. Cas. 330; *Beggs v. McCrea* (1901) 62 App. Div. 39, 70 N. Y. Supp. 864; *Rosenberg v. Dworetzky* (1910) 139 App. Div. 517, 124 N. Y. Supp. 191; *Garr v. Selden* (1859) 4 N. Y. 91; *Marsh v. Ellsworth* (1872) 50 N. Y. 309; *Gallagher v. Surpless* (1917) 163 N. Y. Supp. 551.
- North Carolina.**—*Perry v. Perry* (1910) 153 N. C. 266, 31 L.R.A.(N.S.) 880, 69 S. E. 180; *Baggett v. Grady* (1911) 154 N. C. 342, 70 S. E. 618.
- Ohio.**—*Lanning v. Christy* (1876) 30 Ohio St. 115, 27 Am. Rep. 431.
- Pennsylvania.**—*Kemper v. Fort* (1907) 219 Pa. 85, 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 623, 12 Ann. Cas. 1022, 67 Atl. 991.
- Tennessee.**—*Ruchs v. Backer* (1871) 6 Heisk. 395, 19 Am. Rep. 598; *Crockett v. McLanahan* (1903) 109 Tenn. 517, 61 L.R.A. 914, 72 S. W. 950.
- Washington.**—*Miller v. Gust* (1912) 71 Wash. 139, 127 Pac. 845; *Abbott v. National Bank* (1899) 20 Wash. 552, 56 Pac. 376.
- West Virginia.**—*Johnson v. Brown* (1878) 13 W. Va. 91.
- Wisconsin.**—*Keeley v. Great Northern R. Co.* (1914) 156 Wis. 181, L.R.A. 1915C, 986, 145 N. W. 664.
- Canada.**—*Wilkins v. Major* (1902) Rap. Jud. Quebec 22 C. S. 264.
- Irrelevant statements.**
- In England the rule obtains that any statement contained in a pleading is absolutely privileged irrespective of its relevancy to the issues. *Buckley v. Wood* (1591) Cro. Eliz. pt. 1, p. 230, 78 Eng. Reprint, 486; *Brown v. Michel* (1596) Cro. Eliz. pt. 2, p. 500, 78 Eng. Reprint, 750; *Revis v. Smith* (1856) 18 C. B. 126, 139 Eng. Reprint, 1314, 2 Jur. N. S. 614, 25 L. J. C. P. N. S. 195, 4 Week. Rep. 506; *Astley v. Younge* (1759) 2 Burr. 807, 97 Eng. Reprint, 572, 2 Ld. Kenyon, 536; *Henderson v. Broomhead* (1859) 4 Hurlst. & N. 569, 157 Eng. Reprint, 964, 5 Jur. N. S. 1175, 28 L. J. Exch. N. S. 360, 7 Week. Rep. 492.
- The rule as laid down in England is followed. *Runge v. Franklin* (1889) 72 Tex. 585, 3 L.R.A. 417, 13 Am. St. Rep. 833, 10 S. W. 72. In that case the court said: "We believe it is, and ought to be, the law, that proceedings in civil courts are absolutely privileged. Citizens ought to have the unqualified right to appeal to the civil courts for redress without the fear of being called to answer in damages for libel." See to the same effect *Harris v. Santa Fe Townsite Co.* (1910) 58 Tex. Civ. App. 506, 125 S. W. 77; *Baten v. Hous-*

ton Oil Co. (1919) — Tex. Civ. App. —, 217 S. W. 394. And see Tuohy v. Halsell (1912) 35 Okla. 61, 43 L.R.A. (N.S.) 323, 128 Pac. 126, Ann. Cas. 1916B, 1110, holding to be privileged irrelevant and defamatory statements in an affidavit presented to a committee of the United States Senate in connection with the confirmation of an officer appointed by the President. In Bartlett v. Christhlf (1888) 69 Md. 219, 14 Atl. 518, wherein the statement under consideration was held to be pertinent, the court, after discussing the English cases, said obiter: "These authorities, and others which might be cited, hold that statements made in any of the pleadings or proceedings in a cause before a court having jurisdiction of the subject are absolutely privileged, even though made maliciously and falsely. This privilege, protecting against a suit for libel or slander, is founded upon what would seem to be a sound public policy which looks to the free and unfettered administration of justice, though as an incidental result it may, in some instances, afford an immunity to the evil disposed and malignant slanderer." However, the court said that in the case at bar it was not necessary to decide whether the privilege invoked was absolute or qualified, as the allegations complained of did have direct relation to the subject-matter brought before the court in the petition in which they were used and therefore were privileged within either view of the matter.

But in the majority of the American cases which have passed directly on the question it has been held that statements in a pleading which are not relevant or pertinent to the subject-matter of the action are not privileged.

United States.—Union Mut. L. Ins. Co. v. Thomas (1897) 28 C. C. A. 96, 48 U. S. App. 575, 83 Fed. 803; King v. McKissick (1903) 126 Fed. 215; Potter v. Troy (1909) 175 Fed. 128.

District of Columbia.—Harlow v. Carroll (1895) 6 App. D. C. 128.

Florida.—Myers v. Hodges (1907) 53 Fla. 197, 44 So. 357.

Louisiana.—Randall v. Hamilton (1893) 45 La. Ann. 1184, 22 L.R.A. 649,

14 So. 73; Wimbish v. Hamilton (1895) 47 La. Ann. 246, 16 So. 856.

Massachusetts.—McLaughlin v. Cowley (1879) 127 Mass. 316, s. c. on subsequent appeal in (1881) 131 Mass. 70; Barnett v. Loud (1917) 226 Mass. 447, 115 N. E. 767.

Minnesota.—Sherwood v. Powell (1895) 61 Minn. 479, 29 L.R.A. 153, 52 Am. St. Rep. 614, 63 N. W. 1103.

Missouri.—Hyde v. McCabe (1890) 100 Mo. 412, 13 S. W. 875.

New York.—Lesser v. International Trust Co. (1916) 175 App. Div. 12, 161 N. Y. Supp. 624; Moore v. Manufacturers' Nat. Bank (1890) 123 N. Y. 420, 11 L.R.A. 753, 25 N. E. 1048.

See also the cases heretofore cited to the proposition that pertinent statements are privileged, most of which impliedly hold that irrelevant statements are actionable.

This qualification of the English rule is adopted in order that the protection given to individuals in the interest of an efficient administration of justice may not be used as a cloak from beneath which private malice may be gratified. *McLaughlin v. Cowley* (1879) 127 Mass. 319. "A rule which tolerates and encourages gratuitous, immaterial, and malicious attacks upon a litigant, and excuses and justifies them, simply affords an opportunity for evil-disposed persons to vilify and calumniate, under the guise of an honest effort to secure the proper administration of justice. The doctrine which prevails abroad has not commended itself to the judiciary of this country, and it has been qualified by the American courts so that statements, verbal or written, made in the course of judicial proceedings, must at least be pertinent and material to the case, to be privileged." *Sherwood v. Powell* (1895) 61 Minn. 481, 29 L.R.A. 153, 52 Am. St. Rep. 614, 63 N. W. 1103.

So, in *Carpenter v. Grimes Pass Placer Min. Co.* (1911) 19 Idaho, 384, 114 Pac. 42, it was said: "The ends of justice and the public good can be best served by allowing litigants to freely plead any pertinent or material matter in a judicial proceeding to which they are parties, holding them

accountable only for defamatory matter which is neither pertinent nor material to the subject under inquiry. They cannot be allowed to avail themselves of the protection of the courts to assail and besmirch the reputation of their adversaries, or to there find protection, and thence sally forth in the guise of a pleading to assassinate character and belie virtue. The privilege must be exercised in good faith. The courts will determine as a matter of law whether the matter pleaded was in fact pertinent or material."

Where the alleged libelous matters are authorized by statute as expressing the grounds on which a judicial proceeding may be instituted, they are privileged. *Wilkins v. Hyde* (1895) 142 Ind. 260, 41 N. E. 536; *Hawk v. Evans* (1889) 76 Iowa, 593, 14 Am. St. Rep. 247, 41 N. W. 368. See also *Hodson v. Pare* [1899] 1 Q. B. (Eng.) 455, 68 L. J. Q. B. N. S. 309, 47 Week. Rep. 241, 80 L. T. N. S. 13, 15 Times L. R. 171. Thus there was involved in the case first cited a statute providing that whenever a board of children's guardians should have probable cause to believe that any child under fifteen years of age was abandoned, neglected, or cruelly treated by its parent or parents, or that the latter were of low and gross debauchery, such board should file its petition in court setting forth such facts, and that notice should be given to the parent or parents of the filing of the petition, and on the hearing thereof by the court, if the facts were found to be true, the custody of the children in question should be committed to the board. The alleged libel was based on the following words and matter, written and embraced in a petition filed under the statute: "That she neglects her children and leads a life of low and gross debauchery, and the associations of said children are such as tend to their corruption and contamination." The court held the statements to be privileged.

In California a statutory provision that "a privileged publication is one made . . . in any legislative or judicial proceeding or in any other official proceeding authorized by law"

(Cal. Civ. Code, § 47) has been construed to effect an absolute privilege in respect to matters stated in pleadings. *Duncan v. Atchison, T. & S. F. R. Co.* (1896) 19 C. C. A. 202, 44 U. S. App. 427, 72 Fed. 808; (construing California statute); *Ball v. Rawles* (1892) 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Hollis v. Meux* (1886) 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. 248. But see *Wyatt v. Buell* (1874) 47 Cal. 624, decided before the section of the Code cited was enacted. In *Gosewisch v. Doran* (1911) 161 Cal. 511, 119 Pac. 656, Ann. Cas. 1913D, 442, the court discussed the earlier cases at some length, but declined to pass on the question whether privilege attaches to irrelevant statements, holding that the matter sued on was relevant.

Extent of privilege.

By the weight of authority, it seems that where the allegations and averments are relevant or pertinent to the subject-matter of the litigation, they are privileged, and hence not libelous, however false and malicious they may be. *Wilson v. Sullivan* (1888) 81 Ga. 238, 7 S. E. 274; *Gaines v. Aetna Ins. Co.* (1898) 104 Ky. 695, 47 S. W. 884. In the case last cited the court said: "The paragraph of the answer objected to as libelous was certainly pertinent and relevant to the defense presented by appellee to that action; and though the allegations be untrue, and were known to be untrue when made, and also conceding that they were made with bad motives, still, for obvious grounds of public policy, no action will lie therefor." To the same effect see *Gosewisch v. Doran* (Cal.) *supra*; *Carpenter v. Grimes Pass Placer Min. Co.* (1911) 19 Idaho, 384, 114 Pac. 42; *McCormick v. Ford Mfg. Co.* (1921) — Mo. — 232 S. W. 1010; *Link v. Moore* (1895) 84 Hun, 118, 32 N. Y. Supp. 461, affirmed (1898) 156 N. Y. 661, 50 N. E. 1119; *Rosenberg v. Dworetzky* (1910) 139 App. Div. 517, 124 N. Y. Supp. 191; *Chapman v. Dick* (1921) 197 App. Div. 551, 188 N. Y. Supp. 861; *Abbott v. National Bank* (1899) 20 Wash. 552, 56 Pac. 376; *Miller v. Gust* (1912) 71 Wash. 139, 127 Pac. 845. See also *Buschbaum v. Heriot* (1909) 5 Ga. App.

521, 63 S. E. 645; *Sebree v. Thompson* (1907) 126 Ky. 223, 11 L.R.A. (N.S.) 723, 103 S. W. 374, 15 Ann. Cas. 770. But in at least two jurisdictions the rule is otherwise in this respect, and an allegation in a pleading is not privileged unless founded on probable cause. The privilege in these jurisdictions does not extend to matters known to be false. *Lescale v. Joseph Schwartz Co.* (1905) 116 La. 302, 40 So. 708, s. c. on subsequent appeal in (1907) 118 La. 718, 43 So. 385; *Lebovitch v. Joseph Levy & Bros. Co.* (1911) 128 La. 518, 54 So. 978; *Charlebois v. Bourassa* (1889) Montreal L. R. 5 C. S. (Quebec) 365; *Martin v. Madore* (1912) 18 Rev. de Jur. (Quebec) 481, 3 D. L. R. 441. See also *Gardemal v. McWilliams* (1891) 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 So. 106; *Metzler v. Romine* (1890) 9 Pa. Co. Ct. 171, 20 Phila. 247; *Ruchs v. Backer* (1871) 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598.

The rule that relevant matter contained in a pleading is privileged is generally held to apply, though a stranger to the action seeks a recovery. *Jones v. Brownlee* (1901) 161 Mo. 269, 53 L.R.A. 445, 61 S. W. 795, wherein the court said: "Holding, as we do, that the same policy should govern when reference is made to a third party in a relevant and pertinent pleading as to the parties themselves, we see no reason why we should not hold that the communication which is made the basis of this suit is absolutely privileged." See to the same effect, *Potter v. Troy* (1909) 175 Fed. 128; *Link v. Moore* (1895) 84 Hun, 118, 32 N. Y. Supp. 461, 1 N. Y. Anno. Cas. 330; *Crockett v. McLanahan* (1903) 109 Tenn. 517, 61 L.R.A. 914, 72 S. W. 950; *Miller v. Gunt* (1912) 71 Wash. 139, 127 Pac. 845. Compare *Ruohs v. Backer* (1871) 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598.

The relevancy to the subject-matter of the controversy of the matter alleged to be libelous is a question of law for the court, and is never a question of fact for the jury. *Harlow v. Carroll* (1895) 6 App. D. C. 140; *Jones v. Brownlee* (1901) 161 Mo. 258, 53 L.R.A. 445, 61 S. W. 795; *Crockett v.*

McLanahan (1902) 109 Tenn. 517, 61 L.R.A. 914, 72 S. W. 950.

As to the degree of relevancy or pertinency necessary to bring the alleged defamatory matter within the privilege, the courts favor a liberal rule. Thus, the matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety. *Harlow v. Carroll* (1895) 6 App. (D. C.) 139. "Much latitude must be allowed to the judgment and discretion of those who maintain a cause in court. Much allowance should be made for the earnest though mistaken zeal of a litigant who seeks to redress his wrongs, and for the ardent and excited feelings of the fearless, conscientious lawyer, who must necessarily make his client's cause his own." *Myers v. Hodges* (1907) 53 Fla. 197, 44 So. 362.

In order that matter alleged in a pleading may be privileged, it need not be in every case material to the issues presented by the pleadings. It must, however, be legitimately related thereto, or so pertinent to the subject of the controversy that it may become the subject of inquiry in the course of the trial. *Union Mut. L. Ins. Co. v. Thomas* (1897) 28 C. C. A. 96, 48 U. S. App. 575, 83 Fed. 803.

II. Illustrations.

a. Matter held relevant.

On a petition for the removal of a trustee, receiver, guardian, or other fiduciary, any allegation in the petition of misconduct tending to warrant an order of removal is deemed to be relevant, and is accordingly privileged. *Strauss v. Meyer* (1868) 48 Ill. 385; *Wilkins v. Hyde* (1895) 142 Ind. 260, 41 N. E. 536; *Bartlett v. Christilf* (1888) 69 Md. 219, 14 Atl. 518; *Beggs v. McCrea* (1901) 62 App. Div. 39, 70 N. Y. Supp. 864; *Ruohs v. Backer* (1871) 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598.

Where a proceeding is heard on affidavits, allegations impeaching the reputation of an affiant whose testimony is adduced by the opposing party are relevant, and cannot be made

the basis of an action for libel. *Conley v. Key* (1895) 98 Ga. 115, 25 S. E. 914. The same is true as to allegations asserting that his statements are untrue and perjured. *Hart v. Baxter* (1881) 47 Mich. 198, 10 N. W. 198.

So, in *Perry v. Perry* (1910) 153 N. C. 266, 31 L.R.A.(N.S.) 880, 69 S. E. 130, wherein it appeared that an affidavit of an executor, in opposition to a motion to tax him with costs, contained a charge that the testimony on which the motion was based was fraudulent, the court held that the charge was relevant to the issue, and was consequently privileged.

In *Keeley v. Great Northern R. Co.* (1914) 156 Wis. 181, L.R.A.1915C, 986, 145 N. W. 664, wherein matter in an affidavit alleged illicit relations between the plaintiff and a witness who had testified as a disinterested person, the court held that, since the matter was pertinent to the issue, it was privileged.

Allegations of adultery in a bill for divorce are relevant to the subject-matter of the action, and accordingly cannot be made the basis of an action for libel by the third person with whom the adultery is alleged to have been committed. *Jones v. Brownlee* (1901) 161 Mo. 258, 53 L.R.A. 445, 61 S. W. 795; *Link v. Moore* (1895) 84 Hun, 118, 32 N. Y. Supp. 461, 1 N. Y. Anno. Cas. 330; *Miller v. Gust* (1912) 71 Wash. 139, 127 Pac. 845.

The rule whereby a privilege attaches to pertinent allegations in a pleading has been applied in several instances in proceedings for an accounting. Thus in an action by a minority stockholder for an accounting allegations of misappropriation of corporate assets by the directors are privileged. *Gosewisch v. Doran* (1911) 161 Cal. 511, 119 Pac. 656, Ann. Cas. 1913D, 442. So, in *Kemper v. Fort* (1907) 219 Pa. 85, 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 633, 67 Atl. 991, 12 Ann. Cas. 1022, it appeared that, in answer to a petition to compel an executor to account, he alleged that the petitioner was illegitimate and not entitled to take under the will. It was held that, since the matter was rele-

vant to the issue, it was therefore privileged, the court saying that all doubt should be resolved in favor of relevancy. In *Gallagher v. Surpless* (1917) 163 N. Y. Supp. 551, the court said: "So the only question here is whether the matter complained of was material and pertinent to the accounting proceeding. The defendant Gallagher was objecting to the accounting of an administratrix. In doing so it was necessary for him to point out the respects in which the account was incorrect. In the ninth objection he had pointed out that the accounting party had failed to charge herself with the value of a pawn ticket alleged to have been turned over to the plaintiff. The tenth objection contains a similar assertion to the effect that the administratrix had failed to charge herself with the further indebtedness of \$2,000 alleged to be due from the plaintiff to the estate of the decedent. In that connection the statement was made that this sum was taken by the plaintiff from the clothes of the decedent. It is certain that this statement was pertinent. It was also material. . . . It follows that the complaint . . . shows on its face that the utterance complained of was absolutely privileged." In *Ash v. Zwietusch* (1896) 159 Ill. 455, 42 N. E. 854, wherein an answer filed in opposition to a proceeding for an accounting contained a charge of embezzlement, it was held that since the matter was not wholly irrelevant and impertinent it was privileged.

In *Hawk v. Evans* (1889) 76 Iowa, 593, 14 Am. St. Rep. 247, 41 N. W. 368, a petition for a summary order requiring an attorney to pay over money collected by him, which contained "only the essential facts entitling the plaintiff to the relief asked," was held to be privileged.

In *Wilson v. Sullivan* (1888) 81 Ga. 238, 7 S. E. 274, wherein it appeared that charges of perjury and bribery in procuring a judgment were contained in a bill in equity to enjoin a sale thereunder, the court held that the allegations, being relevant to the issue, were privileged. So, in *Gardemal v. McWilliams* (1891) 43 La. Ann. 454,

26 Am. St. Rep. 195, 9 So. 106, allegations of official misconduct by a sheriff in making a tax sale were held to be pertinent, in an action to set aside the sale.

It appeared in *Hammer v. Forde* (1914) 125 Minn. 146, 145 N. W. 810, that in seeking to recover damages for a private nuisance it was alleged that a lease had been made maliciously and for the purpose of injuring private property. The court held that since the averment was relevant matter it was privileged.

In the reported case (*SIMON V. LONDON GUARANTEE & ACCL. CO.* ante, 143), wherein it appears that, in an action under the Employers' Liability Act, it was alleged that the plaintiff, previous to the injury, was a healthy and able-bodied man, and matter contained in the defendant's brief attributed the real cause to venereal disease, the court holds that the matter was relevant to the issue and was privileged.

Where in an action to recover for services rendered, matter in an answering pleading charged the plaintiff with conversion of the property of the defendant, the court held that since the matter was relevant to the issue the rule of privilege absolved the pleader from liability for libel. *Carpenter v. Grimes Pass Placer Min. Co.* (1911) 19 Idaho, 384, 114 Pac. 42. So, in *Garr v. Selden* (1859) 4 N. Y. 91, wherein an attorney, seeking to recover for services rendered, was charged with "improperly disclosing confidential communications," the court held that since the matter was relevant to the issue it was privileged.

In *Crockett v. McLanahan* (1903) 109 Tenn. 517, 61 L.R.A. 914, 72 S. W. 950, wherein an alleged libel consisted of a charge of illegal voting, made in a bill seeking to prevent the issuance of bonds, the court held that, although it related to a stranger, the charge was relevant to the issue and was privileged.

The averment sued on in *Abbott v. National Bank* (1899) 20 Wash. 552, 56 Pac. 376, was of reckless speculation by the officers of a bank, the proceeding seeking to establish that

funds had been loaned negligently. It was held that the statement, being relevant to the issue, was of a privileged character. So, in *Johnson v. Brown* (1878) 13 W. Va. 71, averments of fraud, mismanagement, and embezzlement in a bill for an accounting against the general manager of a corporation were held to be privileged. Similarly in *Lescale v. Joseph Schwartz Co.* (1907) 118 La. 718, 43 So. 385, wherein petitions filed opposing the liquidation of the affairs of a company contained charges of fraud, the court held that the matter, being relevant and material to the issue, was privileged. See to the same effect, *Monroe v. Davis* (1904) 118 Ky. 806, 82 S. W. 450; see also *Lebovitch v. Joseph Levy & Bros. Co.* (1911) 128 La. 518, 54 So. 978.

In *Chapman v. Dick* (1921) 197 App. Div. 551, 188 N. Y. Supp. 861, the allegations of a defense and counterclaim, which in effect charged plaintiff with larceny of funds of the corporation, and the purchase therewith, in his own name, of its bonds, interposed in a suit for specific performance of defendant's agreement to return to plaintiff certain corporate stock upon the payment of an indebtedness,—were held sufficiently relevant to render them privileged, it appearing that, in the suit for specific performance, the plaintiff (who was also the plaintiff in the subsequent action for libel), in order to show the necessity for specific performance, alleged that the stock was necessary to his continued control of the corporation, and that its future would be jeopardized if he lost control, there being also certain allegations as to the amount of bonds owned by him. It was so held, notwithstanding an order in the suit for specific performance, sustaining a demurrer to the defense and counterclaim, which recited that the demurrer was confessed. The court observed that the question of absolute privilege of the matter complained of was not to be tested as a mere matter of pleading; if it could possibly be pertinent or material, the privilege is absolute; that the rule as to absolute privilege is a broad and

liberal one, designed for the protection of counsel, parties, and witnesses in a judicial action or proceeding.

In *Rosenberg v. Dworetzky* (1910) 139 App. Div. 517, 124 N. Y. Supp. 191, wherein statements in a petition in bankruptcy alleged fraudulent concealment of property, the court said: "This allegation was certainly pertinent and material to the claim that the bankrupt had removed and concealed the goods. The alleged libel complained of, therefore, is a statement in a pleading or petition filed in a court in pending judicial proceedings, pertinent and relevant to the issue there presented. As such it was absolutely privileged."

In *Lanning v. Christy* (1876) 30 Ohio St. 115, 27 Am. Rep. 431, the alleged libel was contained in the answer to a suit on certain notes. The notes were given in compromise of a bastardy proceeding, and the answer alleged that they were procured by the fraud of the plaintiff in falsely swearing that the defendant was the father of her child. It was held that the allegation was pertinent and privileged.

In *Dunn v. Southern Ins. Co.* (1906) 116 La. 431, 40 So. 786, statements by an insurance company, accusing plaintiff of false swearing in seeking to collect on a fire insurance policy, were held to be privileged on account of their relevancy to the issue. So, in *McGehee v. Insurance Co. of N. A.* (1902) 50 C. C. A. 551, 112 Fed. 853, allegations in an answer in an action to recover on an insurance policy, accusing the plaintiff of intentionally burning the insured property, were held to be privileged, since they were material and relevant to the issue. See to the same effect, *Gaines v. Aetna Ins. Co.* (1898) 104 Ky. 695, 47 S. W. 884.

In *Mauney v. Millar* (1920) 142 Ark. 500, 219 S. W. 1032, it appeared that in an action to cancel a lease for breach of a condition therein, an averment of arson by the plaintiff was made by the defendant as an excuse for the breach. Holding that the statement was not actionable, the court said: "There are two classes of privileged communications recognized in the law 16 A.L.R.—48.

governing the publication of alleged libelous matter. One of these classes constitutes an absolute privilege, and the other a qualified privilege, and, according to the great weight of authority, pertinent and relevant statements in pleadings in judicial proceedings are held to be within the first class mentioned, and are absolutely privileged. . . . The test as to absolute privilege is relevancy and pertinency to the issue involved, regardless of the truth of the statements or of the existence of actual malice."

Allegations in the answer in an action by an attorney for services, that the loss of a suit was due to his lack of knowledge and skill, were held, in *McCormick v. Ford Mfg. Co.* (1921) — Mo. —, 232 S. W. 1010, to be relevant, and therefore the subject of an absolute privilege.

b. Matter held irrelevant.

It was shown in *McLaughlin v. Cowley* (1879) 127 Mass. 316, that, in an action to recover damages for procuring the plaintiff to employ an untrustworthy agent, the plaintiff alleged that the agent, prior to his employment, had been guilty of adultery and murder. It was held that the averment was irrelevant and actionable.

So, where a petition in a bankruptcy proceeding contained the statement that the plaintiff was a "fugitive from justice," the court held that the matter, not being relevant to the issue, was not within the rule of privilege. *Lesser v. International Trust Co.* (1916) 175 App. Div. 12, 161 N. Y. Supp. 624.

In *Union Mut. L. Ins. Co. v. Thomas* (1897) 28 C. C. A. 96, 48 U. S. App. 575, 83 Fed. 803, it appeared that an insurance company, in its answer to an action brought against it by the beneficiary under a policy, denied the death of the insured, and alleged as an affirmative defense that the beneficiary and her attorneys had entered into an agreement and conspiracy to defraud the company, that they had no knowledge or information of the death of the insured, and that they had alleged that the insured was dead for the sole purpose of carrying out the conspiracy. The libel suit was insti-

tuted by one of the attorneys against whom these charges had been made. The court in holding that the matter alleged by the company in its answer was not privileged said: "The issue in the action was whether or no the insurance company was liable upon the policy. Its defense was that the insured was still living. Instead of relying upon that defense, it attempted to asperse the character of the attorneys who were conducting the suit, by charging them with libelous matter, which, if true, added in no way to the force of its allegation that the event upon which alone its liability was to attach had not occurred, to wit, the death of the insured. The matter so alleged was not pertinent to the issues in the case, and upon motion it was struck out of the answer by the court."

In *Hyde v. McCabe* (1890) 100 Mo. 412, 13 S. W. 875, it was held that where a motion was heard on affidavits, a statement in an affidavit opposing the motion, that the affidavit supporting it was "a corrupt voluntary and wilful case of false swearing," was irrelevant, and not privileged.

It has been held that statements in an application to perpetuate testimony, accusing an attorney of fraud and false swearing in respect to the claim which the testimony was designed to rebut, not being relevant to the issue, did not come within the rule of privilege. *King v. McKissick* (1903) 126 Fed. 215.

In *Barnett v. Loud* (1917) 226 Mass. 447, 115 N. E. 767, it appeared that an attorney, who was the plaintiff in an action to collect office rent, was accused in the answer of gambling during office hours, and allowing a woman of bad reputation to frequent his office, whereby the defendant suffered damage in the use of the office for the rent of which he was sued. The court held that the matter, not being relevant to the issue, did not come within the rule of privilege.

So, in *Sherwood v. Powell* (1895) 61 Minn. 479, 29 L.R.A. 153, 52 Am. St. Rep. 614, 63 N. W. 1103, a partner seeking to recover funds due after the dissolution of the firm was charged by

his late copartner with using the office of the firm as a place of assignation. The court held that, since the accusation was not relevant to the issue, it was not privileged.

In *Harlow v. Carroll* (1895) 6 App. D. C. 128, it appeared that the libelous matter complained of was inserted in the answer to a bill in equity and consisted in the following words: "Respondent was informed by a detective who had been employed to look up complainant's antecedents and past career that she was a procuress and engaged in other unlawful practices, and was of no veracity or reputation." The court held that the matter was not privileged, and that both the counsel and the client concerned in its utterance were liable at the suit of the person injured thereby.

In *Moore v. Manufacturers' Nat. Bank* (1890) 123 N. Y. 420, 11 L.R.A. 753, 25 N. E. 1048, it appeared that a bank had brought suit against its cashier on his bond, and in a bill of particulars had alleged that the funds of the bank had been misappropriated "by collusion with the teller." The teller was not a party to the bond or to the suit, and there was no issue that called for an investigation of his conduct. The court held that the reference to the teller was not privileged, but was *prima facie* libelous.

In *Potter v. Troy* (1909) 175 Fed. 128, a statement in an answer to the effect that the complainant in a foreclosure suit was only the agent and representative of certain manipulators in New York city, who by the methods adopted and by unreliable and untrue advance expert estimates had planned to bring about the conditions then existing, in an effort unlawfully to take away from certain stockholders of the respondent corporation their interest in the property, was held to be libelous *per se* as respected the alleged manipulators, who were not parties to the foreclosure action, the court holding that as the statement was entirely irrelevant to the issues in the action it was not privileged although set forth in a pleading.

C. B. D.

STERLING P. BOND, Appt.,
v.
LUTHER H. WILLIAMS et al., Respts.

Missouri Supreme Court (Div. No. 2)—July 5, 1910.

(279 Mo. 215, 214 S. W. 202.)

Evidence — of provocation.

1. Where punitive damages are asked in an action for assault and battery, evidence is admissible to show circumstances of provocation.

[See note on this question beginning on page 771.]

—circumstances of assault.

2. Evidence of the circumstances under which the assault was committed is admissible in an action for damages for assault and battery.

—abusive language as mitigation of assault.

3. Evidence of violent abuse of witnesses by an attorney is admissible in an action for him for punitive damages for an assault committed by the witnesses upon him immediately after the court adjourned.

[See 2 R. C. L. 587-589.]

Trial — question for jury — malice in assault.

4. The jury must determine whether or not witnesses, who, after being violently abused by counsel in his address to the jury, assault him immediately after adjournment of court, were actuated by malice so as to be subject to punitive damages.

Assault—malice—what is.

5. A definition of malice in an action for assault and battery as not meaning mere spite, ill will, or hatred,

but that state of disposition which shows a heart regardless of social duty and fatally bent on mischief, is not erroneous.

[See 18 R. C. L. 2.]

Appeal — instruction — nonprejudicial error.

6. One getting the benefit of a definition of malice in his own instruction cannot complain that it was left out of that of his opponent.

Damages — assault — denial —interference with verdict.

7. A verdict denying even actual damages in an action for assault and battery will not be set aside as inadequate, where there is evidence indicating that the injury inflicted was very slight.

Appeal — inadequacy of verdict — raising question.

8. Overruling a motion for new trial because the verdict was against the evidence and against the law does not bring up for review the question whether or not the verdict was inadequate.

APPEAL by plaintiff from a judgment of the Circuit Court of the City of St. Louis (Anderson, J.) in favor of defendants in an action brought to recover damages for an alleged assault and battery. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Lee Meriwether and S. P. Bond for appellant.

Messrs. Fauntleroy, Cullen, & Hay and B. H. Boyer, for respondents:

The plaintiff, having elected to proceed against defendants upon the charge of conspiracy and assault as the result thereof, must recover upon that theory or not at all, and hence must recover against all defendants or none.

Aronson v. Ricker, 185 Mo. App. 528, 172 S. W. 641; Rice v. McAdams, 149 N. C. 29, 62 S. E. 774; Laverty v.

Vanarsdale, 65 Pa. 507; Hines v. Whitehead, 124 Iowa, 262, 99 N. W. 1064; Schafer v. Ostmann, 148 Mo. App. 648, 129 S. W. 63.

The question of whether or not plaintiff had sustained any actual damage was also, by plaintiff's own instructions, left to the jury, and, having found against plaintiff on each hypothesis, plaintiff cannot now be heard to complain.

Berkson v. Kansas City Cable R. Co. 144 Mo. 220, 45 S. W. 1119; Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198.

Plaintiff is bound by the theory adopted by him in the trial court.

Henry County v. Citizens' Bank, 208 Mo. 226, 14 L.R.A.(N.S.) 1052, 106 S. W. 622; Bray v. Seligman, 75 Mo. 31; Wilson v. St. Louis, I. M. & S. R. Co. 87 Mo. 431; Sumner v. Rogers, 90 Mo. 324, 2 S. W. 476; Traber v. Hicks, 131 Mo. 180, 32 S. W. 1145; Carson v. Cummings, 69 Mo. 325; Matousek v. Bohemian R. C. F. C. U. 192 Mo. 597, 91 S. W. 538; Carey v. Metropolitan Street R. Co. 125 Mo. App. 188, 101 S. W. 1123.

The instructions given on behalf of plaintiff did not correctly define the relation of joint tort-feasors, but left the matter of joint liability to mere guess or conjecture of the jury, and were improper.

Thomas v. Werremeyer, 34 Mo. App. 667; Schafer v. Ostmann, 148 Mo. App. 648, 129 S. W. 63.

Evidence as to what occurred in the court room during the argument by plaintiff was clearly competent in mitigation of punitive damages.

Cook v. Neely, 143 Mo. App. 632, 128 S. W. 233; Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1023; Mitchell v. United R. Co. 125 Mo. App. 13, 102 S. W. 661; Joice v. Branson, 73 Mo. 28; Nichols v. Winfrey, 79 Mo. 552; Michael v. Jones, 84 Mo. 581; Hinzeman v. Texarkana & Ft. S. R. Co. 199 Mo. 66, 94 S. W. 973.

White, C., filed the following opinion:

Plaintiff brought this suit in the circuit court of the city of St. Louis, claiming damages for assault and battery. The petition alleged that on the 26th day of March, 1914, in the city of Farmington, the defendants unlawfully assaulted, beat, and bruised the plaintiff, injuring him in a manner described. It was further alleged that the assault and battery were in pursuance of a conspiracy. Judgment was prayed for actual damages in the sum of \$5,000 and punitive damages in the sum of \$10,000. The defendants filed a general denial. On trial of the case there was a verdict and judgment for the defendants, from which the plaintiff appealed.

The circumstances out of which the alleged cause of action arose are as follows: On March 26, 1914, the

plaintiff, who is an attorney, was engaged at Farmington representing the defendant in the case of the State v. John O'Brien. Two of these defendants, Marbury and Luther Williams, were witnesses for the state in that trial. Defendant George K. Williams was brother of Luther. In his argument to the jury on behalf of his client, which took place in the evening, the plaintiff violently abused Williams and Marbury in the presence of a number of people, characterizing them as liars and perjurers. All three of the defendants were in the courthouse at the time, sitting in different parts of the house. After the argument was over and the case submitted to the jury, the plaintiff and his associate counsel walked out of the courthouse and went across the street to the hotel. As they approached the hotel the defendant Marbury accosted the plaintiff and demanded that he apologize for what he had said in the course of his speech. It appears that Marbury attempted to strike Bond, but was held by a friend from behind, so that his purpose in that respect was frustrated. About that time defendant Luther Williams appeared and struck the plaintiff, knocking him down. Defendants offered some testimony to the effect that, when Marbury accosted the plaintiff, he made a motion as if to draw a weapon, and then Luther Williams struck. There is also some evidence that Mr. Bass, Mr. Bond's associate, made a like demonstration before Williams struck.

Each of the defendants testified that he was aroused to extreme anger by the language of the plaintiff, but that there was no concert of action and no conversation between them after the plaintiff made his speech until the encounter took place. The case was submitted to the jury on instructions offered by the plaintiff to the effect, if they should find that the defendants or either of them, acting alone or in concert with the same purpose, assaulted and beat the plaintiff with-

out justification or excuse, they should find for the plaintiff.

I. The principal error complained of was the admission of evidence offered by the defendants showing the abusive language used by the plaintiff while addressing the jury. This was testified to by each of the defendants and other witnesses. The defendants testified that they were very much outraged by the language used, and that the excitement and indignation remained with them up to the time of the assault.

In an action for damages caused by assault and battery it is always

permissible to show the circumstances of assault.

under which the alleged assault was committed. Where punitive damages are asked, whether malice was present is an issue, and it is permissible to show the circumstances

of provocation in mitigation of such damages, though such evidence is inadmissible in mitigation of actual damages. *Joice v. Branson*, 73 Mo. 28; *Gray v. McDonald*, 104 Mo. 303, loc. cit. 314, 16 S. W. 398. In order, however, that evidence of provocation, such as abusive language, may be introduced for the purpose of mitigation, the provocation must have occurred at the time of the assault, or so recently as to warrant an inference that the defendant was still laboring under the excitement caused by it.

Appellant, while admitting the principle of law stated, argues that a sufficient time had elapsed after the provocation and before the assault to show that the attack was made in cool blood and with malice. The authorities are not altogether in agreement as to what would be sufficient time for the passions aroused by such a provocation to subside, so that it would be presumed the assault was deliberate; that is, they do not set definite limits for a period designated as a "cooling time." *State v. Wieners*, 66 Mo. loc. cit. 27. In general, it is said that the length of time neces-

sary to remove the excuse of provocation depends upon the circumstances of each case. As said by this court in the case of *State v. Grugin*, 147 Mo. loc. cit. 51, 42 L.R.A. 774, 71 Am. St. Rep. 553, 47 S. W. 1058: "No precise time, therefore, in hours or minutes, can be laid down by the court, as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very principle on which provocation and passion are allowed to be shown at all, in mitigation of the offense."

This passage is quoted by the court from the case of *Maier v. People*, 10 Mich. 212, 81 Am. Dec. 781.

The appellant cites two Missouri cases in support of its position. *Coxe v. Whitney*, 9 Mo. 531, where plaintiff, editor of a newspaper, published an article reflecting on defendant's wife. Two days later defendant went to the room of plaintiff and made the assault. The court held that evidence of the provocation was inadmissible mitigation of damages. The court said (9 Mo. 535): "The evidence of provocation which is allowed to mitigate the damages must be so recent as to induce a fair presumption that the violence was done during the continuance of the feelings and the passion excited by it."

The court then makes this statement (9 Mo. loc. cit. 536): "But 'ira furor brevis est.' What is done twenty-four or forty-eight hours after the provocation received is not the result of that passion, but is the deliberate infliction of vengeance, for an injury, real or supposed."

The other case is *Collins v. Todd*, 17 Mo. 537. In that case the plaintiff used insulting language to the defendant's niece, and this was communicated to the defendant on Sunday. The assault occurred on the succeeding Monday or Tuesday, and the court held evidence of the provocation was inadmissible, because sufficient time had elapsed to allow

the presumption that the person had cooled. No other case is cited in this state by appellant, holding that a shorter time between the provocation and the assault was sufficient to exclude the evidence, nor do cases in general from other states generally support the appellant's position. In the case of *Dupee v. Lentine*, 147 Mass. 580, 18 N. E. 465, the provocation occurred some time before the assault, but the defendant learned of it just ten minutes before the assault, and the evidence was held inadmissible, but that case is contrary to the weight of authority. The case of *Thrall v. Knapp*, 17 Iowa, 468, is cited. In that case the provocation occurred a week before the assault, but information in relation to it was conveyed to the defendant three hours before, and the evidence of provocation was held improperly admitted. It appears in that case that the court gave attention to the time at which the provocation occurred rather than the time at which the information reached the defendant. It was said that "no circumstance of provocation on the week before, or the day before, the assault, or at any time other than the identical day [of] the assault, . . . could be offered in evidence."

In the case of *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475, the provocation was two hours before the assault, and the evidence was held inadmissible.

The case of *Ward v. White*, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021, is where an abusive article appeared in a newspaper concerning the defendant, and the next day the defendant committed the assault for which he was sued. The newspaper article was held properly admitted.

In *Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630, the plaintiff offered an indignity to the defendant's wife one evening, and on the following morning the assault occurred. Evidence of the affront was held admissible.

In the case of *Dolan v. Fagan*, 63

Barb. 73, the plaintiff insulted the defendant with opprobrious language on a number of occasions before the assault took place. The trial court ruled that the defendant could show anything that took place on the day of the assault, or the day before, but not what took place several days before. The case was reversed on the ground that the ruling excluding what took place several days before was erroneous.

In *Genung v. Baldwin*, 77 App. Div. 584, 79 N. Y. Supp. 569, it was held that, where the defendant on the same day and prior to the assault read some article in defendant's newspaper severely criticizing him, it might be shown in evidence in an action for assault and battery. There is a similar ruling in *Marrriott v. Williams*, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

In the case of *Leachman v. Cohen*, — Tex. Civ. App. —, 91 S. W. 809, a livery-stable keeper hired a horse to a young man, and while the horse was out word came to him that the young man was abusing the horse and driving recklessly. When the young man came in—it appears, several hours later—the livery-stable keeper assaulted him, was sued for damages afterwards, and it was held that the abuse of the horse and the knowledge brought to the defendant were admissible in mitigation. In that case the rule was thus stated: "Immediate provocation . . . [is] such as happens at the time of the assault or so recently before it as to induce the presumption that the violence was committed under the immediate and continuing influence of a passion thus wrongfully excited."

The case of *Cook v. Neely*, 143 Mo. App. 632, 128 S. W. 233, is where a school-teacher violently whipped the son of the plaintiff at the afternoon recess. That evening, about nightfall, the defendant met the plaintiff and assaulted him. The suit was for damages caused by that assault. The Kansas City court of appeals held that the evidence of the provocation by whipping the

plaintiff's son was properly admissible in mitigation of exemplary damages. In that case the provocation occurred several hours before the assault, and the boy who was whipped conveyed the information to his father as soon as he went home after the dismissal of school. Two or three hours must have elapsed between the time the defendant was first excited by the information and the time the assault took place.

The same question arises in criminal prosecutions for murder where the evidence of provocation is offered to reduce the grade of the offense to manslaughter. "The cooling time" is spoken of in such cases in the same manner as it is used in civil cases for assault and battery. To reduce a homicide to manslaughter in the fourth degree under the statute (Rev. Stat. 1909, § 4467), the killing must have occurred "in the heat of passion." A leading case is *State v. Grugin*, 147 Mo. 39, 42 L.R.A. 774, 71 Am. St. Rep. 553, 47 S. W. 1058, quoted above. In that case the defendant was charged with murder. The man killed had committed an outrage upon his daughter some days before. The father learned of the outrage at 9 o'clock in the morning; he hunted up the offender, and killed him at 3 o'clock in the afternoon. The evidence of the provocation and the information was held admissible. It was held that the character of the provocation and its tendency to continue the excited state of mind must always be considered to determine whether the "cooling time" has been sufficient. In that case the provocation was extraordinary. It has been cited in later cases without criticism. *State v. Vest*, 254 Mo. loc. cit. 465, 162 S. W. 615.

While cases showing the provocation which would reduce homicide to manslaughter are cited, it is apparent that the provocation which would mitigate punitive damages in a civil action would not always be sufficient to reduce homicide to man-

slaughter; for instance, mere words are held not sufficient provocation to reduce homicide to manslaughter, but mere words, it is held, may produce a state of mind and arouse a passion that would mitigate damages caused by consequent assault.

Appellant asserts that his violent language offered in evidence occurred an hour and a half before the assault. The evidence fails to show the exact time. Defendants assert that the time was less. At any rate, after the offensive language was used, the court continued in session, and another address to the jury followed that of plaintiff, before the adjournment. The assault took place within a very few minutes after court adjourned. Under all the authorities the evidence was admissible, and it was for the jury to say whether the defendants under the circumstances were actuated by malice, which would authorize punitive damages. The instructions directed the jury that they could consider such evidence only in connection with an award of punitive damages.

—abusive language as mitigation of assault.

Trial—question for jury—malice in assault.

II. Appellant complains of an instruction given on behalf of defendants defining malice as follows: "Malice in its legal sense does not mean mere spite, ill will, or hatred, as it is ordinarily understood, but does mean that state of disposition which shows a heart regardless of social duty and fatally bent on mischief."

That is the definition usually given in homicide cases where the presence or absence of malice may determine the grade of the crime, but the definition has been approved by this court in an action for damages

Assault—malice—what is.

for assault (*Morgan v. Durfee*, 69 Mo. 469, loc. cit. 480, 33 Am. Rep. 508), and it seems to be a generally approved definition (18 R. C. L. p. 2, § 2). The case of *Morgan v. Durfee* has been cited with approval in the case of *Boyd v.*

Missouri P. R. Co. 236 Mo. loc. cit. 93, 139 S. W. 561.

Appellant does not contend that the definition is erroneous so far as it goes, but complains that the usual definition found in the books should have been added, to wit, malice means a wrongful act done intentionally, without legal justification or excuse.

The case of *State v. May*, 172 Mo. 639, 72 S. W. 918, includes both definitions in one, and upon that case the appellant bases his complaint. In reality, however, the two definitions are not very different in meaning. At the instance of plaintiff the court gave an instruction containing the definition which the appellant complains was left out of the defendant's instruction, so that the plaintiff had the benefit of both, and has no cause for complaint.

III. Finally the appellant argues that the verdict ought to be set aside and a new trial granted because he was allowed no actual damages. The argument is that the provocation could not mitigate the actual damages unless it amounted to justification. Instructions given on behalf of the plaintiff authorized the jury to find for the plaintiff against all defendants, provided there was a conspiracy or they acted together for a common purpose. There was little or no evidence on which to base that instruction, and the verdict of the jury is conclusive that there was no conspiracy. George K. Williams, defendant, did not attempt to assault the plaintiff at all. Marbury made as if to assault him, but was held by friends, so that he committed no assault. The only assault of which there was any evidence was made by Luther H. Williams. Since there was a finding of no conspiracy and no concert of action, this objection of the appellant can only apply to the assault made by Luther Williams. Some of the evidence indicates that the injury inflicted upon plaintiff was of a very slight nature, so that the jury might

have found his damage was only nominal. This court is slow to set aside a verdict, in a case of this character, on the ground of inadequacy. *Pritchard v. Hewitt*, 91 Mo. 547, 60 Am. Rep. 265, 4 S. W. 437; *Dowd v. Westinghouse Air Brake Co.* 132 Mo. 579, 34 S. W. 493. There was some evidence, though slight, that plaintiff and his companion made some hostile demonstration before Luther Williams struck. The jury might have found plaintiff was not without fault at that time. *McCarty v. St. Louis Transit Co.* 192 Mo. 396, loc. cit. 403, 91 S. W. 132; *Gorham v. St. Louis, I. M. & S. R. Co.* 112 Mo. App. 205, loc. cit. 209, 86 S. W. 574.

Damages—
assault—denial
—interference
with verdict.

The trial court overruled plaintiff's motion for new trial, and therefore determined the verdict was not against the weight of evidence.

It is possible that the plaintiff would have been entitled to nominal damages had the question been properly presented. Some authorities hold that, where the action sounds in damages only, the failure to prove actual damages is a failure to make out a case, and, though an actual violation of plaintiff's rights is proven, there can be no recovery. 8 R. C. L. § 5, p. 426; *Woodhouse v. Powles*, 43 Wash. 617, 8 L.R.A. (N.S.) loc. cit. 787, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54. On the other hand, the general rule is that in any violation of one's rights, whether actual damage is inflicted or not, whether the action sound in tort for personal injuries or otherwise, in the absence of actual damages, at least nominal damages may be recovered. 1 *Sutherland, Damages*, § 9; *Dailey v. Houston*, 58 Mo. 361, loc. cit. 369; *King v. St. Louis*, 250 Mo. 501, loc. cit. 513, 157 S. W. 498.

But the plaintiff did not assign as a ground for sustaining his motion for new trial that he should have been allowed at least nominal damages against Luther Williams. The

Appeal—
instruction—
nonprejudicial
error.

objection to the verdict repeated in different forms in his motion for a new trial is that the verdict was "against the evidence" and "against the law." Such objections uniformly

Appeal—
inadequacy of
verdict—raising
question.

ly have been held insufficient to permit a review by this court of the evi-

dence to show the verdict was excessive, or inadequate, or unsupported in any respect by evidence, or erroneous in any specific particular. *Polski v. St. Louis*, 264 Mo. 458, loc. cit. 462, 175 S. W. 191; *Kansas City Disinfecting & Mfg. Co. v. Bates County*, 273 Mo. loc. cit. 304, 201 S. W. 92; *Cook v. Clary*, 48 Mo. App. 166, loc. cit. 169; *State v. Scott*, 214 Mo. 257, loc. cit. 261, 113 S. W. 1069; *Raifeisen v. Young*, 183 Mo. App. loc. cit. 511, 167 S. W. 648; *Brosnahan v. Best Brewing Co.* 26 Mo. App. 386, loc. cit. 390.

All instructions asked by plaintiff were given, except one relating to the exclusion of evidence. We are

not prepared to say the trial court erred in overruling the plaintiff's motion for a new trial.

The judgment is affirmed.

Roy, C., absent.

Per Curiam:

The foregoing opinion of White, C., is adopted as the opinion of the court.

Williams, P. J., and Walker, J., concur.

Faris, J., concurs in result.

Petition for rehearing denied.

NOTE.

The general question of punitive or exemplary damages for an assault is treated in the annotation following *BANNISTER v. MITCHELL*, post, 771. Specifically, as to malice and provocation as bearing on the right to exemplary damages, see subs. IV. and V. of that annotation.

BASCOM W. PENDLETON

v.

NORFOLK & WESTERN RAILWAY COMPANY et al., Pliffs. in Err.

West Virginia Supreme Court of Appeals—April 23, 1918.

(82 W. Va. 270, 95 S. E. 941.)

Damages — punitive — assault.

1. Punitive damages should not be awarded in any case unless there is evidence from which the jury may conclude that the defendant acted with malice toward the plaintiff, or with reckless and wanton disregard of the plaintiff's rights.

[See note on this question beginning on page 771.]

Assault — justification — self-defense.

2. In a civil action to recover damages for an assault and battery, the defendant cannot justify upon the ground of self-defense, unless such matter of justification be specially pleaded.

[See 2 R. C. L. 577.]

Evidence — assault — self-defense.

3. In such case, however, evidence tending to show that the assault was committed by the defendant in self-defense may be introduced under the plea of not guilty, in mitigation of damages, but not in justification of the assault.

[See 2 R. C. L. 578.]

Headnotes by RITZ, J.

— conviction for same act.

4. In a civil suit to recover damages for an assault and battery, it is not proper to admit in evidence the record of a justice of the peace showing the conviction of the plaintiff in the civil suit of an assault and battery upon the defendant for the very same transaction which affords the basis for the civil suit, from which conviction an appeal was taken, and which charge still remains undetermined upon the appeal.

[See 2 R. C. L. 575.]

Trial — instruction — punitive damages.

5. Where, in an action for assault and battery, there is evidence tending to show that the defendant acted with malice toward the plaintiff, or with reckless and wanton disregard of the rights of the plaintiff, it is proper to instruct the jury that if they believe that the defendant did so act they may in their discretion award damages in excess of that which would compensate the plaintiff for his injury, as a punishment to deter the defendant and others from the commission of like offenses.

[See 2 R. C. L. 583.]

Damages — punitive — compensatory adequate.

6. Punitive damages should not be awarded in a case where the amount of compensatory damages is adequate to punish the defendant, and in a case where such compensatory damages are not in the judgment of the jury adequate for the purpose of punish-

ment, only such additional amount should be awarded as taken together with the compensatory damages will be sufficient for that purpose.

— amount.

7. In a case where it is proper to award punitive damages, the amount of such award must bear some reasonable proportion to the amount of compensatory damages.

Evidence — elements of punitive damages.

8. In a case in which it is proper for a jury to award punitive damages, it is competent to consider the station of the parties, and particularly the financial and social standing of the defendant, in order that it may be determined what will be adequate and sufficient punishment, and where, after considering these elements, as well as the nature and character of the offense committed, the amount found is so out of proportion to the injury inflicted that it is patent that the jury were actuated by motives of ill feeling toward the defendant in ascertaining such damages, and not alone by the purpose to punish the defendant, such verdict will be set aside as excessive.

[See 2 R. C. L. 586.]

Damages — punitive — excess.

9. Where, in a civil action to recover damages for assault and battery, the actual damages found by the jury are substantial as in this case, an award of punitive damages for ten times the amount of the actual damages awarded will not be sustained.

ERROR to the Circuit Court for Mercer County to review a judgment in favor of plaintiff in an action brought to recover damages for an alleged assault and battery. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. French & Easley, Bernard McClaugherty, and A. W. Reynolds, for plaintiffs in error:

The record of Pendleton's conviction was admissible in mitigation of damages.

George v. Norfolk & W. R. Co. 78 W. Va. 345, 88 S. E. 1036.

The damages were excessive.

George v. Norfolk & W. R. Co. 80 W. Va. 317, 92 S. E. 430; Allen v. Lopinsky, 81 W. Va. 13, 94 S. E. 369; Hess v. Marinari, 81 W. Va. 500, 94 S. E. 968; Marcuchi v. Norfolk & W. R. Co. 81 W. Va. 548, 94 S. E. 979.

Messrs. Sanders, Crockett, & Kee

and John R. Pendleton, for defendant in error:

Exemplary or punitive damages are allowable in an action against a railway company for wilful injury inflicted by the conductor upon a passenger without lawful justification.

McDade v. Norfolk & W. R. Co. 67 W. Va. 582, 68 S. E. 378.

Excessive force used by a conductor in repelling an assault on him by a passenger renders the conductor and the railway company liable for damages to such passenger.

Layne v. Chesapeake & O. R. Co. 66 W. Va. 607, 67 S. E. 1103; Teel v. Coal

& Coke R. Co. 66 W. Va. 315, 66 S. E. 470; Frank v. Monongahela Valley Traction Co. 75 W. Va. 364, 83 S. E. 1009; Smith v. Fahey, 63 W. Va. 346, 60 S. E. 250.

A verdict will not be set aside on the ground that the damages are excessive unless they are so enormous as to furnish evidence of partiality, passion, corruption, or prejudice on the part of the jury.

Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; Vinal v. Core, 18 W. Va. 1; Norfolk & W. R. Co. v. Nighbert, 46 W. Va. 202, 32 S. E. 1032; 8 R. C. L. 675.

In fixing the amount of punitive damages, the financial condition of the defendant should be considered in order to determine what would be a proper punishment for the wrongful acts done.

Hess v. Marinai, 81 W. Va. 500, 94 S. E. 968; 8 R. C. L. 675.

Self-defense cannot be relied on by the defendant as a defense in a civil action for assault and battery, unless it is specially pleaded.

Shires v. Boggess, 68 W. Va. 137, 69 S. E. 466; Hunt v. Di Bacco, 69 W. Va. 449, 71 S. E. 584.

Ritz, J., delivered the opinion of the court:

The plaintiff in this case purchased a ticket from the defendant railway company's agent at Pocahontas, Virginia, entitling him to passage on one of its passenger trains to Cooper, West Virginia. He claims that with this ticket in his possession he boarded a train of the defendant company at Pocahontas, and placed his hand baggage in a seat in one of the cars thereof; that before he got on the train he had been in conversation with a minister of the gospel by the name of Gose, with whom, however, he had had no previous acquaintance. After taking his seat he observed Gose in another seat, and for the purpose of resuming the conversation with him he left his baggage and took the seat beside him. In going to the station of Cooper, the train upon which plaintiff was a passenger passed the station of Bluestone junction. At some point between Pocahontas and Bluestone junction the conductor came through the car and,

as plaintiff contends, took up his ticket from Pocahontas to Cooper. This statement is fully borne out by the testimony of Mr. Gose, who says that he and the plaintiff were occupying the same seat, and when the conductor came through he (Gose) gave the conductor his mileage to Bluestone junction, and that the plaintiff surrendered his ticket to the conductor. This is denied by the conductor. When the train reached Bluestone junction Gose alighted therefrom, and the plaintiff returned to the rear of the car and took his former seat. After the train left Bluestone junction on its way to Cooper the conductor again came through the car and called upon the plaintiff for his ticket. The plaintiff informed the conductor that he had surrendered his ticket before reaching Bluestone junction, and also gave the conductor information as to his changed position since leaving that station. The conductor denied this statement of the plaintiff and contended that he had not received any ticket or fare from him; and the plaintiff, it seems, was as insistent that he had surrendered his ticket to the conductor. While the controversy was going on the conductor continued to take up tickets from the passengers in the adjoining seats. It seems that when the conductor approached the plaintiff on this occasion and demanded his ticket plaintiff was reading a newspaper, and while the controversy with the conductor was going on he folded this newspaper and held the same in his hand. Plaintiff says that when the conductor repeatedly charged him with not paying his fare he arose in his seat and insisted to the conductor that he had surrendered his ticket on the occasion referred to, and in order to be impressive tapped the conductor on the shoulder with the folded newspaper, which he states was a habit he had when in conversation with others whom he desired to impress with his statements. About the same time, according to his statement, he told the conductor if he (the con-

ductor) said that he had not given him his ticket he was a damn liar, and plaintiff says that when he made this statement the conductor struck him a severe blow in the face, which knocked off his glasses and cut a very deep gash over one eye. As a result of this blow the plaintiff fell in his seat, and, according to his statement, the conductor continued to pummel him with his fists until he had administered some ten or twelve severe blows to him, and then kicked him in the leg, as a result of which he sustained a severe gash. About this time the train had reached the plaintiff's destination, Cooper, and the plaintiff was told to get his traps and get off the train, which he did. The same afternoon he returned to Bluefield and went to a hospital, where his wounds were treated, and where he remained until the next afternoon, when he left the hospital and went to Princeton, where he was again treated by a physician. The conductor, who is one of the defendants here, contends that the plaintiff's story is not accurate as to the occurrence on that occasion. He states that the plaintiff never gave him the ticket to Cooper, but that when he approached the plaintiff, and the plaintiff insisted that he had given him the ticket, he had come to the conclusion that because of the probability of his making a mistake he would give the plaintiff the benefit of the doubt, and passed on to take tickets from the passengers to the rear of plaintiff; that when he did this plaintiff rose up in his seat and accused him (the conductor) of trying to embarrass him before the passengers by charging him with attempting to defraud the railroad company out of the insignificant fare, and called him a damn liar, and struck him in the face with the newspaper, whereupon he struck the plaintiff with his fist and knocked him down in his seat, and, according to his own statement, struck him four or five severe blows, and then kicked him with his foot. A number of eyewitnesses to the oc-

currence testify in regard thereto. Some of them support the plaintiff in his contention, and some support the conductor in his theory of what occurred. A verdict was returned by the jury in favor of the plaintiff in the sum of \$5,557.50, and under the direction of the court the jury found that the plaintiff was entitled to recover \$557.50 for his actual damages, and \$5,000 was fixed as punitive damages, making the total of the verdict as aforesaid. Upon this verdict judgment was rendered, and this writ of error is prosecuted thereto.

It cannot be doubted that the evidence fully justified the jury in finding a verdict in favor of the plaintiff. It is insisted that the court should have directed such a verdict inasmuch as the defendants admit the assault committed on the plaintiff, but attempt to justify the same as an act of self-defense. It is contended that there was no plea filed which would allow evidence to be introduced tending to show that the conductor acted in self-defense, or justifying the instructions which the court gave upon this theory of the case. It does not appear from the record that any such plea of justification is filed, and it seems to be very well established that in a civil action for assault and battery, in order for the defendant to justify upon the ground of self-defense, the same must be specially pleaded. *Shires v. Boggess*, 68 W. Va. 137, 69 S. E. 466; *Hunt v. Di Bacco*, 69 W. Va. 449, 71 S. E. 584; 2 Enc. Pl. & Pr. 862; 5 C. J. 655. It may be true that even where the only plea is one of not guilty it is proper to admit evidence that the defendant acted in self-defense, for the purpose of mitigating damages, but such evidence cannot go to the extent of justifying an assault, unless a special plea is filed relying thereon as a justification.

Upon the trial of the case the defendant offered, but was not per-

Assault—
justification—
self-defense.

Evidence—
assault—self-
defense.

mitted to prove, that after this occurrence a warrant was issued for the plaintiff by a justice of the peace charging him with an assault and battery upon Davis, the conductor; that he had been tried before the justice upon that warrant and convicted and fined, from which judgment of conviction he had appealed to the criminal court of Mercer county, where such appeal was at that time still pending and undetermined.

—conviction for same act.

This evidence was properly rejected.

There had been no conviction which was binding upon the defendant, for the reason that when he appealed from the judgment of the justice of the peace to the criminal court, the justice's judgment no longer had validity or force, and the only thing that could be said was that there was a charge against him for committing an assault and battery upon Davis, and the record showed that he pleaded not guilty to the charge and denied it. The case of *George v. Norfolk & W. R. Co.* 78 W. Va. 345, 88 S. E. 1036, is cited as justifying the admission of the record of the proceedings before the justice of the peace. In that case it was held that the record of a justice of the peace showing that the plaintiff had been convicted upon his own confession of the offense of larceny should have been admitted as tending to mitigate damages. There the plaintiff was suing for false imprisonment, and a considerable element of the damages claimed by him was for the humiliation which he suffered from being placed under arrest on a charge of larceny, and it was held that surely the evidence that the plaintiff pleaded guilty to the charge of larceny should be received to mitigate damages, for it is quite apparent that one admittedly guilty of larceny would not be humiliated by being charged therewith to the same extent as one entirely innocent of the charge. Here we have no admission by the plaintiff of guilt, but simply a pending criminal charge against him, and we cannot

see that this record would have had the slightest tendency to prove any issue involved in this case.

On the motion of the plaintiff the court instructed the jury as follows: "The court instructs the jury that if they find for the plaintiff, then in estimating the damages to which he is entitled they may take into consideration the physical injury inflicted upon plaintiff, his physical and mental pain and suffering, shame and humiliation, the damage to his glasses from being broken, the amounts expended by him for hospital fees and doctor's fees, loss of time, and fix his damages at such sum as will fully compensate him for the injury inflicted upon him. And in addition to these compensatory damages, if the jury believe from the evidence that the assault made upon plaintiff was wanton, wilful, reckless, or malicious, then the jury may award the plaintiff punitive or exemplary damages such as will deter others from committing, and the defendants from repeating, like conduct."

It is insisted that this instruction is wrong for the reason that it allowed, or rather directed the jury, in case they determined that exemplary or punitive damages should be awarded, to add to the actual damages sustained such sum as they thought should be awarded as punitive damages, in violation of the rule announced in the cases of *Clairborne v. Chesapeake & O. R. Co.* 46 W. Va. 363, 33 S. E. 262; *Allen v. Lopinsky*, 81 W. Va. 13, 94 S. E. 369; *Hess v. Marinari*, 81 W. Va. 500, 94 S. E. 968, and *Marcuchi v. Norfolk & W. R. Co.* 81 W. Va. 548, 94 S. E. 979; and the plaintiff concedes that this instruction is bad for that reason, but he insists that inasmuch as the jury found the amount of actual damages to which he is entitled, and also found a separate amount which, in their judgment, is necessary to punish the defendants for the assault committed, he should be allowed to release or reduce the judgment to the extent that the damages are cumulated,

and as thus reduced the judgment should be affirmed. It is true in this case the verdict of the jury ascertained the amount of actual damages, and also the amount which, in their opinion, is required to adequately punish the defendants for the act complained of; and when we consider that all of the damages awarded are punitive, so far as the defendants are concerned, that is, that they get nothing for them, and that the amount which the jury found is necessary for punishment is larger than the amount which they found is necessary for compensation, the verdict should have been, of course, for the larger amount, because this would include not only sufficient punishment to the defendant, but all of the compensation to which the plaintiff was entitled. The defendants insist that this cannot be done, for the reason that the punitive damages awarded are excessive, and that no such award as \$5,000 is justified in this case. Of course, if this contention of the defendants is correct, we could not follow the course indicated above, but would have to set aside the verdict in toto and award a new trial. We have considered the evidence in this case from every standpoint, with a view of determining whether or not the verdict of \$5,000 for punitive damages can be sustained. We have taken into consideration the fact that one of the defendants is a large railroad corporation, and that the infliction of a small fine upon it in the way of punitive damages would not have the same effect that the imposition of a like fine would have upon an individual of moderate means. We have considered the aggravated nature of the assault as testified to by the plaintiff and his witnesses, and evidently as the jury believed it to have existed. We have also taken into consideration the fact that the plaintiff was a passenger upon the defendant company's train, and that, instead of being assaulted, he was entitled to the active protection of the defendant company and its servants, yet we cannot

come to the conclusion that any such finding as \$5,000 is justified as a punishment to the defendants here for the act complained of. The jury found that \$557.50 was sufficient for compensation to the plaintiff for all of the injury suffered by him, including compensation for insult and mortification and mental pain and suffering, and we think this finding was very reasonable. Anything in excess of that sum is awarded not because the plaintiff is entitled to it, or has any right to demand it, but simply because of the doctrine that in this character of cases the jury may award damages as punishment in addition to the award of the compensatory damages. As we said in the case of *Hess v. Marinari*, supra, exemplary damages **Damages—** should bear some **amount.**

reasonable proportion to the actual damages sustained, and what we mean by that expression is that the character of the injury inflicted should in some degree be considered by the jury in measuring the punishment to be meted out to the defendants. This principle is recognized in the administration of criminal laws. It is well known that judges in inflicting punishment always consider the extent of the injury done in determining what punishment will be inflicted upon the defendant. It is true there are other elements that enter into the ascertainment of this character of damages, such as **Evidence—** the character and **elements of** reputation of the **punitive** parties, their standing in society, and their financial ability. The object of such punishment is to deter the defendants from committing like offenses in the future, and this, it may be said, is one of the objects of all punishment, and we recognize that it would require, perhaps, a larger fine to have this deterrent effect upon one of large means than it would upon one of ordinary means, granting that the same malignant spirit was possessed by each. Upon this question of the measurement of punitive

damages we have some statutes allowing a recovery of double damages or treble damages where a trespass is committed wantonly and maliciously; and while we do not mean to say that these statutes furnish an infallible guide to be followed in the ascertainment of punitive damages in a case like this, still they are an indication of public policy as ascertained and declared by the legislative body in this regard, and the analogy existing between the damages awarded under such statutes and the damages sought under the claim of punitive damages in cases like this make them a guide which cannot well be disregarded when a verdict of this character is challenged on the ground of excessiveness. We are of the opinion that a verdict which awards to a plaintiff

**Damages—
punitive—
excess.**

nine or ten times as much damages by way of punishment

as he is entitled to by way of compensation, in a case in which substantial compensatory damages are awarded, is indicative that the jury were influenced in some improper way in reaching the same; and while it is true that ordinarily the jury will be held to be the judge of what amount should be added as punitive damages in order to secure adequate punishment in this class of cases, we cannot allow a verdict to stand where the amount thereof is so disproportionate to the amount of actual damages, is so out of harmony with the theory upon which punishments are inflicted for like offenses, that it convinces us that the jury were misguided, to say the least, in returning the same.

The defendants also argue that under the evidence this is not a proper case for the award of punitive damages. We cannot agree with this contention. If the plaintiff's statement of the case is correct, the jury were entirely justified in coming to the conclusion that there was a wanton and wilful disregard of his rights, and in awarding punitive damages against the defendants. It is quite true that

where the uncontradicted evidence shows that there is no malice, or no wanton or reckless disregard of the rights of the plaintiff, the court will refuse to permit a recovery of punitive damages; but where the evidence is conflicting, and where it may be said that if one theory of the case is correct there may be ground for the imposition of such damages, the matter is properly submitted to the jury in order that it may be determined whether or not one theory is true or the other. The instructions in this case carefully submitted that question to the jury and made the jury the sole judge of whether or not,

Trial-instruction—punitive damages.

even though they found that defendants were actuated by malice or a reckless and wanton disregard of plaintiff's rights, punitive damages would be given. These damages are not given as a matter of right. Plaintiff cannot claim them for any reason. The jury is at perfect liberty, no matter how wanton or reckless the defendant has been, to refuse punitive damages, and they are only at liberty to award them when there has been such reckless and wanton disregard of plaintiff's rights as show a malignant spirit upon the part of the defendant.

**Damages—
punitive—
assault.**

It follows from what we have said that the judgment of the Circuit Court of Mercer county complained of will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

NOTE.

On the general question of punitive or exemplary damages for an assault, see annotation following *BANNISTER v. MITCHELL*, post, 771. The various questions relating to punitive damages which are considered in the reported case (*PENDLETON v. NORFOLK & W. R. Co.* ante, 761), are fully treated in that annotation.

WILLIAM BANNISTER, Plff. in Err.,
v.
LUCY MITCHELL.

Virginia Supreme Court of Appeals — September 16, 1920.

(127 Va. 578, 104 S. E. 800.)

Trial — instruction — exemplary damages.

1. An instruction authorizing exemplary damages in case of an assault of a grievous or wanton nature is justified where it appears that defendant, while having an altercation with the brother of plaintiff, who went to the brother's assistance, cut her across the face, through her ear, and into her neck with a pocketknife.

[See note on this question beginning on page 771.]

Damages — for assault — elements.

2. Compensatory damages in case of assault include an allowance for mental suffering and for the indignity and disgrace to which the plaintiff is subjected.

[See 2 R. C. L. 580.]

Appeal — refusal of instructions as error.

3. Refusal of requested instructions

is not reversible error if every right of the complaining party was fully protected by the instructions given.

[See 2 R. C. L. 261.]

Assault — necessity of intent.

4. Intent to injure the person in fact injured is not necessary to support an action for damages for assault.

[See 2 R. C. L. 530.]

ERROR to the Corporation Court of Roanoke to review a judgment in favor of plaintiff in an action brought to recover damages for alleged assault and battery. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. A. B. Hunt and A. J. Oliver for plaintiff in error.

Messrs. Hoge & Darnall for defendant in error.

Prentiss, J., delivered the opinion of the court:

Lucy Mitchell recovered a judgment for \$650 against William Bannister as damages for assault and battery. He assigns error in the instructions.

He complains of instruction A, which reads: "The court instructs the jury that whenever an assault is of a grievous or wanton nature, manifesting a wilful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary damages; and, whilst the existence of malice may be shown in aggravation of such damages, its absence does not defeat the right to their recovery."

It is conceded that this instruc-

tion is correct as an abstract proposition of law (*Borland v. Barrett*, 76 Va. 133, 44 Am. Rep. 152), but it is claimed that no assault of a grievous or wanton nature is shown by the evidence in this case.

It is either conceded, or appears from the evidence introduced in behalf of the plaintiff, that the defendant had an altercation and affray with the plaintiff's brother, who was a small, one-legged man, older than the defendant, and that the altercation commenced while her brother was standing on the running board of an automobile in which the defendant and his brother were sitting; that, after he had been pushed off by the brother of the defendant, these two left the automobile, and that the defendant renewed the fight on the ground; that the plaintiff, who came to the assistance of her brother, struck the defendant with a lady's umbrella;

and that he with his pocketknife cut the plaintiff, making a gash across her cheek, through the lobe of her ear, and into her neck behind the ear, from which she suffered great pain and still bears the scar. The defendant, having been charged with malicious assault, was sent to the grand jury, indicted therefor, and upon his trial pleaded guilty to assault.

Under these facts, we have no doubt whatever that the plaintiff was entitled to have the instruction which is complained of.

Trial-instruction-exemplary damages.

While there has been some difference of opinion as to whether punitive damages should be allowed in such cases, it is said in a note to *Shoemaker v. Sonju*, 11 Ann. Cas. 1175, that "by the weight of authority the rule is that exemplary or punitive damages may be recovered for a wanton or a malicious assault. The amount of damages which may be awarded is largely in the discretion of the jury, the court having the right to set aside the verdict if the jury awards an unreasonable amount,"—citing cases from England, the Federal courts, Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

The allowance of exemplary damages seems to be especially applicable in actions for assault and battery, though sometimes in practice it seems to be a matter of little consequence, as is illustrated in *Bass v. Chicago & N. W. R. Co.* 42 Wis. 654, 24 Am. Rep. 437, cited in *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582. The Bass Case was tried three different times in different counties, twice on instructions authorizing exemplary damages, and once on instructions disallowing such damages; but upon each trial

the verdict was for the same amount. Apparently the same sum which was allowed, including exemplary damages on two trials, was allowed on the third trial for compensatory damages. Compensatory damages in such cases include an allowance for mental suffering, and for the indignity and disgrace to which the plaintiff is subjected by the defendant's assault, so that, in assessing damages in such cases, the juries may fail to appreciate the distinction between compensatory damages for wounded feelings, malice, insult, etc., and exemplary damages for punishment to the defendant. There being no rule for computing such damages, the distinction may be of slight consequence.

It is held in *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285, where the defendant had pleaded guilty in the criminal prosecution, that although in such a prosecution, in assessing the punishment, the courts would consider the fact that the person injured had recovered exemplary damages for the wrong done, that, in the civil suit, the damages to be recovered would be wholly uninfluenced by any punishment imposed in the criminal prosecution.

In *Wagner v. Gibbs*, 80 Miss. 53, 92 Am. St. Rep. 598, 31 So. 434, where it was urged that there was no evidence in the case to justify the infliction of punitive damages, it was said: "It does appear that, after the assault was committed, appellant appeared before a magistrate and pleaded guilty to the offense, under an affidavit which charged that the assault and battery were committed 'wilfully, maliciously, and unlawfully.' Appellant contends, however, that the conviction is only evidence of the conviction itself, and not of the substantive offense charged. The authorities cited by his counsel, and the reasoning in support of their contention, do not apply where the party has pleaded 'guilty.' Such plea is an admission by him of a

solemn character. Because of the want of mutuality, he is not estopped thereby, but it is competent evidence against him. It may not be evidence of each fact alleged in the indictment or affidavit,—mere allegations of surplusage,—but it is evidence of each and every element needed to constitute the offense admitted as a crime. In assault and battery it admits the malice because malice is implied by law in such case. . . . He may, because he is not estopped, defend by showing circumstances of excuse or justification, but in the case at bar no such effort was made. The case went to the jury on an assault and battery confessed, and no circumstances of excuse were even claimed to exist; and we hold that in such state of the action it was competent for the jury to award punitive damages.”

So in the case in judgment, the plea of guilty, together with the evidence introduced in behalf of the plaintiff, are sufficient to show that the use of his knife by the plaintiff, under the circumstances, was entirely unnecessary for his own defense, that he was the aggressor in unnecessarily continuing the affray, and that the wounding of the plaintiff with his knife, under the circumstances, constituted a wanton and grievous assault, for which the jury might impose punitive damages.

The defendant asked the court for six instructions, of which the court gave two, and the refusal to give the others is assigned as error. This assignment presents no new question, and calls for no extended discussion. In the two instructions which the court granted, the defense relied upon was fairly presented to the jury. The defense, so far as valid, was that the defendant used his knife in self-defense, because he was being, at the time, assaulted by the plaintiff. The jury were told that he was justified in resorting to such violence as the circumstances of the case might require; that the force to be used in protecting his person might be in proportion to the attack

made, and the imminence of the danger as it appeared to him at the time of the attack, and that, if he only used such force as appeared to him to be reasonably necessary to protect himself from great bodily harm, the plaintiff could not recover; that, if he was assailed by more than one person, he might act with more promptness and resort to more forceful means to protect himself than where the assault was made by a single person; and that they should consider all the facts and circumstances actuating him in resorting to the force which he used. Every right of the defendant was fully protected by these instructions, and while the evidence in support of the defense was weak and inconclusive, hardly sufficient to sustain a verdict in his favor, still, if the jury had disbelieved the evidence of the plaintiff and her witnesses, the instructions which were given clearly authorized such a finding.

Appeal—refusal of instructions as error.

The defendant also appears to claim immunity upon the ground that the cutting was accidental,—that he intended to cut the plaintiff's brother, and that she got in the way. It is not essential, however, in a civil suit for damages, that there be an intent

Assault—necessity of intent.

to injure the particular person who is injured. *Reynolds v. Pierson*, 29 Ind. App. 273, 64 N. E. 484; 2 R. C. L. 530. It is clear that, where one commits a wanton, reckless, and dangerous act, which may result in injury to any one of a number of others, such as shooting into a crowd, he is guilty of assault and battery, though he has no specific intention to injure any particular person. *People v. Raher*, 92 Mich. 165, 31 Am. St. Rep. 575, 52 N. W. 625. It is correct to say that every person is liable for the direct, natural, and probable consequence of his acts, and that everyone doing an unlawful act is responsible for all of the consequential results of that act. So that, if two persons mutual-

ly engage in a duel in the public streets, and a passer-by is hit, though unintentionally, both will be held guilty as principals. 2 R. C. L. 530.

Upon the merits of the case the verdict is fully justified by the evidence, and we find no reversible error in the proceedings.

Affirmed.

ANNOTATION.

Punitive or exemplary damages for assault.

- I. Scope and introduction, 771.
- II. Statement of rules:
 - a. In general, 773.
 - b. Particular instructions; reasons for rule, 780.
 - c. Necessity for actual damages, and their proportion to exemplary damages, 788.
 - d. Effect of death of party assaulted or of assailant, 792.
 - e. "Exemplary" damages as compensation for nonpecuniary losses, 793.
 - f. Voluntary combat, 797.
- III. Effect of criminal liability:
 - a. As a bar to recovery of exemplary damages:
 1. Majority rule, 798.
 2. Minority rule, 801.
 - b. Mitigation of exemplary damages, 803.
- IV. Malice:
 - a. Necessity for and nature of malice in general, 808.
 - b. Malice toward third person, 818.
 - c. Presumption and reasonable doubt, 814.
 - d. Ability to entertain malicious intent; intoxication, 814.
 - e. Joint tort-feasors; imputed malice, 815.

I. Scope and introduction.

The present annotation deals in general with questions arising between the immediate parties to the assault, and not with the rights of third persons (see, for example, *Sherman v. Johnson* (1886) 58 Vt. 40, 2 Atl. 707, as to the right of a father to recover exemplary damages for an assault on his minor son, and *Stowers Furniture Co. v. Blake* (1908) 158 Ala. 639, 48 So. 89, as to the liability of one at whose instance property is seized on execution for an assault committed in making the seizure). Cases are excluded in so far as they involve merely the question of liability

- V. Provocation:
 - a. In general, 816.
 - b. Cooling time, 821.
- VI. Statutory provisions, 827.
- VII. Matters of practice and procedure:
 - a. Jury questions; discretion of jury, 828.
 - b. Pleadings, 832.
 - c. Evidence:
 1. In general, 835.
 2. Of pecuniary circumstances of parties, 838.
 - d. Excessiveness of verdict, 842.
- VIII. Application:
 - a. In general, 848.
 - b. Assaults with weapons likely to produce serious injury, 845.
 - c. Assaults on women or on feeble or invalid persons, 848.
 - d. Assaults on children, 851.
 - e. Assaults by officers, 852.
 - f. Assault by one as member of a crowd or mob, 852.
 - g. Removing trespassers, 852.
 - h. Unauthorized surgical operation, 855.
- IX. Miscellaneous, 856.

of an employer for exemplary damages for an assault committed by a servant. And the annotation does not, in general, include cases where the master sustained a special contractual relationship to the one assaulted by the servant, as in the case of assaults on passengers by railroad employees.

There are many questions pertaining to the present subject which are not distinctive to actions for assault and battery, and some questions arise in this class of cases where the line between exemplary and compensatory damages is not clearly drawn in the cases. It has not been considered desirable to eliminate all such

questions, but the reader should bear in mind, in considering these questions, that the principles involved extend to other kinds of actions than for assault and battery, and that, for an exhaustive discussion of some of these questions, cases beyond the scope of the present note must be considered.

The doctrine allowing exemplary or punitive damages under certain circumstances in civil actions for such torts as assault and battery has been considered as originating at a time when actual or compensatory damages did not include any allowance for such nonpecuniary losses as mental suffering. Thus, in holding that exemplary damages cannot be allowed as punishment for the wrongful act of the defendant in committing the assault, the court, in *Fay v. Parker* (1872) 53 N. H. 342, 16 Am. Rep. 270, referred to the development of the term "vindictive" damages as follows: "The imposition of vindictive damage is, by some, supposed to have originated in actions of trespass *vi et armis*, slander, and seduction; which means, that they were first given as damages for mental pain. But 'actual' damage, to use the very common word employed in the cases, being habitually referred to things purely gross and material, an injury to anything mental or spiritual was made good by exemplary damages, so called, which, in fact, were as purely compensatory as the damages given for injuries to material things,—both kinds of damages being compensatory, and nothing more. If compensation were now understood, as it formerly was, to be made for injuries to material substance only, and exemplary damages were now understood, as they were formerly, to refer to injuries to the spiritual or mental part of the human nature, there would be no trouble or difficulty in the matter; but in progress of time these definitions have changed. Compensatory damages now include injuries to the mental and spiritual part of mankind; and this change of definition leaving nothing for 'exemplary damages,' as formerly understood, to operate upon and be applied to, by a very natural mistake the term 'ex-

emplary' has been supposed to refer to criminal punishment for the sake of public example,—an idea that was not included in 'exemplary damages,' as formerly understood."

And in *Flanagan v. Womack* (1880) 54 Tex. 45, the court called attention to the fact that the doctrine of exemplary damages doubtless originated from those cases in which a sense of justice to the injured party demanded that more compensation should be allowed than could be given for the mere physical injury sustained; that the outrage upon the feelings would be of such a gross character or the assault committed under circumstances of such indignity as would require ample reparation, but which could not be referred to any fixed standard; and that therefore this character of damages was in a degree necessarily left to the jury's discretion.

The cases in the present annotation fail, for the most part, to suggest clear, logical grounds for the allowance of exemplary damages in civil actions for assault and battery, beyond the mere statement of the idea that punishment should, under certain circumstances, be meted out to the defendant, and an example should be made of him for the purpose of deterring him and others from committing similar acts. But it seems difficult, on principle, to justify criminal punishment in a civil action, with payment of the amount assessed as punishment not to the state or for public benefit, but to the injured party, who is already fully compensated, when the same act is punishable criminally (see III. *infra*). The historical development of the doctrine, as above referred to, may, perhaps, account for the present status of the law on the question, and explain the position of those courts (see II. e, *infra*) which have interpreted "exemplary" damages as meaning compensation for nonpecuniary losses. The matter has become now, however, in many jurisdictions, one of precedent which the courts frequently have felt themselves bound to follow, although they disapproved of the rule.

*II. Statement of rules.**a. In general.*

The doctrine that exemplary or punitive damages may be allowed for an assault and battery committed wantonly, maliciously, or under circumstances of aggravation, is well settled in most jurisdictions.

United States.—*Denver & R. G. R. Co. v. Harris* (1887) 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; *Cushman v. Waddell* (1830) *Baldw.* 57, *Fed. Cas. No. 3,516*; *Gallena v. Hot Springs R. Co.* (1882) 4 *McCrary*, 371, 13 *Fed.* 116; *Brown v. Evans* (1883) 8 *Sawy.* 488, 17 *Fed.* 912, affirmed in (1883) 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 83; *Boyle v. Case* (1883) 9 *Sawy.* 386, 18 *Fed.* 880; *Winters v. Cowen* (1898) 90 *Fed.* 99, affirmed in (1899) 37 C. C. A. 628, 96 *Fed.* 929; *Norfolk & P. Traction Co. v. Miller* (1909) 98 C. C. A. 453, 174 *Fed.* 607.

Alabama.—*Birmingham R. & Electric Co. v. Baird* (1900) 130 *Ala.* 334, 54 *L.R.A.* 752, 89 *Am. St. Rep.* 43, 30 *So.* 456; *Mitchell v. Gambill* (1903) 140 *Ala.* 316, 37 *So.* 290; *Lovelace v. Miller* (1907) 150 *Ala.* 422, 11 *L.R.A.* (N.S.) 670, 43 *So.* 734, 14 *Ann. Cas.* 1139; *Barlow v. Hamilton* (1907) 151 *Ala.* 634, 44 *So.* 657; *Abney v. Mize* (1908) 155 *Ala.* 391, 46 *So.* 230; *Irby v. Wilde* (1908) 155 *Ala.* 388, 46 *So.* 454; *Stowers Furniture Co. v. Blake* (1908) 158 *Ala.* 639, 48 *So.* 89; *Kress v. Lawrence* (1908) 158 *Ala.* 652, 47 *So.* 574; *Miller-Brent Lumber Co. v. Stewart* (1909-1910) 166 *Ala.* 657, 51 *So.* 943, 21 *Ann. Cas.* 1149; *Birmingham R. Light & P. Co. v. Coleman* (1913) 181 *Ala.* 478, 61 *So.* 890; *Birmingham Macaroni Co. v. Tadrick* (1921) 205 *Ala.* 540, 88 *So.* 858; *Avondale Mills v. Bryant* (1913) 10 *Ala. App.* 507, 63 *So.* 932; *Greenwood Café v. Walsh* (1917) 15 *Ala. App.* 519, 74 *So.* 82; *Empire Clothing Co. v. Hammons* (1919) 17 *Ala. App.* 60, 81 *So.* 838.

Arizona.—*Jaeger v. Metcalf* (1908) 11 *Ariz.* 283, 94 *Pac.* 1094.

Arkansas.—*Barlow v. Lowder* (1880) 35 *Ark.* 492; *Ward v. Blackwood* (1883) 41 *Ark.* 295, 48 *Am. Rep.* 41; *Le Laurin v. Murray* (1905) 75 *Ark.* 232, 87 *S. W.* 131; *Davis v.*

Richardson (1905) 76 *Ark.* 348, 89 *S. W.* 318; *Little Rock R. & Electric Co. v. Goerner* (1906) 80 *Ark.* 158, 7 *L.R.A.* (N.S.) 97, 95 *S. W.* 1007, 10 *Ann. Cas.* 273; *St. Louis S. W. R. Co. v. Myzell* (1908) 87 *Ark.* 123, 112 *S. W.* 203; *St. Louis, I. M. & S. R. Co. v. Robertson* (1912) 103 *Ark.* 361, 146 *S. W.* 482; *St. Louis S. W. R. Co. v. Mallard* (1912) 104 *Ark.* 641, 148 *S. W.* 261; *Pine Bluff & A. R. R. Co. v. Washington* (1915) 116 *Ark.* 179, 172 *S. W.* 872; *St. Louis, I. M. & S. R. Co. v. Jackson* (1915) 118 *Ark.* 391, *L.R.A.* 1915E, 668, 177 *S. W.* 33; *Cooper v. Demby* (1916) 122 *Ark.* 266, 183 *S. W.* 185, *Ann. Cas.* 1917D, 580.

California.—*Wilson v. Middleton* (1852) 2 *Cal.* 54; *Wade v. Thayer* (1871) 40 *Cal.* 578; *Howell v. Scoggins* (1874) 48 *Cal.* 355; *St. Ores v. McGlashen* (1887) 74 *Cal.* 148, 15 *Pac.* 452; *Bundy v. Maginess* (1888) 76 *Cal.* 532, 18 *Pac.* 668; *Badostain v. Graziade* (1896) 115 *Cal.* 425, 47 *Pac.* 118; *Marriott v. Williams* (1908) 152 *Cal.* 705, 125 *Am. St. Rep.* 87, 93 *Pac.* 875; *Walker v. Chanslor* (1908) 153 *Cal.* 118, 17 *L.R.A.* (N.S.) 455, 126 *Am. St. Rep.* 61, 94 *Pac.* 606; *Bloomberg v. Laventhal* (1919) 179 *Cal.* 616, 178 *Pac.* 496; *Seelye v. Harvey* (1920) — *Cal. App.* —, 189 *Pac.* 311.

Colorado.—*Courvoisier v. Raymond* (1896) 23 *Colo.* 113, 47 *Pac.* 284; *McConathy v. Deck* (1905) 34 *Colo.* 461, 4 *L.R.A.* (N.S.) 358, 83 *Pac.* 135, 7 *Ann. Cas.* 896; *Clark v. Aldenhoven* (1914) 26 *Colo. App.* 501, 143 *Pac.* 267.

Connecticut.—*Bartram v. Stone* (1862) 31 *Conn.* 159; *Welch v. Durand* (1869) 36 *Conn.* 182, 4 *Am. Rep.* 55; *Burke v. Melvin* (1877) 45 *Conn.* 243; *Maisenbacker v. Society Concordia* (1899) 71 *Conn.* 369, 71 *Am. St. Rep.* 213, 42 *Atl.* 67; *List v. Miner* (1901) 74 *Conn.* 50, 49 *Atl.* 856; *Hanna v. Sweeney* (1906) 78 *Conn.* 492, 4 *L.R.A.* (N.S.) 907, 62 *Atl.* 785; *Shupack v. Gordon* (1906) 79 *Conn.* 298, 64 *Atl.* 740; *Keane v. Main* (1910) 83 *Conn.* 200, 76 *Atl.* 269; *Bogudski v. Backes* (1910) 83 *Conn.* 208, 76 *Atl.* 540; *Distin v. Bradley* (1910) 83 *Conn.* 466, 76 *Atl.* 991.

Delaware.—*Jefferson v. Adams* (1845) 4 *Harr.* 321; *Dolson v. Hill* (1866) 3 *Houst.* 255; *Tatnall v. Court-*

ney (1881) 6 Houst. 434; Thomas v. Black (1889) 8 Houst. 507, 18 Atl. 771; Hendle v. Geiler (1895) — Del. —, 50 Atl. 632; Watson v. Hastings (1897) 1 Penn. 47, 39 Atl. 587; Armstrong v. Rhoads (1902) 4 Penn. 151, 53 Atl. 435; Vansant v. Kowalewski (1914) 5 Boyce, 92, 90 Atl. 421.

Florida.—Smith v. Bagwell (1882) 19 Fla. 117, 45 Am. Rep. 12; Webb v. Brown (1912) 63 Fla. 306, 58 So. 27.

Georgia.—Atlanta & W. P. R. Co. v. Conder (1885) 75 Ga. 51, 8 Am. Neg. Cas. 129; Ratteree v. Chapman (1887) 79 Ga. 574, 4 S. E. 684; Parker v. Lanier (1888) 82 Ga. 216, 8 S. E. 57; Berkner v. Dannenberg (1903) 116 Ga. 954, 60 L.R.A. 559, 43 S. E. 463; Morgan v. Langford (1906) 126 Ga. 58, 54 S. E. 818 (statute); Beckworth v. Phillips (1909) 6 Ga. App. 859, 65 S. E. 1075.

Hawaii.—Coffin v. Spencer (1857) 2 Haw. 23.

Illinois.—McNamara v. King (1845) 7 Ill. 433; Ously v. Hardin (1860) 23 Ill. 403; Foote v. Nichols (1862) 23 Ill. 486; Hawk v. Ridgway (1864) 33 Ill. 473; Dickey v. McConnell (1866) 41 Ill. 62; Connelly v. Harris (1866) 41 Ill. 126; Reeder v. Purdy (1868) 48 Ill. 261; Kelsey v. Henry (1869) 49 Ill. 488; Alcorn v. Mitchell (1872) 63 Ill. 553; Scott v. Hamilton (1873) 71 Ill. 85; Jones v. Jones (1874) 71 Ill. 562; Mitchell v. Robinson (1874) 72 Ill. 382; Drohn v. Brewer (1875) 77 Ill. 280; Hennies v. Vogel (1877) 87 Ill. 242; Cummins v. Crawford (1878) 88 Ill. 312, 30 Am. Rep. 558; Wabash, St. L. & P. R. Co. v. Rector (1882) 104 Ill. 296, 2 Am. Neg. Cas. 648; Harrison v. Ely (1887) 120 Ill. 83, 11 N. E. 334; Chicago Consol. Traction Co. v. Mahoney (1907) 230 Ill. 562, 82 N. E. 868; Schmitt v. Kurrus (1908) 234 Ill. 578, 85 N. E. 261; Hembes v. Fick (1888) 26 Ill. App. 597; Von Reeden v. Evans (1893) 52 Ill. App. 209; Razor v. Kinsey (1894) 55 Ill. App. 605; Pratt v. Davis (1905) 118 Ill. App. 161, affirmed in (1906) 224 Ill. 300, 7 L.R.A.(N.S.) 609, 79 N. E. 562, 8 Ann. Cas. 197; Coal Belt Electric R. Co. v. Young (1906) 126 Ill. App. 651; Merrifield v. Davis (1906) 130 Ill. App. 162; Hidden v. Baker (1914) 190 Ill. App.

561; Michalak v. Tomkiewicz (1916) 199 Ill. App. 405; Busick v. Illinois C. R. Co. (1915) 201 Ill. App. 63; Hinton v. Muhlman (1916) 201 Ill. App. 177; Kelly v. Sanderson (1917) 204 Ill. App. 155.

Indiana.—Southern R. Co. v. Crone (1912) 51 Ind. App. 300, 99 N. E. 762 (illustrative of actions against railroad company; but see cases in this state under III. a, 2, *infra*, to the effect that exemplary damages are not recoverable if defendant may be punished criminally).

Iowa.—Hendrickson v. Kingsbury (1866) 21 Iowa, 379; Guengerich v. Smith (1873) 36 Iowa, 587; Ward v. Ward (1875) 41 Iowa, 686; Reddin v. Gates (1879) 52 Iowa, 210, 2 N. W. 1079; Gronan v. Kukuck (1882) 59 Iowa, 18, 12 N. W. 748; Mallett v. Beale (1885) 66 Iowa, 70, 23 N. W. 269; White v. Spangler (1885) 68 Iowa, 222, 26 N. W. 85; Root v. Sturdivant (1886) 70 Iowa, 55, 29 N. W. 802; Irwin v. Yeager (1888) 74 Iowa, 174, 37 N. W. 136; Martin v. Murphy (1892) 85 Iowa, 669, 52 N. W. 662; Hauser v. Griffith (1897) 102 Iowa, 215, 71 N. W. 223; Reizenstein v. Clark (1897) 104 Iowa, 287, 73 N. W. 588; Fleming v. Loughren (1908) 139 Iowa, 517, 115 N. W. 506; Brause v. Brause (1920) — Iowa, —, 177 N. W. 65.

Kansas.—Wiley v. Keokuk (1870) 6 Kan. 94; Wiley v. Man-a-to-wah (1870) 6 Kan. 111; Titus v. Corkins (1879) 21 Kan. 722; Tucker v. Green (1882) 27 Kan. 355; Edwards v. Warnkey (1901) 63 Kan. 889, 66 Pac. 987.

Kentucky.—Gore v. Cladwick (1838) 6 Dana, 477; Chiles v. Drake (1859) 2 Met. 146, 74 Am. Dec. 406; Slater v. Sherman (1868) 5 Bush, 206; Crabtree v. Dawson (1904) 119 Ky. 148, 67 L.R.A. 565, 115 Am. St. Rep. 243, 83 S. W. 557; Doerhoefer v. Shewmaker (1906) 123 Ky. 646, 97 S. W. 7; Renfro v. Barlow (1909) 131 Ky. 312, 115 S. W. 225; Downs v. Jackson (1910) — Ky. —, 128 S. W. 339; Sparks v. Sipple (1910) 140 Ky. 542, 131 S. W. 389; White v. South Covington & C. Street R. Co. (1912) 150 Ky. 681, 150 S. W. 837; Chesapeake & O. R. Co. v. Robinett (1913) 151 Ky. 778,

45 L.R.A.(N.S.) 434, 152 S. W. 976; Louisville R. Co. v. Frick (1914) 158 Ky. 450, 165 S. W. 649; Ragsdale v. Ezell (1899) 20 Ky. L. Rep. 1567, 49 S. W. 775; Crosby v. Bradley (1890) 11 Ky. L. Rep. 954; Wood v. Young (1899) 20 Ky. L. Rep. 1931, 50 S. W. 541; Carson v. Singleton (1901) 23 Ky. L. Rep. 1626, 65 S. W. 821; Hollins v. Gorham (1902) 23 Ky. L. Rep. 2185, 66 S. W. 823; Ryan v. Quinn (1903) 24 Ky. L. Rep. 1513, 71 S. W. 872; Crocker v. Haley (1906) 29 Ky. L. Rep. 174, 92 S. W. 574.

Louisiana. — Scheen v. Poland (1882) 34 La. Ann. 1107; Webb v. Rothschild (1897) 49 La. Ann. 244, 21 So. 258; Turnbow v. Wimberly (1901) 106 La. 259, 30 So. 747; Trahan v. Benoit (1916) 139 La. 626, 71 So. 893.

Maine.—Pike v. Dilling (1861) 48 Me. 539; Goddard v. Grand Trunk R. Co. (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316; Hanson v. European & N. A. R. Co. (1873) 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336; Currier v. Swan (1874) 63 Me. 323; Johnson v. Smith (1875) 64 Me. 553; Macintosh v. Bartlett (1877) 67 Me. 130; Webb v. Gilman (1888) 80 Me. 177, 13 Atl. 688; Lanfest v. Robbins (1906) 101 Me. 176, 63 Atl. 729; Robichaud v. Maheux (1908) 104 Me. 524, 72 Atl. 334; Rogers v. Foote (1912) 109 Me. 564, 84 Atl. 643; Newton v. Hawks (1915) 113 Me. 44, 92 Atl. 936; Brann v. Leavitt (1918) 117 Me. 144, 103 Atl. 12.

Maryland. — Gaither v. Blowers (1857) 11 Md. 536 (recognizing rule); Baltimore & Y. Turnp. v. Boone (1876) 45 Md. 344; Byers v. Horner (1877) 47 Md. 23; Philadelphia, W. & B. R. Co. v. Larkin (1877) 47 Md. 155, 28 Am. Rep. 442; Sloan v. Edwards (1883) 61 Md. 89; Baltimore & O. R. Co. v. Barger (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360; Thillman v. Neal (1898) 88 Md. 525, 42 Atl. 242; Baltimore & O. R. Co. v. Strube (1909) 111 Md. 119, 78 Atl. 697; Stockham v. Malcolm (1909) 111 Md. 615, 74 Atl. 569, 19 Ann. Cas. 759; Zell v. Dunaway (1911) 115 Md. 1, 80 Atl. 215.

Minnesota.—Gardner v. Kellogg (1877) 23 Minn. 463; Boetcher v.

Staples (1880) 27 Minn. 308, 38 Am. Rep. 295, 7 N. W. 263; Crosby v. Humphreys (1894) 59 Minn. 92, 60 N. W. 843; Gorstz v. Pinske (1901) 82 Minn. 456, 83 Am. St. Rep. 441, 85 N. W. 215; Rauma v. Lamont (1901) 82 Minn. 477, 85 N. W. 236; Germolus v. Sausser (1901) 83 Minn. 141, 85 N. W. 946; Berg v. St. Paul City R. Co. (1905) 96 Minn. 513, 105 N. W. 191; Anderson v. International Harvester Co. (1908) 104 Minn. 49, 16 L.R.A. (N.S.) 440, 116 N. W. 101; Baumgartner v. Hodgdon (1908) 105 Minn. 22, 116 N. W. 1030; Germann v. Great Northern R. Co. (1912) 117 Minn. 310, 135 N. W. 750; Moore v. Fisher (1912) 117 Minn. 339, 135 N. W. 1126; Dahlsie v. Hallenberg (1919) 143 Minn. 234, 173 N. W. 433.

Mississippi. — Bell v. Morrison (1854) 27 Miss. 68; Reese v. Barbee (1883) 61 Miss. 181 (effect of drunkenness); Lochte v. Mitchell (1900) — Miss. —, 28 So. 877; Wagner v. Gibbs (1902) 80 Miss. 53, 92 Am. St. Rep. 598, 31 So. 434; Yazoo & M. Valley R. Co. v. Williams (1905) 87 Miss. 344, 39 So. 489; Kitteringham v. McClutchie (1906) — Miss. —, 41 So. 65; Yazoo & M. Valley R. Co. v. May (1913) 104 Miss. 422, 44 L.R.A. (N.S.) 1138, 61 So. 449.

Missouri.—Corwin v. Walton (1853) 18 Mo. 71, 59 Am. Dec. 285; Goetz v. Ambbs (1858) 27 Mo. 28; Green v. Craig (1870) 47 Mo. 90; Dailey v. Houston (1874) 58 Mo. 361; Nichols v. Winfrey (1883) 79 Mo. 544; Beck v. Dowell (1892) 111 Mo. 506, 33 Am. St. Rep. 547, 20 S. W. 209, affirming (1890) 40 Mo. App. 71; McNamara v. St. Louis Transit Co. (1904) 182 Mo. 676, 66 L.R.A. 486, 81 S. W. 880; BOND v. WILLIAMS (reported herewith) ante, 755; Gieske v. Redemeyer (1920) — Mo. App. —, 224 S. W. 92; Munter v. Bande (1876) 1 Mo. App. 484; Meyer v. Pohlman (1882) 12 Mo. App. 568; Howard v. Lillard (1885) 17 Mo. App. 228; Canfield v. Chicago, R. I. & P. R. Co. (1894) 59 Mo. App. 354; Sloan v. Speaker (1895) 63 Mo. App. 321; Pierce v. Carpenter (1896) 65 Mo. App. 191; Mohelsky v. Hartmeister (1897) 68 Mo. App. 318; Berryman v. Cox (1898) 73 Mo. App.

67; *Lyddon v. Dose* (1899) 81 Mo. App. 64; *Yeager v. Berry* (1900) 82 Mo. App. 534; *Johnson v. Bedford* (1901) 90 Mo. App. 43; *Hickey v. Welch* (1901) 91 Mo. App. 4; *Ickenroth v. St. Louis Transit Co.* (1903) 102 Mo. App. 597, 77 S. W. 162; *Happy v. Prichard* (1905) 111 Mo. App. 6, 85 S. W. 655; *Johnston v. Wells* (1905) 112 Mo. App. 557, 87 S. W. 70; *Williams v. St. Louis, M. & S. E. R. Co.* (1906) 119 Mo. App. 663, 96 S. W. 307; *Cody v. Gremmler* (1906) 121 Mo. App. 359, 99 S. W. 46; *Carmody v. St. Louis Transit Co.* (1907) 122 Mo. App. 338, 99 S. W. 495; *Mitchell v. United R. Co.* (1907) 125 Mo. App. 1, 102 S. W. 661 (recognizing rule); *Baxter v. Magill* (1907) 127 Mo. App. 392, 105 S. W. 679; *Neuer v. Metropolitan Street R. Co.* (1910) 143 Mo. App. 402, 127 S. W. 669; *Cook v. Neely* (1910) 143 Mo. App. 632, 128 S. W. 238; *Cathay v. St. Louis & S. F. R. Co.* (1910) 149 Mo. App. 134, 130 S. W. 130; *Adams v. St. Louis & S. F. R. Co.* (1910) 149 Mo. App. 278, 130 S. W. 48; *Mills v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 529, 137 S. W. 1006; *Dawson v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 642, 138 S. W. 665; *Jennings v. Appleman* (1911) 159 Mo. App. 12, 139 S. W. 817; *Riddle v. Moffitt* (1911) 159 Mo. App. 470, 141 S. W. 448; *McMillen v. Elder* (1911) 160 Mo. App. 399, 140 S. W. 917; *Schafer v. Ostmann* (1913) 172 Mo. App. 602, 155 S. W. 1102, earlier appeal supporting rule is reported in (1910) 148 Mo. App. 644, 129 S. W. 63; *Ellis v. Wahl* (1914) 180 Mo. App. 507, 167 S. W. 582; *Winston v. Lusk* (1914) 186 Mo. App. 381, 172 S. W. 76; *Wingate v. Bunton* (1916) 193 Mo. App. 470, 186 S. W. 32; *Flynn v. St. Louis Southwestern R. Co.* (1917) — Mo. App. —, 190 S. W. 371; *Lindstrom v. Kansas City Southern R. Co.* (1920) 202 Mo. App. 399, 218 S. W. 936; *Wolf v. Baum* (1919) — Mo. App. —, 211 S. W. 697; *Gieske v. Redemeyer* (1920) — Mo. App. —, 224 S. W. 92; *Jessee v. Kenney* (1921) — Mo. App. —, 229 S. W. 219.

New Jersey.—*Bullock v. Delaware, L. & W. R. Co.* (1898) 61 N. J. L. 550, 40 Atl. 650, 4 Am. Neg. Rep. 419;

Osler v. Walton (1901) 67 N. J. L. 63, 50 Atl. 590; *Blackmore v. Ellis* (1904) 70 N. J. L. 264, 57 Atl. 1047; *Zick v. Smith* (1921) — N. J. L. —, 112 Atl. 846.

New York.—*Voltz v. Blackmar* (1876) 64 N. Y. 440 (discussing rule); *Yates v. New York C. & H. R. R. Co.* (1876) 67 N. Y. 100; *Connors v. Walsh* (1892) 131 N. Y. 590, 30 N. E. 59; *Cook v. Ellis* (1844) 6 Hill, 466, 41 Am. Dec. 757; *Whitney v. Hitchcock* (1847) 4 Denio, 461 (dictum); *Keyes v. Devlin* (1854) 3 E. D. Smith, 518; *Waffle v. Dillenback* (1863) 39 Barb. 123, affirmed in (1868) 38 N. Y. 53 (recognizing rule); *Hogan v. Ryan* (1886) 25 N. Y. Week. Dig. 349; *Clayton v. Keeler* (1896) 18 Misc. 488, 42 N. Y. Supp. 1051; *Frost v. Pinkerton* (1901) 61 App. Div. 566, 70 N. Y. Supp. 892; *Genung v. Baldwin* (1902) 75 App. Div. 195, 77 N. Y. Supp. 679, reversed on other grounds in (1902) 77 App. Div. 584, 79 N. Y. Supp. 569, 12 N. Y. Anno. Cas. 236; *Galvin v. Starin* (1909) 132 App. Div. 577, 116 N. Y. Supp. 919; see also *Walker v. Wilson* (1861) 8 Bosw. 586 (action for trespass in forcibly entering plaintiff's premises and assaulting his clerk).

North Carolina.—*Causee v. Anders* (1839) 20 N. C. 388 (4 Dev. & B. L. 246); *Pendleton v. Davis* (1853) 46 N. C. (1 Jones, L.) 98; *Louder v. Hinson* (1857) 49 N. C. (4 Jones, L.) 369; *Smithwick v. Ward* (1859) 52 N. C. (7 Jones, L.) 64, 75 Am. Dec. 453; *Johnston v. Crawford* (1867) 61 N. C. (Phill. L.) 342; *White v. Barnes* (1893) 112 N. C. 323, 16 S. E. 922; *Blow v. Joyner* (1911) 156 N. C. 140, 72 S. E. 319; *Saunders v. Gilbert* (1911) 156 N. C. 463, 38 L.R.A. (N.S.) 404, 72 S. E. 610; *Trogdon v. Terry* (1916) 172 N. C. 540, 90 S. E. 583.

North Dakota.—*Shoemaker v. Sonju* (1906) 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173; *Selland v. Nelson* (1911) 22 N. D. 14, 132 N. W. 220 (rule implied); *Stockwell v. Brinton* (1913) 26 N. D. 1, 142 N. W. 242; *Voves v. Great Northern R. Co.* (1913) 26 N. D. 110, 48 L.R.A. (N.S.) 30, 143 N. W. 760.

Ohio.—*Roberts v. Mason* (1859) 10 Ohio St. 277; *Klein v. Thompson* (1869) 19 Ohio St. 569; *Mahoning*

Valley R. Co. v. De Pascale (1904) 70 Ohio St. 179, 65 L.R.A. 860, 71 N. E. 633, 1 Ann. Cas. 896, 16 Am. Neg. Rep. 548 (rule assumed or implied); Hilbert v. Doebricke (1882) 8 Ohio Dec. Reprint, 518, 8 Ohio L. J. 268; Hendricks v. Fowler (1898) 16 Ohio C. C. 597, 9 Ohio C. D. 209; August v. Finnerty (1908) 30 Ohio C. C. 330; Menninger v. Taylor (1908) 30 Ohio C. C. 717; Baltimore & O. R. Co. v. Reed (1909) 31 Ohio C. C. 521.

Oklahoma. — Willet v. Johnson (1904) 13 Okla. 568, 76 Pac. 174.

Oregon.—Heneky v. Smith (1882) 10 Or. 349, 45 Am. Rep. 143; Stark v. Epler (1911) 59 Or. 262, 117 Pac. 276; Housman v. Peterson (1915) 76 Or. 556, 149 Pac. 538 (rule recognized).

Pennsylvania. — Porter v. Seiler (1854) 23 Pa. 424, 62 Am. Dec. 341; Robison v. Rupert (1854) 23 Pa. 523 (rule recognized); Rhodes v. Rodgers (1892) 151 Pa. 634, 24 Atl. 1044; Wirsing v. Smith (1908) 222 Pa. 8, 70 Atl. 906; Perovich v. Domansky (1911) 231 Pa. 66, 79 Atl. 877; Lewis v. Fleer (1905) 30 Pa. Super. Ct. 237.

Rhode Island. — Hickey v. Booth (1909) 29 R. I. 466, 132 Am. St. Rep. 832, 72 Atl. 529; Wilmot v. Bartlett (1915) 37 R. I. 568, 94 Atl. 427.

South Carolina. — Chancellor v. Vaughn (1802) 2 S. C. L. (2 Bay) 416; Wolff v. Cohen (1855) 42 S. C. L. (8 Rich.) 144; Rowe v. Moses (1856) 43 S. C. L. (9 Rich.) 423, 67 Am. Dec. 560; Hayes v. Sease (1898) 51 S. C. 534, 29 S. E. 259; Edwards v. Wessinger (1902) 65 S. C. 161, 95 Am. St. Rep. 789, 43 S. E. 518; Davis v. Collins (1904) 69 S. C. 460, 48 S. E. 469; Calder v. Southern R. Co. (1911) 89 S. C. 287, 71 S. E. 841, Ann. Cas. 1913A, 894.

South Dakota. — Kerley v. Gernscheid (1906) 20 S. D. 363, 106 N. W. 136; Bogue v. Gunderson (1912) 30 S. D. 1, 137 N. W. 595, Ann. Cas. 1915B, 126; Leggett v. Dinneen (1918) 40 S. D. 336, 167 N. W. 235.

Tennessee.—R. R. Springer Transp. Co. v. Smith (1886) 16 Lea, 498, 1 S. W. 280; Louisville & N. R. Co. v. Ray (1898) 101 Tenn. 1, 46 S. W. 554; Memphis Street R. Co. v. Stratton

(1915) 131 Tenn. 620, L.R.A.1915E, 704, 176 S. W. 105.

Texas. — Flanagan v. Womack (1880) 54 Tex. 45; Shook v. Peters (1883) 59 Tex. 393; Sargent v. Carnes (1892) 84 Tex. 156, 19 S. W. 378; Jackson v. Wells (1896) 13 Tex. Civ. App. 275, 35 S. W. 528; Shapiro v. Michelson (1898) 19 Tex. Civ. App. 615, 47 S. W. 746; Galveston, H. & S. A. R. Co. v. La Prelle (1901) 27 Tex. Civ. App. 496, 65 S. W. 488 (recognizing rule); Denison & S. R. Co. v. Randell (1902) 29 Tex. Civ. App. 460, 69 S. W. 1013; Flannery v. Wood (1903) 32 Tex. Civ. App. 250, 73 S. W. 1072; Parham v. Lankford (1906) 43 Tex. Civ. App. 31, 93 S. W. 525; Hall v. Hayter (1919) — Tex. Civ. App. —, 209 S. W. 436; Walker v. Kellar (1920) — Tex. Civ. App. —, 218 S. W. 792, later appeal in (1921) — Tex. Civ. App. —, 226 S. W. 796; Pfluger v. Schoen (1920) — Tex. Civ. App. —, 221 S. W. 1090 (rule assumed).

Utah.—See Hirabelli v. Daniels (1912) 40 Utah, 513, 121 Pac. 966; Marble v. Jensen (1919) 53 Utah, 226, 178 Pac. 66.

Vermont.—Devine v. Rand (1866) 38 Vt. 621; Earl v. Tupper (1873) 45 Vt. 275; Hoadley v. Watson (1873) 45 Vt. 289, 12 Am. Rep. 197; Edwards v. Leavitt (1873) 46 Vt. 126; Newell v. Whitcher (1880) 53 Vt. 589, 38 Am. Rep. 703; Sherman v. Johnson (1886) 58 Vt. 40, 2 Atl. 707 (recognizing rule); Goldsmith v. Joy (1889) 61 Vt. 488, 4 L.R.A. 500, 15 Am. St. Rep. 923, 17 Atl. 1010; Parker v. Coture (1890) 63 Vt. 155, 25 Am. St. Rep. 750, 21 Atl. 494; Roach v. Caldbeck (1892) 64 Vt. 593, 24 Atl. 989; Dubois v. Roby (1911) 84 Vt. 465, 80 Atl. 150; Rogers v. Bigelow (1916) 90 Vt. 41, 96 Atl. 417; Niebyski v. Welcome (1919) 93 Vt. 418, 108 Atl. 341.

Virginia. — Borland v. Barrett (1882) 76 Va. 128, 44 Am. Rep. 152; BANNISTER v. MITCHELL (reported herewith) ante, 768.

West Virginia.—Stevens v. Friedman (1905) 58 W. Va. 78, 51 S. E. 132; Smith v. Fahey (1908) 63 W. Va. 346, 60 S. E. 250; Fink v. Thomas (1909) 66 W. Va. 487, 66 S. E. 650, 19

Ann. Cas. 571 (assuming rule); *Hunt v. Di Baco* (1911) 69 W. Va. 449, 71 S. E. 584; *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith) ante, 761.

Wisconsin.—*McWilliams v. Bragg* (1854) 3 Wis. 424; *Birchard v. Booth* (1855) 4 Wis. 67; *Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670; *Fairbanks v. Witter* (1864) 18 Wis. 288, 86 Am. Dec. 765; *Morely v. Dunbar* (1869) 24 Wis. 183; *Schmidt v. Pfeil* (1869) 24 Wis. 452; *Wilson v. Young* (1872) 31 Wis. 574; *Bass v. Chicago & N. W. R. Co.* (1877) 42 Wis. 654, 24 Am. Rep. 437; *Brown v. Swineford* (1878) 44 Wis. 282, 28 Am. Rep. 582; *Corcoran v. Harran* (1882) 55 Wis. 120, 12 N. W. 468; *Shay v. Thompson* (1884) 59 Wis. 540, 48 Am. Rep. 588, 18 N. W. 473; *Draper v. Baker* (1884) 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527; *Spear v. Sweeney* (1894) 88 Wis. 545, 60 N. W. 1060; *Nichols v. Brabazon* (1896) 94 Wis. 549, 69 N. W. 342; *Lamb v. Stone* (1897) 95 Wis. 254, 70 N. W. 72; *Lowe v. Ring* (1904) 123 Wis. 107, 101 N. W. 881; *Deragon v. Sero* (1908) 187 Wis. 276, 20 L.R.A.(N.S.) 842, 118 N. W. 839; *Thomas v. Williams* (1909) 139 Wis. 467, 121 N. W. 148; *Palmer v. Smith* (1911) 147 Wis. 70, 132 N. W. 614; *Ogodziski v. Gara* (1921) — Wis. —, 181 N. W. 227; *Ogodziski v. Gara* (1921) — Wis. —, 181 N. W. 231.

Wyoming.—*Williams v. Campbell* (1913) 22 Wyo. 1, 133 Pac. 1071.

Canada.—*Slater v. Watts* (1911) 16 B. C. 36.

It follows, as a corollary of the above rule, that if the proof fails to show wantonness or malice or aggravating circumstances, punitive damages cannot be recovered. See, for example, *Steeve v. Smith* (1910) 153 Ill. App. 630; *McGlothlin v. Peters* (1916) 201 Ill. App. 181; *Joice v. Branson* (1880) 73 Mo. 28; *Orscheln v. Scott* (1901) 90 Mo. App. 352; *Bullock v. Delaware, L. & W. R. Co.* (1898) 61 N. J. L. 550, 40 Atl. 650, 4 Am. Neg. Rep. 419; *Williams v. Garrett* (1856) 12 How. Pr. (N. Y.) 456; *Fink v. Thomas* (1909) 66 W. Va. 487, 66 S. E. 650, 19 Ann. Cas. 571; *Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670.

The jury is only at liberty to award punitive damages for an assault when there has been such reckless and wanton disregard of the plaintiff's rights as shows a malignant spirit on the part of the defendant. *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith), ante, 761.

Exemplary damages, it was said in *Baumgartner v. Hodgdon* (1908) 105 Minn. 22, 116 N. W. 1030, can be allowed only where the wrong complained of was wilful and malicious, or committed in a spirit of mischief and criminal indifference to civil obligations.

It was said in *Birmingham R. Light & P. Co. v. Coleman* (1913) 181 Ala. 478, 61 So. 890, that "in civil actions for damages for assaults and batteries or for assaults, exemplary damages are recoverable whenever the 'wrongful act was done wantonly or maliciously, or was attended with insult, oppression, or other circumstances of aggravation.'"

It is not entirely clear whether the English court in such cases as *Forde v. Skinner* (1830) 4 Car. & P. (Eng.) 239, intended to approve the allowance of exemplary damages for an assault, using that term in the sense of damages as a punishment, or whether it intended merely to allow damages for mental suffering, injury to feelings, etc., in view of circumstances of aggravation. In this case, where parish officers forcibly cut off the hair of a woman pauper in the poorhouse, the court said that if the act was done violently and with force, and with the malicious intent imputed, namely, of "taking down their pride," and not with a view to cleanliness, increased damages because of aggravation should be allowed.

"Exemplary and punitive damages in law mean the same thing. They are damages given in the way of example, warning, and punishment." *Green v. Craig* (1870) 47 Mo. 90.

And exemplary damages for an assault and battery are allowable not only for the purpose of punishing the defendant, and of deterring him from future wrongful conduct of a similar nature, but also for the purpose of

making an example of him, and deterring others from committing similar offenses. *Ward v. Ward* (1875) 41 Iowa, 686 (see this case and others under II. b, *infra*; but for construction of the term "exemplary" damages merely as compensation for non-pecuniary loss, see II. e, *infra*).

A point which appears to be well taken, but is not considered generally in the cases, is that made by the West Virginia court, that, where punitive damages are proper in case of assault, the jury should not first ascertain the amount of compensatory damages, and then add thereto such amount as, in its judgment, is sufficient to punish the defendant and to serve as an example to himself and others to prevent commission of similar offenses; but that, since the compensatory damages are in a sense punitive in so far as the defendant is concerned, in that he receives no benefit therefrom, the jury should, first of all, consider whether the compensatory damages which they have allowed are sufficient punishment, and, if not, should add thereto by way of punishment only such additional sum as, together with the compensatory damages, will be a proper punishment for the defendant. This principle is supported in assault and battery cases by the decisions in *Hess v. Marinari* (1918) 81 W. Va. 500, 94 S. E. 968, and *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith), *ante*, 761.

In *Hess v. Marinari* (W. Va.) *supra*, the court held that an instruction was erroneous that if the jury believed from the evidence that the assault and battery, if such was committed, was done maliciously, wilfully, wantonly, and in utter disregard of plaintiff's rights, they might, in their discretion, in addition to compensatory damages, give punitive or exemplary damages against the defendants as a punishment to them, to prevent them and others from committing like offenses. It was said: "The objection urged to this instruction is that it permitted the jury, in fixing the quantum of damages, to ascertain: first, what damages would compensate the plaintiff for the injury he received;

and second, if they decided to award exemplary damages, to ascertain what amount would be sufficient to punish the defendants for the alleged assault, and to add these two amounts together as their verdict. It cannot be denied that this is the effect of the instruction. Under our holdings compensatory damages include allowances for mental anguish and pain and suffering, and for this reason there is very little occasion for the allowance of exemplary damages. Damages called exemplary or punitive damages are more frequently allowed in those jurisdictions where compensatory damages do not include the items of mental anguish, pain, and suffering, but only actual pecuniary loss, and are justified largely upon the ground that they are a compensation to the party for the mental anguish, pain, and suffering endured by him. In this jurisdiction all such items of damages are included under the head of compensation, and whatever may be allowed by a jury as exemplary or punitive damages is something strictly as punishment,—something to which the plaintiff is in no wise entitled as a compensation, either for any actual pecuniary loss, or for any pain suffered, or humiliation which he may have endured. In a case like this it will be borne in mind that all damages inflicted upon the defendant are purely exemplary or in the way of punishment. He gets nothing, and even to the extent that damages are awarded as compensation to the plaintiff for the injury he receives, they also accomplish the purpose of punishing the defendant, so that it is quite clear that where the damages found by the jury as compensation for the injury inflicted are sufficient of themselves to punish the defendant for the wrong he has done, in a case in which punishment is proper, no additional damages should be awarded for that purpose."

There are other cases which in result seem opposed to the above conclusion, although it does not appear that the point was brought to the attention of the court. For example, in *Jennings v. Appleman* (1911) 159 Mo.

App. 12, 139 S. W. 817, an instruction was held not erroneous which included the proposition that if the injuries were wilfully inflicted, the jury might assess, in addition to compensatory damages, a further sum by way of punitive damages. But the particular objections raised and discussed related to the term "wilfully."

The somewhat novel defense was unsuccessfully interposed to the allowance of exemplary damages for assault, in *Webb v. Gilman* (1888) 80 Me. 177, 13 Atl. 688, that the plaintiff ought not to be allowed such damages because he was guilty of great rashness and folly in going to see the defendant and trying to make a contract with him in view of the fact that actual malice had existed between the parties for years. The trial court stated to the jury, in refusing to exclude exemplary damages on this ground, that while it had known of many cases where a defense was made to a claim for exemplary damages on the ground that parties were friendly before the affray, and that it was merely the result of sudden provocation, this was the first claim of a defense to exemplary damages based on the ground of actual malice existing on the part of the defendant for years culminating in an assault.

b. Particular instructions; reasons for rule.

For the reason that in some jurisdictions (see II. e, *infra*) exemplary damages are regarded as compensation for nonpecuniary losses, and the further reason that often the correctness of a particular instruction may be in doubt although the general principles are comparatively well settled, attention is called at this point, by jurisdictions, to a number of instructions and statements of rules which have been approved or disapproved in various cases. Instructions relating to particular questions are considered later in the annotation under the appropriate headings. For example, as to instructions infringing on jury's discretion, see VII. a, *infra*; as to instruction on the question of provocation, see V. *infra*; as to the correct-

ness of instructions authorizing the jury to award such punitive damages as they might "see fit," see *Yazoo & M. Valley R. Co. v. Williams* (1905) 87 Miss. 344, 39 So. 489; *Cooper v. Johnson* (1884) 81 Mo. 483; and *Hall v. Hayter* (1919) — Tex. Civ. App. —, 209 S. W. 436, under VII. a, *infra*. See also *Hess v. Marinari* (1918) 81 W. Va. 500, 94 S. E. 968, and *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith) ante, 761, under II. a, *supra*, holding erroneous instructions which permitted the addition of punitive damages to the amount found to constitute compensatory damages; and *St. Ores v. Mc-Glashen* (1887) 74 Cal. 148, 15 Pac. 452, under IV. c, *infra*, as to an instruction involving question of reasonable doubt of malice.

An instruction was approved in *Empire Clothing Co. v. Hammons* (1919) 17 Ala. App. 60, 81 So. 838, that if the jury believed from all the evidence that the defendant "unlawfully, wantonly, and intentionally assaulted the plaintiff with a pistol, they may, in addition to actual damages, assess exemplary or punitive damages, as a punishment to the defendant, if the assault was attended with circumstances of aggravation."

And an instruction was approved in *Jaegar v. Metcalf* (1908) 11 Ariz. 283, 94 Pac. 1094, that "if the injury inflicted by the defendant was wanton, malicious, and committed in reckless and wilful disregard of the rights of plaintiff, 'exemplary damages might be allowed in case the compensatory damages return might not be sufficient, in the judgment of the jury, 'to punish the defendant and serve as a warning to others.'"

But an instruction that if the jury found that the assault was committed wilfully and maliciously, they had the right to give the plaintiff exemplary damages in addition to compensatory damages, in any amount they believed proper, not exceeding a stated sum, was held erroneous in *St. Louis S. W. R. Co. v. Myzell* (1908) 87 Ark. 123, 112 S. W. 208, it being said: "This is putting the assessment of exemplary damages at large, restrained only by

what the jury may believe proper, when their assessment 'must be commensurate with the wrong done, as shown by the evidence adduced.' "

And it was held erroneous, in an action for assault, to instruct the jury that "in case of personal injury, for which a criminal prosecution might have been brought, exemplary damages may be recovered in a civil suit," since this omitted consideration of mitigating circumstances which might prevent the allowance of exemplary damages. *Badostain v. Gra-zide* (1896) 115 Cal. 425, 47 Pac. 118.

An instruction was given in *Tatnall v. Courtney* (1881) 6 Houst. (Del.) 434, as follows: "When the plaintiff shows that the attack upon him was wanton or malicious, without any provocation, and the wrong inflicted was grievous, the jury may give him damages without reference to actual injury, but by way of punishment and example. Such damages are in the reasonable discretion of the jury, in view of all facts and circumstances proved. When thus given they are not mere compensation to the plaintiff, but are called punitive, vindictive, or exemplary, and are by way of public example or punishment. In estimating these damages, the jury may take into account, and should consider, the circumstances of time and place of the attack, the mode of making it, the insult to the plaintiff, his suffering of body and mind, and any other fact enhanced the injury of the plaintiff, and they may consider the pecuniary means of the defendant in awarding them."

In *Hendle v. Geiler* (1895) — Del. —, 50 Atl. 632, the jury were instructed that "in determining the matter of exemplary damages, you must be satisfied that the injuries were inflicted in a depraved, malicious, and wilful manner; that the defendant did not merely strike a blow, but that he struck a blow entirely disproportionate to the resistance offered; that he did it with a bad motive, with a bad heart, and was influenced by malice."

The jury was instructed in *Vansant v. Kowalewski* (1914) 5 Boyce (Del.)

92, 90 Atl. 421, that, before awarding to the plaintiff exemplary or punitive damages, they must be satisfied that the injury complained of was not only committed by the defendant, and was wrongful and unlawful, but that it was also malicious, or wilful and wanton in its character.

Exemplary damages, it was said in *Hendle v. Geiler* (Del.) *supra*, are awarded by way of example to the community, that men should not commit such acts producing trouble and disorder.

In *Coffin v. Spencer* (1857) 2 Haw. 23, the jury were instructed that, "in aggravated cases, when it appears that the defendant was actuated by malicious motives, as, for instance, when a violent assault and battery has been committed without any apparent provocation, or upon slight and inadequate provocation; when the defendant has used dangerous weapons; or when he has accompanied the act with such expressions as displayed a malicious purpose, and not merely a temporary excitement or irritation of passion from provocation,—in such cases juries go beyond the rule of a just compensation for the injury sustained by the plaintiff, and very justly, too, in my opinion, award against the defendant what are called vindictive damages, punitive damages, or, as we say, smart money. In such cases they give these extra damages as a punishment, to the plaintiff, and for the sake of example, to deter others from committing the like offense."

In *Foote v. Nichols* (1862) 23 Ill. 486, the court approved an instruction that, if the jury believed that the defendant assaulted the plaintiff without provocation, and that such assault was an aggravated one, and that the public good, or justice to the plaintiff, or both, demanded it, they were not confined in their verdict to actual damages, but might give exemplary damages not only to compensate the plaintiff, but to punish the defendant for such wanton injury, not exceeding the amount claimed in the declaration.

An instruction was approved in

Harrison v. Ely (1887) 120 Ill. 83, 11 N. E. 334, that, if the jury found the defendant guilty, if the assault and battery was unprovoked by the plaintiff, and was wantonly, maliciously, and wilfully inflicted, and plaintiff was seriously injured thereby, then, in fixing the amount of the plaintiff's damages, they were not confined to the actual damages proved, but might give, in addition thereto, such exemplary damages, or smart money, as, in their judgment, would be just and proper.

In *Friedman v. Shuffitowski* (1913) 182 Ill. App. 5 (abstract of decision only reported), it was held that "an instruction in an action for assault, which allows the jury to award exemplary damages if malice has been shown, without conditioning it upon defendant's having been found guilty, is erroneous."

In an action against a street railway company for ejecting a passenger, an instruction that the jury might allow exemplary damages not only to compensate the plaintiff, but to punish the defendant, and to deter others from the commission of like offenses if the assault was without provocation, was malicious, aggravated, and wanton, and if the jury believed that "justice and public good require it," was held, in *Chicago Consol. Traction Co. v. Mahoney* (1907) 230 Ill. 562, 82 N. E. 868, not erroneous, as submitting to the jury the question as to what "justice and public good" required.

But an instruction was held erroneous in *Hendrickson v. Kingsbury* (1866) 21 Iowa, 379, which authorized the jury, in an action for assault and battery, to return a verdict which would, in addition to compensatory damages, "manifest the detestation in which the act is held by them." The other portions of the instruction, however, the court did not regard as erroneous. After defining nominal and compensatory damages, the court instructed the jury that "exemplary damages are given whenever elements of oppression or fraud or malice enter into the commission of the offense; and in such cases the jury are not

limited to actual compensation, nor are they required to scrutinize very closely the amount of their verdict, but, blending together the rights of the injured party and the interests of community, they may give such a verdict as will compensate for the injury, and at the same time inflict some punishment upon the defendant for his wrongful act, protect society, and manifest the detestation in which the act is held by them. In this case you may give either nominal, compensatory, or exemplary damages, as you may believe yourselves justified by the evidence."

In *Hendrickson v. Kingsbury* (Iowa) supra, it was held that an instruction was not erroneous which permitted the jury to render a verdict such as would not only compensate for the injury, but would, at the same time, "inflict some punishment upon the defendant for his wrongful act."

And instructions were approved in *Root v. Sturdivant* (1886) 70 Iowa, 55, 29 N. W. 802, to the effect that vindictive or punitive damages were awarded by way of punishment for the wrongful act committed, and for the purpose of restraining wrongdoers from a repetition of like wrongs; and that the amount which should be awarded for these purposes was left very largely to the jury's sound discretion.

So, an instruction was approved in *Ward v. Ward* (1875) 41 Iowa, 686, which permitted the jury, in an action for assault, to allow the plaintiff "additional, exemplary, or vindictive damages in any amount in your discretion proper or necessary to restrain the defendant and others from the commission of like acts in the future," if they found that the assault was committed in an ignominious manner, openly, in the public highway, with intent to injure the plaintiff, and for the purpose of gratifying a malicious purpose; the objection being that the instruction erroneously directed the finding of damages which should operate to deter not only the defendant, but others, from the commission of like acts in the future. The court said: "Counsel for defendant insist

that while, in proper cases, exemplary damages may be allowed for the purpose of punishing the defendant, they ought not to be carried to the extent that they may serve as an example to others; that is, the defendant ought not to suffer for the purpose of public good. It is true that vindictive damages are never allowed alone for the purpose of public good, through the example given in their assessment. The effect upon the public is but an incident, just as the effect of punishment in criminal cases incidentally operates to deter others from the commission of crime. It is claimed by defendant's counsel that, in civil cases, damages ought to be limited to the extent that will operate alone upon the offender as a punishment, and a restraint of his future conduct; the example to others ought to be kept out of view. This is impossible, because, in all cases of punishment, the example will reach and affect the public. There cannot be a punishment without an example; the two are inseparable. If punishment be administered so there will be no example for the good or ill of the public, it ceases to be punishment. As the example always attends punishment, and of necessity reaches and affects the public, the law will wisely administer it, both in civil and criminal cases, with a view of producing a good effect by the example." As will be observed from the instructions set out in this subdivision, the above is in accord with the results in many other cases where this particular point was not, however, raised. Among other cases in which instructions have been given and the judgment for the plaintiff affirmed without consideration of this point; see *Anderson v. International Harvester Co.* (1908) 104 Minn. 49, 16 L.R.A.(N.S.) 440, 116 N. W. 101, where the jury was instructed that if they believed the assault was committed wilfully and wrongfully, they might allow the plaintiff such additional sum as, in their judgment, they thought proper and right by way of punitive damages "for the purpose of deterring others from the

commission of similar acts in the future."

An instruction in an action for assault and battery that exemplary damages, when given, were assessed by way of punishment for a wrongful act "wilfully" or wantonly or maliciously committed, was held, in *White v. Spangler* (1885) 68 Iowa, 222, 26 N. W. 85, not erroneous on the ground that the jury might interpret the word "wilfully" to mean merely an act intentionally done, and therefore might award exemplary damages even if the act was in self-defense, the court saying that, under the circumstances, the word expressed the idea that the act was committed with a wrong motive, as well as that it was intentional.

In an action for assault and false imprisonment, an instruction was approved in *Wiley v. Keokuk* (1870) 6 Kan. 94, that "whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages." To the same effect is *Wiley v. Man-a-to-wah* (1870) 6 Kan. 111.

An instruction in an action for assault and battery, authorizing the jury to award punitive damages as a punishment to the defendant, and as a warning to others not to commit similar assaults and batteries, was held erroneous in *Ryan v. Quinn* (1903) 24 Ky. L. Rep. 1513, 71 S. W. 872. The court cited as authority *Schneider v. McGill* (1901) 23 Ky. L. Rep. 587, 64 S. W. 835, where a similar instruction was held erroneous in an action for false imprisonment. In the latter case the court said that it was doubtful if the jury should ever be told that punitive damages are permitted as a punishment of the defendant, the better practice being simply to say, after stating for what causes exemplary or punitive damages may be awarded, that if the jury thus believe, they may, in the exercise of a sound discretion, give exemplary or punitive damages not exceeding the amount claimed. The proposition is not further discussed in this case.

The jury may properly be instructed, in an action for assault, that

if they find the defendant committed the act wantonly, they may, if they think proper, in addition to the actual damages which the plaintiff has sustained, allow him a further sum; as exemplary or vindictive damages, both as a protection to the plaintiff and as a salutary example to others, to deter them from offending in like cases. *Pike v. Dilling* (1861) 48 Me. 539. (See also *Ward v. Ward* (Iowa) supra, and other cases cited in this subdivision, in which instructions embodying the idea of damages as a restraint on others have been approved.)

An instruction was approved in *Brann v. Leavitt* (1918) 117 Me. 144, 108 Atl. 12, that, "it is a rule, in a case of this kind, that, when an assault is wanton, unprovoked, causeless, with a desire to hurt, to gratify anger or malice, the jury, if they think the actual damages awarded are not sufficient punishment, are warranted in adding to the actual damages such a sum as smart money, or punitive damages, which, taken together with the actual damages, will afford a sufficient punishment to the person who has done the wrong; juries are not compelled to do this; they are not required to do it; they are allowed to do it. Whether they will add punitive damages or not is left solely to the discretion of the jury. You have a right in this case, if you find that this was a wanton, wicked assault, not provoked by the plaintiff himself, to add to the actual damages a sufficient sum of money as punitive damages to afford sufficient punishment, provided the actual damages themselves are not sufficient. Otherwise not."

In *Thillman v. Neal* (1898) 88 Md. 525, 42 Atl. 242, instructions were approved that if the jury found, in addition to the fact that the defendant assaulted and struck the plaintiff, that he "was treated with reckless violence and indignity," that they might award such further damages as they might think proper from all the evidence to punish such conduct, and to deter the defendant from like conduct in the future.

An instruction was approved in *Zell*

v. Dunaway (1911) 115 Md. 1, 80 Atl. 215, that if the jury believed that the plaintiff was injured by the defendant, as alleged, and that the assault and battery was wanton, unprovoked, and excessive in its nature, they might inflict vindictive and punitive damages on the defendant.

In *Alford v. Vincent* (1884) 53 Mich. 555, 19 N. W. 182, the court, in holding that an instruction permitting the jury to give exemplary damages in an action for an aggravated assault was not prejudicial error, said: "Complaint is also made that the court allowed the jury to give exemplary damages, though special damages are not claimed in the declaration. The declaration sets out an aggravated assault, with circumstances of special injury, including a miscarriage. The estimate of damages must necessarily be very much at large in such a case. The judge told the jury exemplary damages might be given. The phrase is an unfortunate one and liable to mislead . . . but in this case the context shows that the judge was not leaving the jury to give damages at discretion; but only in view of the wilfulness and malice of defendant's act, the actual damages from which could not be accurately computed. We have no reason to think the jury were misled." (See cases from this state under II. e, infra.)

The correct rule, it was said in *Berg v. St. Paul City R. Co.* (1905) 96 Minn. 513, 105 N. W. 191, is that where the defendant's act, which is the subject-matter of the action, is shown to have been wanton or malicious or fraudulent or oppressive, and of such a character as to indicate that he acted with a reckless disregard of the rights of the plaintiff, the jury, in their discretion, may award to the plaintiff, in addition to his compensatory damages, such further reasonable sum as exemplary damages as they deem just.

The court, in *Anderson v. International Harvester Co.* (1908) 104 Minn. 49, 16 L.R.A. (N.S.) 440, 116 N. W. 101, laid down the rule in an action for assault, that "where, in an action to recover damages for a tort, the evidence shows that the act was committed

wilfully, wrongfully, or maliciously, or fraudulently or oppressively, and is of such a character as to indicate that the defendant acted with a reckless disregard of the rights of the plaintiff, the jury may, in its discretion, award exemplary damages."

The court approved an instruction in *Germolus v. Sausser* (1901) 83 Minn. 141, 85 N. W. 946, that if the assault and battery were wilful and malicious, the jury might allow not only actual damages, but might give punitive or exemplary damages "for the purpose of preventing the defendant and others from committing such wilful and malicious assaults in the future."

And in *Gorstz v. Pinske* (1901) 82 Minn. 456, 83 Am. St. Rep. 441, 85 N. W. 215, the court instructed the jury in an assault and battery case, that if the injuries were inflicted wilfully and maliciously, they were not limited to mere compensation for the actual damages sustained, but might give such further sum by way of exemplary damages, as an example to others, to deter them from offending in a like manner. While no exception was taken to this portion of the charge, the court, on appeal, said that it undoubtedly correctly stated the law in that case.

In *Boetcher v. Staples* (1880) 27 Minn. 308, 38 Am. Rep. 295, 7 N. W. 263, the court said: "It is fully settled by the decisions of this court that in actions for torts, where there has been fraud, malice, or oppression on the part of the defendant, the jury may allow what are denominated exemplary or punitive damages,—that is, damages beyond the mere pecuniary loss or injury to the plaintiff, and intended as in some measure a punishment upon the defendant for the wrong done, and as an example to deter others from similar acts."

An award of punitive or exemplary damages is in the nature of punishment for wrongdoing, as an example; so that others may be deterred from the commission of such wrongs, and the public may be properly protected. *Yazoo & M. Valley, R. Co. v. May* 16 A.L.R.—50.

(1913) 104 Miss. 422, 44 L.R.A. (N.S.) 1138, 61 So. 449.

And it was said in *Yazoo & M. Valley R. Co. v. Williams* (1905) 87 Miss. 344, 39 So. 489, that punitive damages are awarded chiefly on account of a desire to protect the public and prevent the repetition of such actions.

It was said in *Bell v. Morrison* (1854) 27 Miss. 68, that it is settled by the authorities almost without exception in England and the United States, that in actions for injury to the person or to character, the jury are not restricted, in giving damages, to the actual, positive injury sustained by the plaintiff, but may give damages as a punishment against the defendant; in order that not only may the plaintiff receive compensation for the injury inflicted upon him, but that the interest of society may be regarded, and such damages awarded as will tend to operate by way of example, and to deter others from similar acts of violence and oppression.

An instruction was approved in *Lochte v. Mitchell* (1900) — Miss. —, 28 So. 877, that if the defendant wilfully and wantonly, and without provocation, assaulted and beat the plaintiff, the jury might, at its discretion, award punitive damages.

Substitution of the word "maliciously" for the word "wantonly," in an instruction offered by the defendant, requiring the jury, before they could assess punitive damages for an assault, to find that the injury was wantonly inflicted, without any circumstances of excuse or palliation, was held in *Gieske v. Redemeyer* (1920) — Mo. App. —, 224 S. W. 92, not prejudicial to the defendant. The court said that the plaintiff's evidence tended to show that the assault was intentional, without just cause or excuse, and it followed that it was malicious and unlawful, and might form the basis for punitive damages.

It was said in *Ellis v. Wahl* (1914) 180 Mo. App. 507, 167 S. W. 582, that exemplary damages are allowed on the theory that the defendant's conduct has been such that he deserves to be punished.

The basic idea of punitive damages,

it was said in *Mills v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 529, 137 S. W. 1006, is to give the offender a lesson for his own good and for the welfare of others who may come in contact with him in the future, and to make an example of him that will serve as a warning to others; and the punishment should stop when the doctrines of the rule are satisfied.

In *Baxter v. Magill* (1907) 127 Mo. App. 392, 105 S. W. 697, the court held that an instruction was properly refused which proceeded on the theory that the quantum of force employed, and not the state of mind with which that force was exerted, determined whether or not the case was one for exemplary damages. In this case the defendant requested an instruction that exemplary damages could not be allowed unless the jury believed that the defendant broke the plaintiff's jaw by kicking instead of striking with his fists. It was said: "Now the right to recover compensatory [exemplary] damages in this case depended not upon the quantum of force employed by defendant, nor was it material whether the plaintiff received his broken jaw by blows from defendant's fist or from kicks with his booted foot; but the right to recover such damages depended rather upon the fact whether such blows, either from the fist or foot, were administered by defendant while in a malicious state of mind; and if there was malice on the part of defendant, then the case was one for exemplary damages."

The fact that an instruction authorizing the jury to allow punitive damages if they found the assault was made wantonly and maliciously omitted the proposition that the finding must be "from the evidence" was held, in *Cody v. Gremmler* (1906) 121 Mo. App. 359, 99 S. W. 46, not to render the instruction erroneous, where the jury had just been instructed that they should find a verdict for the plaintiff, and assess his actual damages, if they found "from the evidence" that the defendant assaulted and beat the plaintiff without cause.

The refusal of the court to give an instruction that "all the circum-

stances of the transaction are to be considered by the jury in determining whether there was the presence or absence of malice on the part of the persons making the arrest" was held prejudicial error, in *Frost v. Pinkerton* (1901) 61 App. Div. 566, 70 N. Y. Supp. 892, where the circumstances were such that the jury might have been led to believe that they need look no further than to the mere fact of the assault, which was made in connection with an alleged wrongful arrest, and there was evidence that the defendant acted in good faith, believing that the plaintiff was committing a misdemeanor.

Instructions were approved in *Conners v. Walsh* (1892) 131 N. Y. 590, 30 N. E. 79, that if the jury found from the evidence that the act of the defendant was wanton and malicious, they had the right to add to the actual damages which the plaintiff had sustained "something more by way of punishment—damages that are called exemplary, or punitive, or smart money, for the purpose of teaching the defendant that he must not maliciously and wantonly assault a person."

Instructions authorizing exemplary damages by way of punishment of the defendant for an assault were approved in *Causee v. Anders* (1839) 20 N. C. 388 (4 Dev. & B. L. 246).

An instruction that if the jury believed the attack was wanton and unprovoked, and with a deadly weapon, they could give exemplary, or even vindictive, damages, if necessary, to repress the practice of carrying and using deadly or dangerous weapons, was held in *Porter v. Seiler* (1854) 23 Pa. 424, 62 Am. Dec. 341, not objectionable on the ground that there was no evidence that any such practice existed in the community where the injury was inflicted and the cause tried; since, even if this were true, the direction was correct without the reason, and the addition thereof could not injure the defendant, but might benefit him, as the jury might infer that unless necessary to repress the practice referred to, vindictive damages could not be given.

An instruction was approved in

Leggett v. Dinneen (1918) 40 S. D. 336, 167 N. W. 235, that if the jury found by a preponderance of the evidence that the defendant was actuated by hatred or ill will towards the plaintiff, and that the assault, if any, was malicious, they might award the plaintiff such damages as, under the evidence, they thought was proper by way of punishment to him for the assault.

An instruction in an action for assault that if the act was done "wantonly and without justification" the jury might, in addition to actual damages sustained, award such sum as might be deemed adequate as exemplary or punitive damages, was held in *Shook v. Peters* (1883) 59 Tex. 393, not objectionable on the ground that it was misleading, in that the jury might understand that the terms "wantonly" and "without justification" were synonymous; it being said that this was not the effect of the charge, but on the contrary, its effect was that the act must have been not only wanton, but also without justification.

"Where in an action for assault and battery, there is evidence tending to show that the defendant acted with malice toward the plaintiff, or with reckless and wanton disregard of the rights of the plaintiff, it is proper to instruct the jury that if they believe that the defendant did so act, they may, in their discretion, award damages in excess of that which would compensate the plaintiff for his injury, as a punishment to deter the defendant and others from the commission of like offenses." *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith) ante, 761.

In *Fink v. Thomas* (1909) 66 W. Va. 487, 66 S. E. 650, 19 Ann. Cas. 571, an instruction permitting recovery of punitive damages for an unjustifiable assault merely was held erroneous. In this case the instruction directed the jury that if they believed that the defendant made an assault on the plaintiff, and did strike and beat him with his fist and a pistol, and that such assault was without any, or upon slight, provocation, they should find for the plaintiff, and allow him not

only compensatory damages, but also such damages as would operate as a punishment to deter him and others from similar conduct. After holding that the fact that the instruction was erroneous in directing the jury to award punitive damages, instead of leaving it to their discretion, the court said: "Another vice in this instruction is that it leaves out elements essential for the finding of exemplary damages. All the books say that to warrant punitive damages there must be malice, oppression, or wanton, wilful or reckless conduct. . . . This instruction leaves out these essential elements. It does say that the assault must be without any or slight provocation, but that is not enough. When we go beyond actual or compensatory damages, and enter the domain of exemplary or punitive damages, we must find—a jury must find—elements and circumstances based on the evidence beyond mere compensation for injury. There must be gross fraud, malice, oppression, or wanton, wilful, or reckless conduct, or criminal indifference to civil obligation."

An instruction was held not erroneous, in *McWilliams v. Bragg* (1854) 3 Wis. 424, that, "if the offense is committed wilfully, the jury have a right to give damages as a punishment to the defendant, for the purpose of making an example, and as a warning to him and others, in addition to their damages, which are as a compensation for the plaintiff's injuries."

An instruction authorizing a jury, if they awarded exemplary damages for an assault, to consider the defendant's wealth, was held in *Thomas v. Williams* (1909) 139 Wis. 467, 121 N. W. 148, not prejudicial error, as omitting one of the elements upon which exemplary damages are awarded, viz., the seriousness of the offense, in the absence of a request on the part of a defendant for additional instructions.

An instruction that if the jury found that the assault and battery were inflicted under circumstances of aggravation or cruelty, with vindictiveness or malice, they might award exemplary damages by way of punishment to the defendants, was approved

in *Lamb v. Stone* (1897) 95 Wis. 254, 70 N. W. 72.

And in *Birchard v. Booth* (1855) 4 Wis. 67, it was held not erroneous to instruct the jury as follows: "In actions for assault and battery, where the trespass is necessarily wilful, the jury is not only warranted, but in proper cases should give not merely compensatory but exemplary damages,—not only compensate the plaintiff for the actual pecuniary loss sustained by him, including above compensatory damages for his loss of time and expenses, by reason of the injuries inflicted by the defendant, but also for the amount of his personal sufferings and his mental suffering from the pain and indignity wilfully done him. And you may go farther, and, if you think proper, under all the circumstances of the case, you may include damages by way of example."

An instruction was approved in *Williams v. Campbell* (1913) 22 Wyo. 1, 133 Pac. 1071, that, in addition to actual damages, if any were found, the jury might award exemplary damages in case they found that the wrongful acts, if any, by the defendant, causing the actual damages," were committed in a wanton, wilful, or reckless manner, or in case you find such acts were committed wantonly, recklessly, and without due regard to the rights of the plaintiff, or if you find that wrongful acts of the defendant causing such damages were from any bad motive, or so recklessly done as to imply a disregard for the obligations and rights of the plaintiff."

c. Necessity for actual damages, and their proportion to exemplary damages.

See, in this connection, VII. d, *infra*. It is stated in 8 R. C. L. § 137, that "as a general rule, exemplary or punitive damages are not recoverable in an action of tort unless actual damages are shown." This principle is discussed and its application illustrated in some cases of assault and battery. It should be observed, however, that while, in several of the cases cited below, nominal damages are regarded as sufficient to permit recovery of punitive damages, this is

a doctrine on which the authorities do not appear to be agreed, the question being one which arises in many kinds of actions besides those for assault and battery.

In *Lindstrom v. Kansas City S. R. Co.* (1920) 202 Mo. App. 399, 218 S. W. 936, the court said it was well settled that when no actual damages are suffered, no punitive damages can be allowed. And it was held in this case, in an action for assault, where the jury returned a verdict in which they found the issues for the plaintiff, and assessed his punitive damages at \$500, and "actual damages, none," that the verdict was not such that a judgment could be rendered upon it, but that the court should have sent the jury back with instructions to return a proper verdict, and, upon failing to do this, after the jury was discharged, he should have granted a new trial. The court distinguished the case of *Adams v. St. Louis & S. F. R. Co.* (1910) 149 Mo. App. 278, 130 S. W. 48, *infra*, where the jury returned a verdict finding the issues for the plaintiff, and assessing the sum of — dollars as actual damages and the sum of \$100 as punitive damages, on the ground that, in the case before it, the jury had expressly found that the plaintiff did not suffer any actual damages, while in the *Adams Case* there was a mere omission to find such damages.

In *Adams v. St. Louis & S. F. R. Co.* (Mo.) *supra*, it was held that the failure of the jury to assess any sum as actual damages in an action for assault by railroad employee in ejecting the plaintiff from a train was error of which only the plaintiff could complain, where the issues were found for the plaintiff and punitive damages were allowed, although the court said that unless actual damages were suffered, punitive damages could not be allowed, such damages not being a matter of right, but discretionary, and not serving as the basis of recovery independent of a showing which would entitle the plaintiff to an award of actual damages.

And in *Birchard v. Booth* (1855) Street R. Co. (1911) 157 Mo. App.

642, 138 S. W. 665, the jury in an assault case returned a verdict finding for the plaintiff and assessing exemplary damages at \$500. The court, upon return of this verdict, orally informed the jury that unless they found that actual damages were sustained by the plaintiff, their verdict must be for the defendant. Afterwards the jury returned a verdict for the plaintiff for \$1 actual damage and \$500 exemplary damages. It was held that the action of the court was not erroneous, the rule being quoted that where a jury, in finding the issues for the plaintiff and in assessing punitive damages, must have found facts to be true which would have entitled the plaintiff to at least nominal damages, assessed as actual damages, the omission by the jury to assess any sum as actual damage is error against the plaintiff, but is not an error of which the defendant can complain.

Also in *Flanagan v. Womack* (1880) 54 Tex. 45, it was held that exemplary damages for an assault cannot be recovered without proof of actual or compensatory damages. The court said it was a general rule that, for every unlawful trespass, the injured party is entitled to at least nominal damages; that this certainly should be so if the trespass was of such a character as to authorize exemplary damages; and that this nominal damage would be the measure of the actual damage if no other were shown, and must necessarily arise in every case in which exemplary damages are allowed.

So, in *Flannery v. Wood* (1903) 32 Tex. Civ. App. 250, 73 S. W. 1072, it was said that all the authorities in that state agreed that there could be no recovery of exemplary damages except where actual damages were sustained.

In *Kerley v. Germscheid* (1906) 20 S. D. 363, 106 N. W. 136, an instruction was given in an action for assault that the jury could not allow exemplary damages unless they found that the plaintiff had suffered actual damages. But the correctness of this instruction was not discussed on ap-

peal, although the judgment for the defendant was affirmed.

The contention that exemplary damages could not be allowed because there were no actual damages, or, at most, only nominal damages, was overruled in *Saunders v. Gilbert* (1911) 156 N. C. 463, 38 L.R.A. (N.S.) 404, 72 S. E. 610, on the ground that in this case there were actual damages, when the elements of mental suffering, annoyance, and discomfort were considered, the action being for damages against a member of a mob who had assisted in forcing the plaintiff to seek refuge in his own home by threats and hostile demonstrations, and fired a pistol at him after he reached there.

And the mere fact that the amount of the plaintiff's damages, in an action for assault, was not shown in dollars and cents, but that it only appeared that he suffered pain, was held in *Reddin v. Gates* (1879) 52 Iowa, 210, 2 N. W. 1079, not to render erroneous an instruction permitting the recovery of exemplary damages, on the ground of lack of evidence to justify recovery of compensatory damages, since evidence of pain and suffering was sufficient as a basis for such damages.

It was held also in *Hidden v. Baker* (1914) 190 Ill. App. 561 (abstract of decision only reported), an action for an assault on a married woman at her home, in the nighttime, that "where an assault is wilful and wanton, it is not necessary to prove actual damages in order to recover exemplary damages."

In *Pratt v. Davis* (1905) 118 Ill. App. 161, an action for performance, without proper consent, of a serious surgical operation on the plaintiff's wife, who was insane, objection was made that exemplary damages could not be awarded, as no exact amount of actual damage was or could be shown, and that exemplary or punitive damages could not be allowed unless "actual damages" were found. In overruling this contention, the court said: "If counsel uses the term 'actual damages' as distinguished from nominal damages, which must

follow any unauthorized trespass on the person of another, they mistake the law. The correct statement, on the contrary, is, if a case is otherwise a proper one for punitive or exemplary damages, they can be given wherever there is a right of action in the plaintiff, though his loss is but nominal." The decision is affirmed in (1906) 224 Ill. 300, 7 L.R.A.(N.S.) 609, 79 N. E. 562, 8 Ann. Cas. 197.

Where it was shown that actual damage resulted to the plaintiff from the alleged assault, although the amount of such damage was not found, the question arose in *McConathy v. Deck* (1905) 34 Colo. 461, 4 L.R.A.(N.S.) 358, 83 Pac. 135, 7 Ann. Cas. 896, whether the recovery of exemplary damages could be sustained. It was shown that the defendants, as sheriff and deputy, acting under a warrant, had arrested the plaintiff; that in so doing they maliciously and unnecessarily subjected him to indignity and violence, and to mental and physical suffering; that, in obedience to the warrant, they threw him into jail, and that the unnecessarily rough treatment of the plaintiff, and his frail condition, resulted in illness and loss of time. In sustaining a judgment for exemplary damages, the court said: "It is said the failure to find the amount of such actual damage is fatal to the judgment. The contention is an attempt to apply the rule announced by some of the authorities that exemplary damages can be awarded only when actual damages have been sustained; that is, 'exemplary damages can never constitute the basis of a cause of action.' It is unnecessary for us, in this case, to express an opinion as to whether such rule is the law in this jurisdiction, because the facts of the case do not bring it within such view of the law. As stated, the finding and the undisputed facts show that the arrest here was attended by unnecessarily rough treatment of a frail, sick man, his confinement in a cold jail, and consequent illness and loss of time. The finding was to the effect that appellants were trespassers ab initio in making the arrest and

casting appellee into prison, and that appellee had sustained real injury therefrom. The authorities are that if actual damage is shown, even though its amount is not shown or found, and the other elements entitling the plaintiff to exemplary damages are present, exemplary damages may be awarded. In other words, after actual damage is shown, it is unnecessary to show its money extent to sustain a judgment for exemplary damages."

Where the jury allowed the plaintiff no compensatory damages, but gave him one cent punitive damages, and he appealed from the judgment, the court, in *Hoagland v. Forest Park Highlands Amusement Co.* (1902) 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878, there being other grounds also for reversal, held that the judgment did not comply with the rule that actual damages must be found as a predicate for the recovery of exemplary damages. The court cited various cases in support of this rule, and stated: "The verdict, therefore, seems to be inconsistent with itself, for when no actual damages has been sustained, as found by the jury in the case at bar, no exemplary damages can be allowed, nor can exemplary damages constitute the basis of a cause of action, for they are mere incidents to it, and, when given, they are not given upon any theory that the plaintiff has any just right to recover them, but are given only upon the theory that the defendant deserves punishment for his wrongful acts, and that it is proper for the public to impose them upon the defendant as punishment for such wrongful acts in the private action brought by the plaintiff for the recovery of the real and actual damages suffered by him. No right of action for exemplary damages, however, is ever given to any private individual who has suffered no real or actual damages. He has no right to maintain an action merely to inflict punishment upon some supposed wrongdoer. If he has no cause of action independent of a supposed right to recover exemplary

damages, he has no cause of action at all."

It was held in *Stockwell v. Brinton* (1913) 26 N. D. 1, 142 N. W. 242, that any error in the instructions concerning punitive damages could not amount to reversible error, as the jury had, by their verdict, found that no actual damages had been unlawfully sustained by the plaintiff at the hands of the defendant. In this case the jury found a general verdict for the defendant, and in holding that any error committed in instructions on the question of exemplary damages did not constitute ground for reversal, the court said: "Any error so committed in instructions concerning exemplary damages only is rendered nonprejudicial by the verdict finding no cause of action to have existed for compensatory or actual damages. Under the issues joined, to return such a verdict for defendant, the jury must have found either that the defendant did not assault the plaintiff, or, on the contrary, that plaintiff was the aggressor and assaulted defendant; or, the equivalent of the latter, that any injuries inflicted upon plaintiff by defendant were done in his necessary self-defense in repelling an unlawful assault made by plaintiff upon him, defendant. Under the authorities a right of action for punitive damages did not exist where a right of action as to actual damages is thus found never to have existed." In this case the court quoted authorities to the effect that if the plaintiff had suffered no actual loss, he cannot maintain an action merely to recover exemplary damages; that actual damage must be found as a predicate for the recovery of exemplary damages; that the latter class of damages are merely an incident of the cause of action to recover damages for some real or substantial loss, and can never constitute the basis of a cause of action independent of such element, although the act of the defendant may have been wanton or malicious."

The rule appears to be that exemplary damages for an assault should not be disproportionate to the actual

damage sustained, although it is impossible to lay down a fixed rule as to just what proportion the two must bear.

In *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith) ante, 761, it was held, that in a case of assault, where punitive damages may properly be awarded, the amount of such award must bear some reasonable proportion to the amount of compensatory damages; and that where the actual damages found by the jury are substantial, an award of punitive damages for ten times the amount of the actual damages awarded for the assault will not be sustained. In this connection, however, attention is called to *Pendleton v. Davis* (1853) 46 N. C. (1 Jones, L.) 98, where a verdict for \$100 actual damages, and \$1,000 exemplary damages, was sustained. But the objection was that the verdict was not sufficiently certain.

In the *PENDLETON CASE* (reported herewith), where the jury awarded the plaintiff \$557.50 as actual damages, and \$5,000 as punitive damages for an assault, the court, in holding that the amount of punitive damages was excessive, and that therefore the verdict should be set aside, called attention to the fact that in that state there were statutes allowing a recovery of double or treble damages in cases of trespass committed wantonly and maliciously; and stated that, while it did not mean to say that these statutes furnished an infallible guide to be followed in the ascertainment of punitive damages in a case like that before it, still they were an indication of public policy, and the analogy existing between the damages awarded under such statutes and those sought under the claim of punitive damages in cases like that before it made the statute a guide which could not well be disregarded when a verdict of the character in question was challenged on the ground of excessiveness.

The rule is laid down also in the syllabus by the court in *Hess v. Marinari* (1918) 81 W. Va. 500, 94 S. E. 968, that "where punitive or exem-

plary damages are awarded, the same should bear some reasonable proportion to the actual damages shown; and where this is not the case, and no special reasons are shown for making an award in excess of such reasonable proportion, it indicates that the jury was controlled by passion, prejudice, or some other improper motive."

Flannery v. Wood (1903) 32 Tex. Civ. App. 250, 73 S. W. 1072, also supports the rule that exemplary damages should bear a reasonable proportion to the actual damages. And in this case, where the jury returned a verdict for \$56 actual damages and \$2,344 exemplary damages, it was held that the verdict for exemplary damages was out of proportion to the actual damages sustained, and that a new trial should be ordered unless the appellee filed a remittitur of all exemplary damages in excess of \$500. It was said: "What would be a reasonable or proper ratio in all cases cannot, of course, be declared. It will depend upon the circumstances of each individual case, and necessarily much is left to the discretion of the jury. If it be conceded, which it must be, that the rule forbidding exemplary damages except in those cases where actual damages are shown is a sound one, it follows, then, that the amount or extent of such actual damages should, in a measure, determine the amount to be awarded as exemplary damages. . . . We are not to be understood as holding that the amount of the actual damages, to the exclusion of every other consideration, is of controlling importance in estimating the exemplary damages, but that, after considering the evil motive which must be present in every case to authorize a recovery for vindictive damages, the jury will also take into consideration the extent of the real injuries inflicted in assessing such exemplary damages, and maintain a reasonable proportion between the two, having due regard to the circumstances which authorize the recovery of exemplary damages in the first place. We do not think the circumstances surrounding this case, interpreted in the light of the verdict

for actual damage, are such as to call for the interposition of so harsh a penalty as has been inflicted upon appellants."

In *Tatnall v. Courtney* (1881) 6 Houst. (Del.) 434, the jury were instructed that while, in a case of malicious assault and battery, they might allow exemplary damages and fix the same by considering the defendant's circumstances, as one of the elements of the calculation, yet the punishment thus inflicted or the example made "should bear some proper relation to the main fact, and not be merely arbitrary."

That the amount of exemplary damages allowed by the jury should bear some reasonable proportion to the actual damages found, else they would be unreasonable and excessive, evincing partiality and prejudice on the part of the jury, so as to justify the court in setting the verdict aside, is supported by other cases, such as *Pennington v. Gillaspie* (1910) 66 W. Va. 648, 66 S. E. 1009, which are not on facts within the scope of the note, because not assault and battery cases.

d. Effect of death of party assaulted or of assailant.

In *Earl v. Tupper* (1873) 45 Vt. 275, it was held that exemplary damages might be recovered for an assault notwithstanding the party who was assaulted had died pending the suit. The court said: "The counsel of the defendant insists that because the injured party had died, and the suit was prosecuted by an administrator, it was not, under those circumstances, a proper case for exemplary damages. If such damages were given as a compensation to the person injured, for some remote consequence of the injury, for which damages could not be given otherwise than as exemplary damages, there might be some reason for this view. But, as has been stated before, such damages are given to stamp the condemnation of the jury upon the acts of the defendant on account of the malicious or oppressive character of the acts, and the decease

of the party injured, would not take away the bad character of the acts, nor prevent the jury from holding them in detestation, nor take away their right to visit the defendant with damages, to show what might be expected from similar conduct."

The rule that the administrator may recover exemplary damages for an assault to the intestate is recognized (obiter) in *Sherman v. Johnson* (1886) 58 Vt. 40, 2 Atl. 707.

And although not on facts within the scope of the note, attention is called to the statement in the syllabus by the court in *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83, that, in all cases of negligence, the law governing the assessment of exemplary, punitive, or vindictive damages is the same whether death results or not.

It was contended in *Wagner v. Gibbs* (1902) 80 Miss. 53, 92 Am. St. Rep. 598, 31 So. 434, that the death of the party assailed terminated the right to recover punitive damages from the assailant, where a statute provided that, in case of the death of a trespasser, punitive damages cannot be recovered from his estate. The court held the statute inapplicable, stating that the fact that no such provision appeared in the statute relating to a deceased plaintiff, showed that the legislature intended a difference, and that the reason for such difference was manifest; that "punitive damages are inflicted for the purpose of deterring a culprit in the future, and the imposition of them for such purpose is impossible in the case of a person deceased. But where the trespasser is still alive, as in the case at bar, there is no reason whatever why he should be exonerated because of the death of the one upon who he has committed a trespass; for the punishment is imposed not to deter him from repeating his trespass as against the particular party assailed or injured, but to secure his general good behavior."

In *McWilliams v. Bragg* (1854) 3 Wis. 424, the court referred to a statute which, while providing that ac-

tions for assault and battery should survive, declared that the plaintiff should not be entitled to exemplary damages in such cases when the action was prosecuted to judgment against the executor or administrator.

e. "*Exemplary*" damages as compensation for nonpecuniary losses.

As shown above, the rule in most jurisdictions is that exemplary or punitive damages may be, as the terms imply, allowed by way of "example" or "punishment." But in a few jurisdictions the principle obtains that exemplary damages are awarded not by way of punishment to the defendant, but as compensation to the plaintiff for the wrong suffered, although they may and do operate by way of punishment. The theory appears to be that exemplary damages are given because the injury is greater, and the actual damages are increased by reason of the aggravating circumstances. See 8 R. C. L. § 131. In other words, the court has apparently regarded "exemplary" damages as additional compensation for nonpecuniary loss. This doctrine has been considered and applied in some cases of assault and battery.

While in some cases the Michigan court has approved the allowance of exemplary damages (see *Newman v. Bowman* (1884) Howell N. P. (Mich.) 46; *Welch v. Ware* (1875) 32 Mich. 77; *Elliott v. Van Buren* (1875) 33 Mich. 49, 20 Am. Rep. 668; and *Millard v. Truax* (1891) 84 Mich. 517, 22 Am. St. Rep. 705, 47 N. W. 1100), the term "exemplary" has, in the later cases, at least, apparently not been construed in the sense of "punitive," but rather as meaning compensation for such nonpecuniary losses as injury to feelings, reputation, etc.,. In the *Welch Case* (1875) 32 Mich. 77, the court said it was contended that vindictive or exemplary damages were improper. And the court proceeded to discuss the question as though it were one merely of allowance of damages in addition to pecuniary losses, such as damages for shame, mental anxiety, suffering, or indignation, and reached the conclusion that

such elements of damages should be allowed. It was said: "It is not an open question in this state, that damages are to be given not only for grievances beyond pecuniary losses, but also in accordance with the malice, or want of malice, of the offender." In the Elliott Case (1875) 33 Mich. 49, 20 Am. Rep. 668, *supra*, the court regarded the question of allowance of "exemplary" damages as no longer an open one in that state, overruled the contention that, by the allowance of such damages, one was punished twice within the constitutional and common-law rule forbidding such punishment, and considered the case as a proper one for the allowance of "exemplary" damages.

And, although there are other Michigan decisions, such as *Ross v. Leggett* (1886) 61 Mich. 445, 1 Am. St. Rep. 608, 28 N. W. 695 (an action for false imprisonment), which in themselves give color to the view that the court did not regard as erroneous the allowance of exemplary damages for the purpose of punishing the defendant, such decisions must be interpreted in the light of later decision by the same court. For instance, in *Stuyvesant v. Wilcox* (1892) 92 Mich. 233, 31 Am. St. Rep. 580, 52 N. W. 465, the court, although referring to the *Leggett* Case, said: "This court has never held that one should be compelled to pay 'smart money' as exemplary damages, or any damages by way of punishment merely. Damages to be awarded can never exceed what shall compensate for the injury done. Compensation to the plaintiff is the purpose in view, and any instruction which may lead the jury to suppose that they have the right to go beyond that, and that they may punish the defendant by compelling him to pay 'smart money,' is erroneous." And in the *Stuyvesant* Case, the court held erroneous an instruction which permitted the jury to award "smart money" if the assault was unprovoked and was maliciously, wilfully, and wantonly committed on the plaintiff, and he was seriously injured, it being said: "The court did, indeed, charge the jury that 'these damages

are awarded as compensation to the plaintiff;' but nowhere in the charge did the court instruct the jury that all that plaintiff could claim was the amount which should compensate him for the wrongs he had suffered; and, under the charge as given, the jury might well have understood that they had the right, if they found that the defendant had acted wantonly and maliciously, to punish the defendant in their discretion, and make him 'smart' for his illegal, wanton and malicious conduct."

Other Michigan decisions are to a similar effect as the one last cited. Thus, in an action for damages for ejection of a passenger from a train, it was held in *Lucas v. Michigan C. R. Co.* (1893) 98 Mich. 1, 39 Am. St. Rep. 517, 56 N. W. 1039, that it was erroneous to instruct the jury that the plaintiff was entitled to exemplary damages, in the absence of any explanation as to what was meant by that term. It was said that the aim of the law is compensation to the injured rather than the prevention of a recurrence of the wrong, although the law recognizes the fact that an injury may be intensified by the malice or wilfulness of the act, and simply allows damages commensurate with the injury when these elements are present; that the added injury in consequence of their presence is not always susceptible of proof; hence the matter is left to the sound discretion of the jury.

Also in *Haviland v. Chase* (1898) 116 Mich. 214, 72 Am. St. Rep. 519, 74 N. W. 477, the court held, in an action for assault, that an instruction was erroneous to the effect that there was in law, in addition to actual damages, "another element of damages designated as 'exemplary' or 'punitive' damages. Such damages, if given at all, are only given by way of punishment of the defendants in case that, in the commission of the trespass complained of, they were actuated by malice or a reckless disregard of plaintiff's rights." The court said: "The rule has obtained in this court for many years that damages in civil cases should be limited by some rule

of compensation. . . . It is true, charges have been sustained where exemplary damages have been referred to as 'punitory' or 'vindictive' . . . ; but the court has in no case not depending on statute given sanction to the distinct instruction that the jury may award a sum by way of punishment to the defendant, by whatsoever term such sum may be designated. The law recognizes that acts of indignity to the person or reputation may give an added smart or injury to the feelings if actuated by malice or committed in wanton disregard of plaintiff's rights; but the theory upon which damages are increased because of these motives is that the injury is deemed to be greater. Therefore it has been held that an instruction that the jury may award damages by way of punishment is improper." The court referred to, without setting out, a statute which it is said provided for the recovery of actual and exemplary damages, but stated that the present case was not one arising under the statute.

And in *Henderson v. Agon* (1907) 148 Mich. 252, 111 N. W. 778, where the honesty of the plaintiff, a clerk in defendant's store, was mistrusted, and there was evidence that the defendant rudely and insolently laid his hands upon her in the presence of others, and led her through the store in business hours to the basement, where money was taken from her person and never returned, it was said: "The court did not permit the jury to give exemplary damages, but did instruct them that the damages assessed must be compensatory, and, if the assault was committed under circumstances of peculiar indignity and humiliation, they might consider the wounded feelings of plaintiff, the humiliation and disgrace. This was proper."

The decision in *Robinson v. Stimer* (1908) 154 Mich. 244, 117 N. W. 634, seems to imply that an instruction allowing punitory damages would be improper, although the court stated that if the plaintiff's testimony was believed, the defendant made the occasion one for grievously maltreating

the plaintiff; it being held that an instruction permitting recovery of compensation for injury to feelings in case the attack was wanton, malicious, and wilful, did not amount to an instruction permitting the recovery of punitory damages.

And an instruction in an action for assault, that the jury might allow exemplary damages, was held not reversible error, although regarded as inaccurate, in *Alford v. Vincent* (1884) 53 Mich. 555, 19 N. W. 182, it being said that the context showed that the judge was not permitting the jury to give damages at discretion, but only, in view of the wilfulness and malice of the defendant's act, to allow the actual damages which could not be accurately computed.

In this connection, although beyond the scope of the note, as regards the nature of the action, attention is called to the statement in *Ford v. Cheever* (1895) 105 Mich. 679, 63 N. W. 975, that "while it may not be error to refer to exemplary damages as such, yet it has never been the policy of the court to permit juries to award capiously any sum which may appear just to them, by way of punishment to the offender, but rather to award a sum in addition to the actual proven damages, as what, in their judgment, constitutes a just measure of compensation for injury to feelings, in view of the circumstances of each particular case."

A similar view was taken in an earlier West Virginia case, but the court subsequently changed its position in this respect. Thus, in an action for assault and battery, the court in *Beck v. Thompson* (1888) 31 W. Va. 459, 13 Am. St. Rep. 870, 7 S. E. 447, laid down the rule that exemplary damages, as that term was used in that state, did not mean damages by way of punishment to the defendant, but damages for mental suffering or other non-pecuniary loss. In support of the rule, the court cited *Pegram v. Stortz* (1888) 31 W. Va. 220, 6 S. E. 485, an action for injury to the plaintiff by the sale of liquor to her husband, as holding that "by exemplary damages is meant, not additional damages

given as a punishment of the defendant for selling intoxicating liquors to her husband illegally, but damages which shall not only compensate her for injury to her means of support, but also, in a proper case, damages which shall compensate her for her mental anguish;" and stated that this case repudiated the doctrine that punitive, vindictive, or exemplary damages can be imposed as a mere punishment to the defendant.

But the above cases were disapproved and overruled, in so far as they held that exemplary damages could not be inflicted by way of punishment in a civil action upon a wrongdoer, in the later decision in *Mayer v. Frobe* (1895) 40 W. Va. 246, 22 S. E. 58, also an action for damages for the unlawful sale of intoxicating liquor to the plaintiff's husband. The view was taken that the common-law definition of the term "exemplary damages" is damages inflicted by way of punishment upon a wrongdoer as a warning to him and others to prevent a repetition or commission of similar wrongs; that the term was used in its common-law sense in the Statute of 1887, providing for the recovery of exemplary damages in certain cases from the sale of intoxicating liquor. The rule is laid down generally in the syllabus by the court that, "in actions of tort, where gross fraud, malice, oppression, or wanton, wilful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous."

The effect of the New Hampshire decisions appears to be that while damages, sometimes referred to as exemplary, may be awarded in case the assault is malicious, these "exemplary" damages are not punitive damages, in the sense that they are awarded as a punishment to the defendant, and as an example to deter him and others from the commission of like acts, but are in reality compensatory damages for the mental injury to the plaintiff in such cases, as

distinguished from damages for actual material loss. *Fay v. Parker* (1872) 53 N. H. 342, 16 Am. Rep. 270; *Bixby v. Dunlap* (1876) 56 N. H. 456, 22 Am. Rep. 475; see also *Kimball v. Holmes* (1880) 60 N. H. 163 (stating rule, although this was an action of trespass for injury to personal property), and *Adams v. Strain* (1921) — N. H. —, 113 Atl. 209.

In *Fay v. Parker* (N. H.) *supra*, an instruction was held erroneous in an action for assault and battery, which charged the jury that if the assault was accompanied by act or word of indecency, outrage, insult, or indignity which injured the plaintiff's feelings, compensation therefor should be included in the actual damages, and that the jury might allow exemplary damages which would be punitive and not compensatory, if they thought the case one in which an example ought to be made for the protection of the public.

And in *Bixby v. Dunlap* (N. H.) *supra*, an instruction was held erroneous which authorized the jury to find exemplary damages by way of punishment under certain circumstances. It was said: "The rule is not, as I understand it, to instruct the jury first place to determine the actual money damage which the plaintiff has sustained, and then further instruct the jury that, if they find the defendant has been malicious, they may give another separate sum in damages by way of example, or for the sake of punishment. The true rule, as I understand it, is, to instruct the jury that, if they find the defendant has been malicious, the rule of damages will be more liberal; that, instead of awarding damages only for those matters which are capable of exact pecuniary valuation, they may take into consideration all the circumstances of aggravation,—the insults, offended feelings, degradation, and so on,—and endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff, on the whole, ought to receive and the defendant ought to pay."

The cases of *Towle v. Blake* (1868)

48 N. H. 92, and *Belknap v. Boston & M. R. Co.* (1870) 49 N. H. 358, which in themselves seem somewhat out of harmony with the above view, must apparently be interpreted in the light of these later decisions. In the *Towle Case*, an instruction was held not erroneous that, if the plaintiff was found not to have assaulted the defendant, the latter would be liable for all the damages to the plaintiff that were the natural and necessary consequences of the violence used by him, including both bodily and mental pain and suffering, and that the jury were at liberty to add a further sum by way of exemplary damages, such as the defendant ought to pay and the plaintiff to receive. The statement in this case seems somewhat confused, that "where the conduct of the defendant clearly evinces motives and acts of a wanton or of an excessive, violent, malicious, or evil nature, we think the jury may give, as compensatory damages, what are usually denominated vindictive damages."

The language of the opinion in *Belknap v. Boston & M. R. Co.* (N. H.) *supra*, supporting the view, in an action for assault in ejecting a passenger from a train, that exemplary damages are recoverable as punishment in case the assault is malicious, was considered as obiter in *Fay v. Parker* (N. H.) *supra*.

In the recent case of *Adams v. Strain* (1921) — N. H. —, 113 Atl. 209, the court approved an instruction to the effect that, if the jury found that the assault was maliciously and wantonly committed, they would apply a more liberal rule of damages in awarding compensation to the plaintiff than they would if those elements did not exist. But in the same opinion the court regarded the rule as well established in that jurisdiction that punitive damages are not recoverable.

But while in the cases cited above the term "exemplary" damages has been used sometimes in an ambiguous sense and sometimes clearly in the sense merely of additional compensation for mental suffering and non-

pecuniary losses in general which cannot be precisely estimated, this, as before suggested, is not the general rule. It is clear generally that the courts do not intend, by awarding exemplary damages, merely damages for such nonpecuniary injury. In many cases, such as *Saunders v. Gilbert* (1911) 156 N. C. 463, 38 L.R.A. (N.S.) 404, 72 S. E. 610, the jury have been instructed that, in reaching their conclusion as to actual damages sustained, they might consider any mental and physical pain which the plaintiff suffered by reason of the alleged wrongful conduct of defendant, and, in addition, might add such amount as, in their judgment, they deemed right as punitive or exemplary damages, provided the assault was committed maliciously or wantonly. And in *Borland v. Barrett* (1882) 76 Va. 128, 44 Am. Rep. 152, the court, after calling attention to authorities holding that in actions for assault and the like, the circumstances of the time and place, the insulting character of the assault, and all matters of aggravation, may be taken into consideration in determining the amount of injury which the plaintiff has sustained, since the jury are not confined to the actual pecuniary damage, said that the modern authorities went further and held that where elements of malice entered into the commission of the offense, the jury might give not only such damages as they thought necessary to compensate the plaintiff, but also such as would operate as a punishment to the defendant, and tend to deter him and others in like cases from similar outrages. (See also II. b. *supra*.)

f. Voluntary combat.

The general question of civil liability growing out of mutual combat is treated in annotation following *McCulloch v. Goodrich*, 6 A.L.R. 388.

The jury were instructed in *Shay v. Thompson* (1884) 59 Wis. 540, 43 Am. Rep. 538, 18 N. W. 473, that if they found that the plaintiff and the defendant by common consent, in anger,

fought together, and that the plaintiff was injured in the fight by the defendant, the plaintiff was entitled to recover actual damages, but not exemplary damages. It was said on appeal by the defendant that this instruction was fully sustained by the authorities. But it does not appear that the actual decision goes further than to sustain the doctrine that the fact of combat by consent will not bar recovery of actual damages.

And in holding that parties who engage voluntarily in a fight may recover actual damages, each against the other, the court in *Grotton v. Glidden* (1892) 84 Me. 589, 30 Am. St. Rep. 413, 24 Atl. 1008, stated that the fact that the fight was voluntary was admissible in evidence to keep down the amount of punitive damages, but not to reduce the actual damages.

The doctrine that exemplary damages cannot be recovered where the alleged assault and battery is a fight by mutual consent is recognized (obiter) in *Badostain v. Grazide* (1896) 115 Cal. 425, 47 Pac. 118.

And that the assault alleged was the result of an agreement to fight made between the plaintiff and the defendant, it was held in *Barholt v. Wright* (1887) 45 Ohio St. 177, 4 Am. St. Rep. 535, 12 N. E. 185, would mitigate the damages (whether the court referred to exemplary or compensatory damages does not appear), but was not a bar to the action.

III. Effect of criminal liability.

a. As a bar to recovery of exemplary damages.

1. Majority rule.

The rule appears to be settled in most jurisdictions that the recovery of exemplary or punitive damages for an assault and battery is not precluded merely because the same assault may be or has been prosecuted criminally. It would seem that cases generally which have held that such damages may be recovered support this doctrine by inference at least, but the rule has been expressly so declared in a number of cases.

United States.—*Brown v. Evans*

(1883) 8 Sawy. 488, 17 Fed. 912, affirmed in (1883) 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 83.

California.—*Wilson v. Middleton* (1852) 2 Cal. 54; *Bundy v. Maginess* (1888) 76 Cal. 532, 18 Pac. 668; see also *Badostain v. Grazide* (1896) 115 Cal. 425, 47 Pac. 118.

Delaware.—*Jefferson v. Adams* (1845) 4 Harr. 321; see also *Keller v. Taylor* (1858) 2 Houst. 20.

Florida.—*Smith v. Bagwell* (1882) 19 Fla. 117, 45 Am. Rep. 12.

Iowa.—*Hendrickson v. Kingsbury* (1866) 21 Iowa, 379; *Guengerich v. Smith* (1873) 36 Iowa, 587; *Ward v. Ward* (1875) 41 Iowa, 686; *Reddin v. Gates* (1879) 52 Iowa, 210, 2 N. W. 1079; *Hauser v. Griffith* (1897) 102 Iowa, 215, 71 N. W. 223.

Kansas.—*Wiley v. Keokuk* (1870) 6 Kan. 94; *Wiley v. Man-a-to-wah* (1870) 6 Kan. 111.

Kentucky.—*Chiles v. Drake* (1859) 2 Met. 146, 74 Am. Dec. 406 (see this case under VI. infra); *Doerhoefer v. Shewmaker* (1906) 123 Ky. 646, 97 S. W. 7.

Maine.—*Johnson v. Smith* (1875) 64 Me. 553.

Michigan.—See *Elliott v. Van Buren* (1875) 33 Mich. 49, 20 Am. Rep. 668, infra (see explanation of Michigan decisions under II. e, supra).

Minnesota.—*Boetcher v. Staples* (1880) 27 Minn. 308, 38 Am. Rep. 295, 7 N. W. 263.

Mississippi.—*Wagner v. Gibbs* (1902) 80 Miss. 53, 92 Am. St. Rep. 598, 31 So. 434.

Missouri.—*Corwin v. Walton* (1853) 18 Mo. 71, 59 Am. Dec. 285.

New Jersey.—*Zick v. Smith* (1921) — N. J. L. —, 112 Atl. 846.

New York.—*Cook v. Ellis* (1844) 6 Hill, 466, 41 Am. Dec. 757.

North Carolina.—*Pendleton v. Davis* (1853) 46 N. C. (1 Jones, L.) 98; *Smithwick v. Ward* (1859) 52 N. C. (7 Jones, L.) 64, 75 Am. Dec. 453; *Saunders v. Gilbert* (1911) 156 N. C. 463, 38 L.R.A.(N.S.) 404, 72 S. E. 610.

Ohio.—*Roberts v. Mason* (1859) 10 Ohio St. 277.

Pennsylvania.—*Rhodes v. Rodgers* (1892) 151 Pa. 634, 24 Atl. 1044; *Wir-*

sing v. Smith (1908) 222 Pa. 8, 70 Atl. 906.

South Carolina.—Wolff v. Cohen (1855) 42 S. C. L. (8 Rich.) 144; see also Rowe v. Moses (1856) 43 S. C. L. (9 Rich.) 423, 67 Am. Dec. 560; and Edwards v. Wessinger (1903) 65 S. C. 161, 95 Am. St. Rep. 789, 43 S. E. 518.

Texas.—Flanagan v. Womack (1880) 54 Tex. 45; Shook v. Peters (1883) 59 Tex. 393; Jackson v. Wells (1896) 13 Tex. Civ. App. 275, 35 S. W. 528.

Vermont.—Hoadley v. Watson (1873) 45 Vt. 289; Edwards v. Leavitt (1873) 46 Vt. 126; Niebyski v. Welcome (1919) 93 Vt. 418, 108 Atl. 341.

West Virginia.—See Mayer v. Frobe (1895) 40 W. Va. 246, 22 S. E. 58 (action for selling liquor to plaintiff's husband).

Wisconsin.—Brown v. Swineford (1878) 44 Wis. 282, 28 Am. Rep. 582.

It may be observed that the above view is taken not only in such jurisdictions as Michigan, where the term "exemplary damages" is used in the sense of compensation for nonpecuniary loss, but also in states where such damages are regarded as a punishment. As shown in the next subdivision following, however, there is some dissent from this view in the latter jurisdictions.

It was said in *Boetcher v. Staples* (1880) 27 Minn. 308, 38 Am. Rep. 295, 7 N. W. 263, that the rule according to the great mass of authorities, allowing exemplary damages, applied as well where the wrongful acts of the defendant bring him within the law for punishing crimes, as where they are less aggravated in their character; and that the rule is so well established that whatever may be the abstract reason for or against it, it must be adhered to until changed by the legislature.

In *Hendrickson v. Kingsbury* (1866) 21 Iowa, 379, *supra*, the court after reviewing many authorities on the question, reached the conclusion that damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the "wrong done to the public;"

that they are called punitive damages by way of distinction from pecuniary damages, and are a punishment for the "wrong done to the individual." And it was said that, in this view, the awarding of punitive damages could not, in any just sense, be said to be in conflict with the constitutional or common-law inhibition against inflicting two punishments for the same offense.

Such cases as *Root v. Sturdivant* (1886) 70 Iowa, 55, 29 N. W. 802, seem indirectly to support the view that a criminal prosecution for the same assault will not preclude recovery of exemplary damages, it appearing in this case that the defendant had been prosecuted criminally for the assault and battery for which the civil action was brought, and an instruction being approved in the civil action, allowing exemplary damages.

And the common-law maxim that no one shall be twice punished for the same cause it was said in *Elliott v. Van Buren* (1875) 33 Mich. 49, 20 Am. Rep. 668, where applicable, prevented a second prosecution as well as a second punishment; and, if it applied to civil damages, would cover the whole of the damages, and not merely a part of them. But the court said there was no analogy between the civil and criminal remedy; that the punishment by criminal prosecution is to redress the grievance of the public, while the civil remedy is for private redress; and one action could not be pleaded in abatement or bar of the other, because they were between different parties. It should be observed, however, that "exemplary" damages in this state are regarded as compensation for nonpecuniary losses. See II. e, *infra*.

Although not on facts within the scope of the note, attention is called to *Mayer v. Frobe* (1895) 40 W. Va. 246, 22 S. E. 58, in which the court observed that there was no constitutional inhibition against pecuniary punishment twice for the same offense, but that the constitutional provision was that "no person shall be put in jeopardy of life or liberty twice for the same offense." See also, as illus-

trative of cases not on facts within the scope of the note. *Garland v. Wholenham* (1868) 26 Iowa, 185, an action for damages for the malicious killing of a horse, where the court overruled the contention that since the acts charged in the petition constituted an offense punishable under the criminal statutes, the allowance of damages by way of punishment was contrary to the constitutional provision that no person should be twice punished for the same offense.

In reply to the contention that the allowance of exemplary damages for assault, which was also a misdemeanor punishable by fine and imprisonment, would offend against a constitutional provision that no person should be subject to be twice put in jeopardy for the same offense, the Federal circuit court in *Brown v. Evans* (1883) 8 Sawy. 488, 17 Fed. 912, affirmed in (1883) 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 83, said: "A person may, by one act, commit two offenses; one, against the civil law, by the invasion of a private personal right; the other, against the state, in the violation of its criminal law; and he may be prosecuted for each offense, and yet not twice criminally punished for the same offense. In the one case the offending party makes reparation in damages for the civil wrong done to the person injured thereby; in the other, the party is punished by the state for an offense against it in the violation of its law; and a judgment in the one case is no bar to a prosecution in the other. In like manner a person may, by one act, offend against two sovereignties. His act may be an offense against the laws of a state and also against the laws of the United States, and he may be prosecuted and punished either by the state whose laws he has violated, or by the United States, or by both, for his offense against each."

In holding that recovery of exemplary damages for assault was not precluded because the act was punishable as a crime, the court in *Brown v. Swineford* (1878) 44 Wis. 282, 28 Am. Rep. 582, followed what it regarded as the settled rule established by prece-

dents, although deploring the fact that this was the rule. It was held that this conclusion did not result in the violation of the constitutional provision that no person, for the same offense, should be twice put in jeopardy of punishment, since this provision was only a re-enactment of the common-law rule, and the word "jeopardy" applied only to strictly criminal prosecution. The court called attention to the fact that, in criminal cases, the rule forbidding double jeopardy implied more than the bar of a judgment to an action for the same cause; and that it might be difficult in principle to hold that a criminal conviction was a bar to the recovery of punitive damages in a civil action, and not a bar to the recovery of compensatory damages.

In *Birchard v. Booth* (1855) 4 Wis. 67, the court, in instructions which were held not erroneous, called attention to the fact that, by a statute an action for assault and battery was tried before a justice of the peace, and that the maximum punishment was a fine of only \$50; and that, in cases of great aggravation, therefore, it was proper that the defendant should respond in such sum as should operate by way of example.

Where the assault was committed in the presence of the court, it was unsuccessfully contended in *Pendleton v. Davis* (1853)) 46 N. C. (1 Jones L.) 98, that this circumstance should not be taken into consideration on the question of exemplary damages, because the defendant was liable to a fine for contempt, and therefore he might be punished twice for the same act. The court said that, on the same ground, it might be insisted that the jury could not give exemplary damages when a defendant is liable to indictment, but that it was settled law that exemplary damages might be allowed in such cases; although no doubt the court, in imposing the fine, would take into consideration the fact that exemplary damages had been recovered, and that, in several cases, the proceedings by indictment had been stayed until the extent of re-

covery in the civil action was ascertained.

It should be observed that the allowance of exemplary damages does not depend on the result of the inquiry whether there has in fact been a criminal prosecution. Thus, in *Wilson v. Middleton* (1852) 2 Cal. 54, an action for assault and battery, where it appeared that the defendant had been fined for the assault in question, it was held not erroneous to refuse an instruction requested by the defendant that the jury had no right to award exemplary damages for a personal injury for which the law provided a punishment by criminal prosecution.

And the fact that the defendant in an action for assault and battery had been criminally prosecuted for the same assault, and had paid the fine imposed, was held, in *Hauser v. Griffith* (1897) 102 Iowa, 215, 71 N. W. 223, not to defeat recovery of exemplary damages for the assault.

So, the fact that the defendant in an action for assault and battery had been convicted and sentenced to a long term of imprisonment, which he was then serving, was held, in *Wirsing v. Smith* (1908) 222 Pa. 8, 70 Atl. 906, not to preclude the recovery in the civil action of exemplary damages.

2. *Minority rule.*

In a few jurisdictions, the recovery of exemplary or punitive damages for an assault and battery has been denied on the ground that it is illogical and unjust, or unconstitutional, to award damages in a civil action for an act for which the state has provided a punishment through a criminal prosecution. *Huber v. Teuber* (1879) 3 MacArth. (D. C.) 484; *Taber v. Hutson* (1854) 5 Ind. 322, 61 Am. Dec. 96; *Nossamen v. Rickert* (1862) 18 Ind. 350; *Farman v. Lauman* (1881) 73 Ind. 568; *Wolf v. Trinkle* (1885) 103 Ind. 355, 3 N. E. 110; *Borkenstein v. Schrack* (1903) 31 Ind. App. 220, 67 N. E. 547; *Boyer v. Barr* (1878) 8 Neb. 68, 30 Am. Rep. 814; *Winkler v. Roeder* (1888) 23 Neb. 706, 8 Am. St. Rep. 155, 37 N. W. 607; *Atkins v.*
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v. Gladwish (1889) 25 Neb. 390, 41 N. W. 347; *Mangold v. Oft* (1901) 63 Neb. 397, 88 N. W. 507; *Glasse v. Dye* (1909) 83 Neb. 615, 119 N. W. 1128; *Kast v. Link* (1911) 90 Neb. 25, 132 N. W. 717; *Fay v. Parker* (1872) 53 N. H. 342, 16 Am. Rep. 270; *Burger v. Covert* (1913) 75 Wash. 528, 135 Pac. 30, Ann. Cas. 1915C, 81; see also *Stewart v. Maddox* (1878) 63 Ind. 51; *Rees v. Rasmussen* (1904) 5 Neb. (Unof.) 367, 98 N. W. 830, and *Johnson v. Ish* (1911) 90 Neb. 173, 133 N. W. 201.

In *Huber v. Teuber* (D. C.) *supra*, in holding that an action for assault was not a proper one for punitive damages, since the defendant might be prosecuted criminally, the court said: "Undoubtedly a party charged with publishing a libel, or the commission of an assault and battery, is liable at the same time to a civil action for damages and to a criminal prosecution for his offense against the public.

But in all cases where this double liability exists, the damages in the action should be compensatory only, and not punitive. Even this rule will be found to be sufficiently latitudinous for all the ends of justice, and there should be some limit to restrain juries from running wild in the matter of damages. Compensatory damages include such as the jury may award for injuries done to the person, for all the expenses immediately resulting from such injuries, for loss of time, for disabilities, for loss of health, for bodily pain and for mental sufferings, including allowance on these accounts for the future. Surely these are no narrow boundaries for the range of juries in the irresponsible exercise of their fancy or their discretion. It appears to us that after damages have been computed on all these several grounds, no defendant who is still liable to fine and imprisonment by the criminal law should be further punished by the infliction of punitive damages for the benefit of a plaintiff who is already compensated, and who is no more entitled to them than any other member of the community. Cases, however, may happen, as such cases have happened,

where the injury done may be aggravated by wanton violation of the rights of others, by malice, or revenge without cause, resulting in a species of injury whose effects can neither be calculated nor compensated, and for which the law has provided no remedy except an action for damages. These constitute the class of injuries for which damages, both compensatory and punitive, may justly be awarded. The seduction of a wife or daughter belongs to this class."

In *McVay v. Ellis* (1921) 148 La. 247, 86 So. 783, the court, in an assault and battery case, said that it was well settled by the recent decisions of that court that punitive or exemplary damages should not be allowed in any case; that in criminal prosecutions alone the courts administer punishment.

The doctrine of punitive damages was rejected by the Washington supreme court in *Spokane Truck & Dray Co. v. Hoefler* (1891) 2 Wash. 45, 11 L.R.A. 689, 26 Am. St. Rep. 842, 25 Pac. 1072, as unsound in principle and unfair and dangerous in practice. This was an action for personal injuries, and therefore beyond the scope of the note. But attention is called to the statement that "it is to be presumed that the state has fully protected its own interests, or as fully, at least, as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes, and fixes the fine at a sum which it deems commensurate with the crime designated; hence, punitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated,—a theory which is repugnant to every sense of justice."

Other Washington cases have held, in accord with the above decision, that punitive damages cannot be recovered in that state; see, for example, citing other decisions, *Woodhouse v. Powles* (1906) 43 Wash. 617, 8 L.R.A.(N.S.) 783, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54,

an action for libel. And this doctrine was applied in an action for assault and battery in *Burger v. Covert* (1913) 75 Wash. 528, 135 Pac. 30, Ann. Cas. 1915C, 81.

Although an action for libel, the case of *Austin v. Wilson* (1849) 4 Cush. (Mass.) 273, 50 Am. Dec. 766, supports in some degree, at least, the above doctrine. The court said that if exemplary or punitive damages were ever recoverable, it was clearly of the opinion that they could not be recovered in an action for an injury which was also punishable by indictment, as libel and assault and battery; that if they could be, defendant might be punished twice for the same act.

The doctrine that where the assault is punishable criminally, exemplary damages therefor cannot be allowed in a civil action, is supported by *Taber v. Hutson* (1854) 5 Ind. 322, 61 Am. Dec. 96, in which the court said: "Where the defendant is sued for the commission of a tort, such as slander, an offense not the subject of criminal punishment, the rule that gives damages 'to punish the offender,' may, with some degree of propriety, be applied, because it is the only mode in which, by public example, the various rights in community to personal security and private property can, under the sanction of law, be protected from injury and outrage. In such a case, there is wisdom in permitting a jury to 'blend together the interest of society and of the aggrieved individual.' But there is a class of offenses, the commission of which, in addition to the civil remedy allowed the injured party, subjects the offender to a state prosecution. To this class the case under consideration belongs; and if the principle of the instruction be correct, *Taber* may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares that 'no person shall be twice put in jeopardy for the same offense;' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a

fundamental principle inculcated by every well-regulated system of government; viz., that each violation of the law should be certainly followed by one appropriate punishment, and no more."

And in *Nossaman v. Rickert* (1862) 18 Ind. 350, the court applied to an action for assault and battery the doctrine that where one is sued for a tort which is also a subject of criminal jurisdiction, punitive damages are not recoverable.

Borkenstein v. Schrack (1903) 31 Ind. App. 220, 67 N. E. 547, also holds that exemplary damages cannot be recovered for an assault and battery because the defendant is also subject to criminal prosecution. The court said: "In some of the instructions to the jury they were told that they might award punitive damages. These instructions were erroneous. It is a well-settled rule that for a wrong the commission of which subjects the wrongdoer to both a criminal prosecution and a civil action, punitive damages cannot be assessed."

The case of *Stewart v. Maddox* (1878) 63 Ind. 51, also supports the doctrine that where the complaint alleges facts which constitute a criminal offense as well as a civil liability, the jury cannot give exemplary or punitive damages, although the complaint was held in this case not to charge facts amounting to an assault and battery. The court said that the doctrine of exemplary or punitive damages rested upon a very uncertain and unstable basis; that a principle which allowed an individual to put the money assessed against another individual, as punishment or a warning example, into his private pocket when he was not entitled to it, whatever public advantages it might have, did not seem to be thoroughly sound.

And the same principle has been applied in Indiana in other cases than those involved in assault and battery; as, for example, *Humphries v. Johnson* (1868) 20 Ind. 190, where the court, in an action of trespass on real estate, applied the rule that for those wrongs the commission of which subjects the offender to a state prosecu-

tion, in addition to the civil remedy afforded the injured party, exemplary damages cannot be allowed.

The earlier rule in Colorado, until changed by statute, it appears, was that, in civil actions for injuries resulting from torts, exemplary damages as a punishment were not permissible, where the offense was punishable under the criminal laws. The court in *Courcoisier v. Raymond* (1896) 23 Colo. 113, 47 Pac. 284, stated that in a number of cases, beginning with *Murphy v. Hobbs* (1884) 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119 (an action for damages for malicious prosecution and false imprisonment), it had been so held; but that these decisions were based upon the common law; and that in 1889 the legislature provided by statute that exemplary damages might be given in certain cases, and that the statute had now settled the practice in that state. It was accordingly held that if the jury believed that the shooting in question was done with malice, or that the injury was the result of a wanton and reckless disregard of the plaintiff's rights, and not in necessary self-defense, exemplary damages might be awarded.

See also *Howlett v. Tuttle* (1890) 15 Colo. 454, 24 Pac. 921, where, in an action for flooding the plaintiff's land, the syllabus by the court is that "it is the settled rule in this state, when not controlled by legislation, that exemplary or punitive damages as a punishment or example should not be awarded in civil actions for injuries resulting from torts, where the offense is punishable under the criminal laws."

In *Jacks v. Bell* (1828) 3 Car. & P. (Eng.) 316, where the plaintiff had received a part of the fine imposed on a prosecution by indictment of the defendant for the same assault, the court discouraged the bringing of a civil action for damages, and the jury awarded only nominal damages.

b. Mitigation of exemplary damages.

The authorities are not in accord on the question whether the fact that the defendant has been fined or im-

prisoned for the same assault should be considered by the jury in mitigation of exemplary damages. It seems but just that this fact should be so considered, assuming as is held in most jurisdictions, that such damages are punitive, and not merely compensatory; and there is authority to this effect.

Thus, on the question of vindictive damages for assault, evidence offered by the defendant was held admissible in *Smithwick v. Ward* (1859) 52 N. C. (7 Jones, L.) 64, 75 Am. Dec. 453, that he had been convicted of the assault and battery, and had been fined. The court expressed doubt whether vindictive damages ought to be allowed in a civil action under any circumstances where the case appears to involve, beyond question, the same principle and object as the public punishment; but sustained the allowance of exemplary damages notwithstanding the criminal proceedings, in view of the well-established practice in that state, which it did not think proper to disturb. And by the admission in the civil action of evidence of the criminal punishment, the court was of the opinion that the harshness or danger of double punishment would be removed. It was said: "The word 'vindictive,' here adopted, is in common professional and legislative use as a synonym of vindictory or punitive; and in that sense, we suppose, it is used in the record. This element, in the estimate of damages, is allowed, to punish the defendants for violating the laws, and, by making them smart, to deter others as well as themselves from similar violations. The principle upon which society acts in punishing criminally is precisely the same. The public never is actuated by revenge, but solely by a motive of self-protection; and punishes to prevent a repetition of the offense by the culprit, or its perpetration by others. These considerations suggest the pertinency and propriety of the evidence offered. When the inquiry is made by the jury, in a civil action, how much ought to be given for smart money, it is material and

legitimate to know how much the defendant has been made to smart already, that the jury may estimate how much more will be required to effect the object of the law. When the court is called upon, in the exercise of criminal jurisdiction, to fix a punishment, it is, in like manner, proper for it to know whether there has been a civil action, and what has been the result of it. Neither the court nor the jury will be bound, as we suppose, by the judgment of the other, but each will be at liberty to add to what has been done by the other, such additional penalties as each, in its turn, may judge adequate and proper."

"And while holding that punitive damages might be recovered for an assault notwithstanding the defendant was subject also to indictment and punishment for the act as for a fine, the court, in *Saunders v. Gilbert* (1911) 156 N. C. 463, 38 L.R.A.(N.S.) 404, 72 S. E. 610, took the view that in the civil action evidence would be admissible to show payment of the fine in the criminal case in reduction of punitive damages. It was said: "It would be exceedingly strange if a civil injury, which is also a crime, does not entitle the injured party to vindictive damages, and yet it is said that the reason why the law should be so is the very fact that the defendant will be punished in the criminal indictment, if convicted. But he may not be either indicted or adequately punished. Whatever may be the law elsewhere, this court has held, according to the rule, which we think is general, that when the defendant has been indicted and punished for the crime, the pecuniary punishment can be considered by the jury in reduction of punitive damages. . . . Is not this the fair and equitable rule? Should the wrongdoer escape his full and proper measure of punishment in the civil suit, until he is ready to show that he has made proper amends to the public in the criminal prosecution? Even then, the payment of the fine may be considered only in reduction of the damages, as we have shown, and does not bar the claim to vindic-

tive damages. . . . It is not, and should not be, his liability to be criminally indicted and punished for the same offense that entitles him to any reduction, but his actual prosecution and punishment for the same."

Also in *White v. Barnes* (1893) 112 N. C. 323, 16 S. E. 922, the jury were instructed that in an action for assault and battery in which exemplary damages were claimed, they should consider the fact that the defendant had paid a fine. It was unnecessary, however, on appeal, to pass on the correctness of this ruling. And see *Johnston v. Crawford* (1867) 61 N. C. (Phill. L.) 342, where the jury, in estimating exemplary damages, were allowed to take into consideration the fine and costs imposed and paid by the defendant on an indictment for the same assault and battery.

The fact that the defendant in an action for assault had been criminally prosecuted for the same assault, and had paid the fine and costs in the criminal case, was a circumstance which the court, in *Rhodes v. Rodgers* (1892) 151 Pa. 634, 24 Atl. 1044, submitted for the jury's consideration on the question of punitive damages, and, on appeal by the defendant from a verdict for the plaintiff, the court stated that this would seem to be the proper practice. To the same effect is *Wirsing v. Smith* (1908) 222 Pa. 8, 70 Atl. 906.

The fact that the defendant had been adjudged guilty of an aggravated assault, and had paid his fine and the incidental costs, it was held in *Jackson v. Wells* (1896) 13 Tex. Civ. App. 275, 35 S. W. 528, can be pleaded in mitigation of exemplary damages for the same assault, but not in bar thereof. And to the same effect are *Flanagan v. Womack* (1880) 54 Tex. 45, and *Shook v. Peters* (1883) 59 Tex. 393.

The same doctrine is supported by *Cherry v. McCall* (1857) 23 Ga. 193, where it appeared in an action for assault and battery that the defendant had been indicted for the same assault, had pleaded guilty, and been fined, the court refused to instruct the jury that they could not, in view of

this criminal action, allow the plaintiff exemplary damages, and instructed that the fine "has nothing whatever to do with the plaintiff's right to damages in this case. And should you find the facts of this case entitle the plaintiff to exemplary damages, you will not reduce the amount one cent on account of that fine." This instruction was held erroneous, it being said that the trial court ought not to have gone further in its charge to the jury than to instruct them that if they did not think the fine a sufficient punishment, they might increase the damages by such a sum as would, in their opinion, make the punishment sufficient. And the court said that even an instruction to this effect would, perhaps, be going too far, and added: "Is it not to be presumed that the punishment imposed by the court in a case set on foot solely to bring about punishment is sufficient?"

It may be observed that the judge who wrote the opinion in *Flanagan v. Womack* (Tex.) supra, expressed his own opinion clearly to the effect that if exemplary damages were regarded merely as compensatory rather than punitive, the fact that the defendant had already been fined in a criminal case would not be admissible in mitigation of the damages. He, however, yielded to the weight of authority which regards such damages as punitive, and not compensatory; and, upon that assumption, concurred in the view that such a fine should be considered in mitigation of damages.

But in some jurisdictions the view has been taken that the criminal prosecution and punishment cannot be considered by the jury, even in mitigation of exemplary damages.

Thus, in holding that, in an action for assault and battery, the jury should not be permitted to consider, on the question of punitive damages, the fact that the defendant had already been convicted and fined for the assault, the court, in *Jefferson v. Adams* (1845) 4 Harr. (Del.) 321, called attention to the fact that the proceeding in the criminal court was between other parties, the state and the defendant; that the verdict was

rendered upon other testimony than that given in the civil case; and that the punishment had reference to the public peace, and not to the plaintiff's wrongs; and stated that it would obviously, therefore, be improper that these proceedings in the criminal court should enter into the civil action for any purpose.

And in *Keller v. Taylor* (1858) 2 Houst. (Del.) 20, it was held that, in a civil action for assault and battery, evidence is not admissible, in mitigation of damages, of a criminal prosecution, conviction, and fine of the defendant for the same assault. The court does not refer, however, especially to exemplary damages. It was said that it was not unusual in a criminal prosecution for assault and battery for the court on conviction, when about to impose a fine, to inquire if any civil action had been brought for the injury, with a view to moderation of the fine if such was the case; that this was a consideration addressed merely to the court's discretion, and that the fact that the civil action was allowed to mitigate the fine in the criminal prosecution was, of itself, a good reason why the latter should not be allowed to mitigate the damages in the civil action.

It was said in *Hoadley v. Watson* (1873) 45 Vt. 289, 12 Am. Rep. 197: "Exemplary damages are not given in lieu of punishment. The fact that, in a civil action founded on a criminal act, the guilty party had been compelled to pay exemplary damages to the party injured on account of the act, would be no bar to a prosecution in a criminal proceeding for the same act, nor to any part of the fine imposed by law upon such offenses. Neither should the liability to, nor the actual imposition of, a fine in a criminal proceeding, bar any portion of the liability in a civil action for the same act. . . . The liability to both criminal punishment and to such damages as a jury may impose in a civil suit, is the consequence of any act that is criminal, and also creates civil liability."

And it was held in *Roach v. Calbeck* (1892) 64 Vt. 593, 24 Atl. 989,

that the fact that the defendant had been prosecuted criminally for the same assault, and had paid the fine imposed, could not be taken into consideration by the jury in reduction of exemplary damages.

Also in *Du Bois v. Roby* (1911) 84 Vt. 465, 80 Atl. 150, the fact that the defendant in a civil action for assault had been punished criminally for the same assault was held not material upon the question of exemplary damages.

So, where the defendant, in an action for assault, had been criminally prosecuted for the same act, and had paid the fine therein imposed, it was contended in *Reddin v. Gates* (1879) 52 Iowa, 210, 2 N. W. 1079, that these facts might be considered by the jury in determining the amount of exemplary damages. But instructions to this effect were held properly overruled.

In *Irby v. Wilde* (1908) 155 Ala. 388, 46 So. 454, in holding that the defendant in an action for assault and battery was not entitled to introduce in evidence the judgment of his conviction in a criminal prosecution for the same assault, in mitigation of exemplary damages, it was said: "It is conceded that the judgment was not admissible for the purpose of defeating a recovery; but it is insisted that it should have been admitted in mitigation of the exemplary damages which the jury were authorized to award. This identical question arose and was decided in the case of *Phillips v. Kelly* (1857) 29 Ala. 623. In that case the record of the defendant's conviction was offered in evidence precisely in the same way as was done in this case. In that case the record of conviction was offered generally, and, after objection to it was sustained, it was then offered, as here, for the purpose of showing, in mitigation of damages, the fine imposed for the criminal offense, to which offer an objection was again sustained. This court held that 'the defendant has no right to prove that he had been indicted, convicted, and fined for the same assault and battery.'

This holding is in accord with the great weight of authority."

The doctrine that criminal punishment for an assault is not proper for the consideration of the jury even in a case which is proper for the allowance of vindictive or punitive damages for the same assault seems also to be supported by *Wolff v. Cohen* (1855) 42 S. C. L. (8 Rich.) 144. The court called attention to the fact that the indictment and the civil action were prosecuted by different parties; that one was an offense against society and the other a private wrong; that the state punishes for a breach of the public peace, while the individual recovers damages for an injury to his person; and where compensation is beyond the actual loss, it operates only incidentally as a penalty; that the parties, the nature of the offense, and the remedies are different, and that where circumstances of aggravation call for vindictive and punitive damages, the range of the jury's discretion should not be narrowed by the sentence of the court.

And in several other cases, the court has intimated that the criminal prosecution should not be considered in mitigation of exemplary damages, it being unnecessary to decide the question. Thus, in *Roberts v. Mason* (1859) 10 Ohio St. 278, evidence was admitted in an action for assault and battery of the punishment, fine, and costs adjudged against the defendant in a criminal prosecution for the same assault, the jury being instructed that they might consider these facts on the question of punitive damages. On appeal by the defendant, the court said it was at least questionable whether evidence of the criminal conviction was not incompetent.

And in *Cook v. Ellis* (1844) 6 Hill (N. Y.) 466, 41 Am. Dec. 757, where the defendant had been indicted for the same assault and battery complained of, and had paid the fine imposed after conviction, an instruction was given that the criminal proceedings did not prevent the jury from giving exemplary damages if they chose, although the fine and its pay-

ment were proper for the consideration of the jury in fixing the amount to be allowed the plaintiff. It was held that this instruction was at least sufficiently favorable to the defendant, and the court was apparently of the opinion that the criminal proceedings had no bearing on the question of exemplary damages, indicating, however, that in the criminal case the court might suspend sentence pending the determination of the civil action. It was said: "We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally compensatory for damages, and, at the same time, answers the purposes of punishment. The recovery of such damages ought not to be made dependent on what has been done by way of criminal prosecution, any more than on what may be done. Nor are we prepared to concede that either a fine, an imprisonment, or both, should be received in evidence to mitigate damages. True, if excluded, a double punishment may sometimes ensue; but the preventive lies with the criminal rather than the civil courts. The former have ample power, if they choose to exert it, of preventing any great injury from excess of punishment. In a proper case, if the party aggrieved will not release his private injury, or stipulate to waive a suit for it, or, at least, to waive all claim for smart money, the court may, after conviction, either impose a fine merely nominal, or stay proceedings till a trial shall be had in the civil action, and govern themselves accordingly in the final infliction of punishment. This, or something equivalent, has often been done."

As to the effect in the criminal prosecution of the allowance of exemplary damages for the same assault, see also *Keller v. Taylor* (1858) 2 Houst. (Del.) 20, supra, and *Pendleton v. Davis* (1853) 46 N. C. (1 Jones, L.) 98, under III. a, 1, supra. And in *Rowe v. Moses* (1856) 43 S. C. L. (9

Rich.) 423, 67 Am. Dec. 560, the court said that although the defendant in an action for assault and battery may be liable both civilly and criminally, yet the damages found on the civil side of the court, if regarded as a sufficient punishment, uniformly make the punishment criminally nominal. The question, however, whether, in a criminal prosecution, exemplary damages allowed in a civil action for the same assault may reduce the fine or imprisonment, extends beyond the scope of the note.

To the effect that the criminal prosecution and punishment cannot be considered in mitigation of damages, attention is called also to the following, among other cases, which do not, however, specially consider exemplary as distinguished from compensatory damages: *Phillips v. Kelly* (1857) 29 Ala. 628; *Reed v. Kelly* (1816) 4 Bibb (Ky.) 400; *Wheatley v. Thorn* (1851) 23 Miss. 62; *Edwards v. Wessinger* (1903) 65 S. C. 161, 95 Am. St. Rep. 789, 43 S. E. 518.

In the absence of a showing as to the amount of the fine, the defendant cannot prove a prosecution and fine imposed in a criminal proceeding for the same assault, for the purpose of proving his financial resources. *Du Bois v. Roby* (1911) 84 Vt. 465, 80 Atl. 150.

IV. Malice.

a. Necessity for and nature of malice in general.

See also cases cited *infra*, under other subdivisions of IV.

See *Stark v. Epler* (1911) 59 Or. 262, 117 Pac. 276, under VI., *infra*, for statute conclusively presuming a malicious intent under certain circumstances.

As to necessity of expressly alleging malice in the petition, see VII. b, *infra*.

The authorities generally hold that to justify exemplary damages for an assault, actual malice need not be expressly proved; that is, that there need be no direct proof of ill will, hatred, or an intent to injure. Malice, it is held, may be inferred. So far the authorities seem in accord, and the rule is applied in many cases, of

course, besides those involving assault and battery. But while "actual malice" need not be expressly proved, the question whether "malice in law" may be deemed to exist only where the circumstances are such that an inference of actual malice may be inferred, or whether it may arise even in cases of a conscious disregard of the rights of others, irrespective of personal animus, is one upon which the authorities do not appear to be in accord. Some courts, as will appear from the cases cited below, have gone much farther than others in permitting inferences of malice to be drawn. It is not practicable, within the limits of a note confined to cases of assault and battery, to discuss abstractly the various refinements which may or have been made as to actual and implied malice. And generalizations in respect thereto, when only a few of the cases on the question are considered, are likely to be misleading. It seems, therefore, that the most helpful plan, in view of the fact that the present note is limited to cases of assault and battery, and that the necessity for and nature of malice in this class of cases is of practical importance on the issue of exemplary damages, is to state by way of illustration the holdings in the particular cases, by jurisdictions, without attempting generalization or comprehensive treatment from an abstract point of view.

It was said in *Walker v. Chanslor* (1908) 153 Cal. 118, 17 L.R.A.(N.S.) 455, 126 Am. St. Rep. 61, 94 Pac. 606, an action for assault in attempting to force an occupant off from land, that damages of an exemplary character could only be assessed against the defendant upon a showing of malice in fact, as distinguished from malice in law.

An instruction on the question of malice was held erroneous in *Bado-stain v. Graziade* (1896) 115 Cal. 425, 47 Pac. 118, as omitting the element of deliberation, that "if defendant wrongfully used force and violence upon the person of plaintiff, in a malicious manner, that is, in a manner that showed he intended to vex, injure, or annoy him," then the jury, in fixing

the damages, should not be confined to the actual damage sustained, but might also give exemplary damages. The court said this was, in effect, an instruction that if a battery was committed at all, the jury should award punitive damages, for it was difficult to conceive of any battery intentionally committed which did not involve the intent on the part of the assailant to vex, injure, or annoy the person assailed. It was said: "As in a prosecution for homicide, when there is evidence tending to show that the killing was the consequence of a sudden quarrel or heat of passion, the jury may find that the offense was without malice, and therefore manslaughter only, so here they should have been instructed that the presence or absence of a malicious intent in the mind of defendant was a question of fact, to be determined by them from the evidence; that they might allow punitive damages if they believed from the evidence that such intent existed; but that, if the battery was the consequence of a sudden heat, resulting from provocation first offered by the plaintiff, and not of a design for his injury, deliberately formed by defendant, and that the force used was not so disproportionate to the provocation as to repel the inference that it was induced thereby, then no exemplary damages should be included in their verdict."

In *Drohn v. Brewer* (1875) 77 Ill. 280, it was held that the court properly refused an instruction in an action for assault, that the jury should not allow exemplary damages unless they believed, from a preponderance of the evidence, that the defendant maliciously assaulted the plaintiff. In this case the court struck out the word maliciously, and added, "without any justifiable cause." In affirming the judgment, the court said: "The instruction, as asked, was not the law. Exemplary or vindictive damages may be given where the act committed was accompanied with malice, violence, oppression, or wanton recklessness. . . . Under the instruction as asked, the trespass complained of may have been committed with great violence, oppres-

sion, or wanton recklessness, and yet no recovery could be had except for actual damages."

It was held also that an instruction was properly refused that if the jury believed that the defendant assaulted the plaintiff, and that such assault was made "with considerable provocation, and without malice, the jury should not assess against the defendant exemplary damages." *Ibid.* It was said that if the assault was made with considerable provocation and without malice, yet, if it was of a wanton, gross, and outrageous character, which the evidence in this case tended to establish, the plaintiff might recover exemplary damages. The alleged assault in this case consisted in striking the plaintiff a number of heavy blows on the head with a padlock.

Where an important surgical operation was performed without the consent of the patient, and without the consent of anyone authorized to act for her, the court, in *Pratt v. Davis* (1905) 118 Ill. App. 161, overruled the contention that exemplary damages should not be allowed because malice, violence, oppression, or wanton recklessness on the part of the defendant surgeon was not expressly shown, taking the view that malice might be inferred. See quotation from this case under VIII. h, *infra*.

It was said in *Chicago Consol. Traction Co. v. Mahoney* (1907) 230 Ill. 562, 82 N. E. 868, in considering the liability for exemplary damages on the part of a street railway company in ejecting a passenger from a car, that, "if the assault be made with considerable provocation and without malice, yet, if it is of a wanton, gross, and outrageous character, it will authorize exemplary damages. . . . Malice being a question of fact and for the consideration of the jury, it is not necessary that express malice should be proved. If it appears that the party has acted with a wanton, wilful, or reckless disregard of the rights of the plaintiff, malice will be inferred." And in this case instructions were approved which charged the jury that malice, or such wanton recklessness as amounted to malice, must be proved

in order for them to render a verdict for exemplary damages.

The rule that malice need not be expressly proved, but may be inferred from wanton, wilful, or reckless disregard of the rights of the plaintiff, so as to justify recovery of exemplary damages in an action for assault and battery, is recognized also in *Coal Belt Electric R. Co. v. Young* (1906) 126 Ill. App. 651.

Although not an action for assault, but for trespass in making a forcible entry upon a tenant, attention is called to *Farwell v. Warren* (1869) 51 Ill. 467, in which, in submitting to the jury the question of the right to recover exemplary damages, the court said: "It is not necessary, to warrant a finding of exemplary damages, that express malice should be proved. If it appears that a party has acted with a wanton, wilful, or reckless disregard of the rights of the plaintiff, malice would be inferred. All persons are presumed to know the law, and when they take the law into their own hands, and invade the rights of another, it is evidence of what may be regarded as general malice. It is not necessary that a pique or grudge against the injured party should be shown."

An instruction was approved in *Reddin v. Gates* (1879) 52 Iowa, 210, 2 N. W. 1079, an action for assault, that malice might be inferred from the circumstances, and that if the defendant assaulted and beat the plaintiff, without just cause and provocation, the assault would be malicious. In this case, where the defendant had attacked the plaintiff while in bed, and inflicted numerous blows upon him with a "rawhide," it was contended that the assault must be shown to have been malicious, and that evidence that the battery was excessive had no tendency to establish that fact. But the court said that the jury was fully warranted in finding that the battery was excessive, that there was not even a well-grounded pretense that it was justifiable, that everyone was presumed to intend the necessary consequences of his act, and that therefore the intent of the act may be, and should be determined from the excessiveness of the battery.

That malice may be inferred or implied from the circumstances of the assault also finds support in *White v. Spangler* (1885) 68 Iowa, 222, 26 N. W. 85.

In *Irwin v. Yeager* (1888) 74 Iowa, 174, 37 N. W. 136, the court, in reversing the judgment, stated that the instructions in relation to exemplary damages were erroneous because the jury were not required to find that the assault was malicious.

In *Anderson v. International Harvester Co.* (1908) 104 Minn. 49, 16 L.R.A.(N.S.) 440, 116 N. W. 101, it was held that an instruction was not erroneous that if the assault was committed "wilfully and wrongfully," the jury might award punitive or exemplary damages, for the purpose of deterring others from the commission of similar acts in the future. It was contended that the instruction was erroneous because the word "malicious" was omitted. The court held that the circumstances were such that the jury might infer malice, and that therefore the instruction was not erroneous, although stating that, under some circumstances, the words "wilful" and "unlawful" might not imply malice.

The view that, to justify exemplary damages for assault, malice in the sense of actual ill will against the person assaulted is not necessary, but it is sufficient if the act is wilfully and intentionally committed without just cause; in other words, that legal malice may be inferred without actual malice against the person assaulted,—is sustained by *Goetz v. Ambs* (1858) 27 Mo. 28. It was held that instructions were properly refused that, unless the jury believed that the defendant deliberately and maliciously struck the plaintiff with the intent to injure him, they ought not to allow exemplary damages, and that, in allowing smart money to the plaintiff, in case they found for him, the jury should consider mainly the malicious intent and motive of the defendant in committing the injury, since these instructions gave undue prominence to the idea of deliberation and malice, and implied that the defendant must have been prompted by ill will and hostility toward the plaintiff. The court said:

"It is said generally that malice must exist to entitle the plaintiff to anything more than reparation for the injury; but it will be found that the word 'malice' is always used, in such connections, not in its common acceptance of ill will against a person, but in its legal sense, 'wilfulness,—a wrongful act, done intentionally, without just cause.' . . . The term 'malice' imports, according to its legal signification, nothing more than that the act is wilful or intentional; and when used to qualify the character of a trespass, it is only employed to distinguish it from that class of injuries which one person may inflict upon another without the intention to do harm, but for which he is responsible, because the act is not unavoidable."

That the jury may properly be instructed that malice in its legal sense does not mean mere spite, ill will, or hatred, but rather that state of disposition which is regardless of social duty and is bent on mischief, see *BOND V. WILLIAMS* (reported herewith) ante, 755.

Where the plaintiff alleged that the defendant, without just cause or provocation, wilfully, unlawfully, and violently beat the plaintiff, the court, in *Johnson v. Bedford* (1901) 90 Mo. App. 43, held that the allegation that the assault was wilful was, in legal effect, the equivalent of an allegation that it was malicious.

The language of the court in *Middle v. Moffitt* (1911) 159 Mo. App. 470, 141 S. W. 448, suggests the view that proof merely that the assault is unjustifiable is sufficient to authorize an inference of malice so as to permit recovery of exemplary damages. In this case it was held that an instruction was improperly given for the defendant in an action for assault and battery, that if the jury found from the evidence that, "as the result of passion, suddenly arising, defendant and plaintiff had a difficulty in which plaintiff sustained the injury or some of the injuries of which he complains, yet the court instructs the jury that any assault upon the plaintiff, whether in self-defense or not, was not malicious, as meant by these instructions, and there could be no finding on account of the punitive

damages claimed in the petition." The court said: "If the assault was unjustifiable, the mere fact that it resulted from sudden passion does not take malice out of the case. Proof of an assault which is unjustifiable is proof of malice; that is, as more frequently expressed, the law implies malice. And exemplary damages can be based on such character of malice."

An instruction that, if the injuries were wilfully inflicted, the jury might assess, in addition to compensatory damages, a further sum by way of punitive damages, was held in *Jennings v. Appleman* (1911) 159 Mo. App. 12, 139 S. W. 817, not erroneous, as authorizing a recovery of punitive damages without requiring the jury to find express malice. The court said: "The word 'wilful' therein is said to signify no more than that plaintiff's injuries were intentionally inflicted.

. . . Though it is usually the practice to require the jury to find malice as a predicate for punitive damages, it is said the term 'malice' imports, according to its legal significance, no more than that the act is wilful or intentional. Therefore, when the word 'malice' is used to qualify the character of a trespass, it is only employed to the end of distinguishing it from that class of injuries which one person may inflict upon another without the intention to do harm, but for which he is responsible because the act is not unavoidable, as in negligent torts. The word 'wilful,' of course, implies that the act was intentionally done, and it goes without saying that if such a battery as that involved here was wilful and intentional, it was malicious as well."

And in *McMillen v. Elder* (1911) 160 Mo. App. 399, 140 S. W. 917, the court said that, in order for an assault and battery to be malicious, so as to allow the assessment of punitive damages, it is sufficient that it was intentional and without just cause or excuse. In this case the jury were instructed that before the plaintiff could recover punitive damages, he must show that the act complained of was malicious on the part of the defendant, but that malice does not consist alone in personal spite or ill will, but exists in law

wherever a wrongful act is intentionally done without just cause or excuse. The court regarded as incorrect the assumption by the defendant that, in order to warrant the jury in assessing punitive damages against the defendant for the assault, he must have been prompted by ill will toward the plaintiff; and quoted the rule that malice, as authorizing recovery of more than compensatory damages, is used not in its common acceptance of ill will against a person, but in its legal sense of wilfulness, or wrongful act done intentionally and without just cause.

So, in discussing the right to exemplary damages in an action for assault, the court in *Wingate v. Bunton* (1916) 193 Mo. App. 470, 186 N. W. 32, said that "the term 'malice,' in its legal meaning, imports nothing more than that the wrongful act was wilful or intentionally wrongful; and the quality of wilfulness may be presumed from the facts that the act was wrongful, and was without just cause or excuse."

And where there was evidence that the assault was intentional, without just cause or excuse, the court in *Gieské v. Redemeyer* (1920) — Mo. App. —, 224 S. W. 92, said that it followed that the assault was malicious and unlawful, and might form the basis for a verdict and judgment for punitive damages.

But although holding that it is not error in an action for assault to give to the jury the conventional definition of malice,—the intentional doing of a wrong act without just cause or excuse,—the court in *Ickenroth v. St. Louis Transit Co.* (1903) 102 Mo. App. 597, 77 S. W. 162, intimated that a more ample and definite charge by directing the jury to consider whether the defendant's act was marked by wantonness, brutality, or other aggravating features, would not be improper, and would probably better inform the jury as to what constituted malice, so as to justify exemplary damages for an assault.

A distinction between "culpable negligence" and malice such as will authorize an allowance of punitive or exemplary damages for an assault is

made in *Noonan v. Luther* (1907) 119 App. Div. 701, 104 N. Y. Supp. 684, holding that an instruction was erroneous that if the assault was wanton, malicious, and attended with insult or oppression, or if there were aggravating circumstances, or if the defendant "was guilty of culpable negligence," the jury might allow a further sum as smart money. The court took the view that "culpable negligence" was the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do; while wilful and wanton conduct justifying exemplary damages occurred only where the conduct was so gross as to raise the presumption of conscious indifference to consequences, or a wanton disregard of the rights of others.

In holding that the court erroneously withdrew the question of malice from the jury, since the evidence only failed to show actual malice, and did not show that the assault was not committed with implied malice, the court, in *Shoemaker v. Sonju* (1906) 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173, said: "Malice which will authorize a recovery of exemplary damages may be actual or presumed. Section 4977, Rev. Codes 1899. Malice which is presumed, or malice in law, as distinguished from malice in fact, 'is not personal hate or ill will of one person toward another; it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen.'"

While malice may be inferred or presumed from the particular circumstances or nature of an assault, if the act warrants such inference or presumption, the mere doing of an act which is wrongful or unlawful does not, abstractly considered, of itself authorize the inference of malice. *Seland v. Nelson* (1911) 22 N. D. 14, 182 N. W. 220.

An instruction was held properly refused, in *Borland v. Barrett* (1882) 76 Va. 128, 44 Am. Rep. 152, that if the jury believed that the defendant, in making the assault, "was actuated by no motive of malice or deliberate de-

sign to injure, but acted under the heat of blood and the impulse of the moment," the measure of damages was compensatory, and not vindictive. The court said: "It is to be further observed the right to recover exemplary damages is not confined to cases of actual malice. Whenever the assault is of a grievous or wanton nature, manifesting a wilful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary damages. Whilst, therefore, the existence of malice may be shown in aggravation of such damages, its absence does not defeat the right to their recovery."

An instruction which the court considered as in effect charging the jury that inferences of malice or wanton conduct in making the assault would be refuted by the fact that it arose out of an altercation over business transactions was held erroneous in *Lowe v. Ring* (1904) 128 Wis. 107, 101 N. W. 381. The instruction was as follows: "If, for instance, the plaintiff and defendant met, and there was provocation in what occurred between them growing out of a dispute about a business matter at the time, and the defendant, moved by a sudden impulse, turned and struck the plaintiff, and that is all that happened, then you would not be justified in punishing the defendant by what are called exemplary damages. That would be the ordinary case of business men getting into a dispute over a business matter, and one of them becoming angry, and, on the impulse of the moment, striking the other. So, if you find that was the situation here,—that the defendant, without previous malice, and not wantonly, became angry over a business transaction, having provocation, as reasonably appeared to him, and, on the impulse of the moment, he struck the plaintiff,—then I say to you, gentlemen, that you would not be justified in assessing any exemplary damages." It was said: "We think this instruction was clearly erroneous. The facts and circumstances covered by the instruction under which the jury were directed to allow no punitive damages were such from which

the jury might reasonably have drawn the inference that the defendant acted maliciously and wantonly in assaulting the plaintiff. The jury were, in effect, directed that, since this altercation arose out of a business transaction, which led defendant to beat plaintiff, it refuted all inference of malicious or wanton conduct. The instruction seems to have been framed in the idea that, under no reasonable inference from the evidence, could it be said that defendant acted maliciously and wantonly in striking the plaintiff, unless it appeared that he harbored malice against him before the altercation resulting in the affray. It was not necessary that defendant be imbued with malice for any length of time before the assault to subject him to punishment by way of enhancing the damages. If malice prompted the assault, though it existed but for a moment before the blow was struck, then exemplary damages may be awarded. The instruction failed to give the jury the correct rule on the subject, and may have been prejudicial to plaintiff's rights."

b. Malice toward third person.

One may be liable for exemplary damages for an assault, if committed wantonly and recklessly, even though the party committing it acts under the belief that he is assaulting a third party with whom he has immediately before had an altercation. *Crabtree v. Dawson* (1904) 119 Ky. 148, 67 L.R.A. 565, 115 Am. St. Rep. 242, 83 S. W. 557. In this case the owner, who had removed from his premises an intoxicated person, inflicted the injury in question on a third party, who was entering, and who he supposed was the one whom he had just ejected. The court recognized the case as a proper one for exemplary damages in case the assault was reckless and wanton, in that there was a failure on the part of the defendant to exercise care to ascertain the identity of the person whom he was about to strike.

And the proposition that one may be liable for a malicious assault, so as to justify exemplary damages, if the assault is made with malice

against a particular person, and a third party is injured in the attack, although no actual malice is entertained toward the latter, is sustained by *Davis v. Collins* (1904) 69 S. C. 460, 48 S. E. 469. In this case the defendant, armed with brass knucks, went to a railroad station, for the purpose of whipping an expected arrival, and, in the fight which ensued in carrying out his purpose, injured the plaintiff, who was one of the crowd about the station. An instruction was approved that if the defendant struck the blow alleged to have been struck, intending to strike someone other than the plaintiff, and struck the plaintiff, he would be liable; that the act would be malicious if he struck the blow with malice toward another, although no ill will was entertained toward the person struck.

Also, in *Chiles v. Drake* (1859) 2 Met. (Ky.) 146, 74 Am. Dec. 406, the case was considered a proper one for the allowance of exemplary damages where the defendant presented a loaded pistol in a room where many persons were present, and it was discharged, killing the plaintiff's husband, it appearing that he was not the person with whom the defendant was quarreling, nor the one whom he intended to injure.

An instruction that if the jury believed the defendant committed an assault and battery on the plaintiff, the law presumed the assault was malicious, and the jury might render damages by way of smart money, was held erroneous in *Mooney v. Kennett* (1854) 19 Mo. 551, 61 Am. Dec. 576. The alleged assault in this instance consisted in the act of the defendant, the mayor of a city, in placing his hands on the plaintiff, to induce him to remove a wagon which the defendant claimed was unlawfully blocking a crossing.

c. Presumption and reasonable doubt.

An instruction in an action for assault and battery, that before the jury could allow exemplary damages against the defendant they should be satisfied beyond a reasonable doubt that the alleged assault and battery,

if any, was maliciously committed by the defendant, was held properly refused in *St. Ores v. McGlashen* (1887) 74 Cal. 148, 15 Pac. 452, the court saying that this instruction did not embody the law as applicable to civil cases; that in such cases a preponderance of evidence is all that is necessary; and that the rule in criminal cases requiring evidence to satisfy the mind beyond a reasonable doubt, is inapplicable.

d. Ability to entertain malicious intent; intoxication.

The fact that the probate court had appointed a guardian of the person and estate of the defendant, who, at the time of the alleged assault, was over eighty years old, was held, in *Dahlsie v. Hallenberg* (1919) 143 Minn. 234, 173 N. W. 433, not conclusive evidence of his inability to entertain a malicious intent, and therefore not, of itself, to preclude submission to the jury of the question of punitive damages. It was said: "The purpose of the inquiry in the proceeding for the appointment of a guardian is to determine capacity to manage property and transact business. The determination is in no sense a determination of the question of mental inability to commit a wilful or malicious assault. The order in the guardianship proceeding was evidence to be considered by the jury as bearing upon defendant's ability to entertain a malicious intent, but it was not conclusive of his inability to do so. The court properly submitted the question of punitive damages to the jury."

Where there was no evidence that the defendant, at the time of the assault, was in such a state of intoxication as to be in any manner deprived of his reason, or irresponsible for the act which he committed, although there was evidence that he "drank considerable" shortly before the assault, and was "considerably under the influence of liquor" when he committed the assault, it was held, in *Schmidt v. Pfeil* (1869) 24 Wis. 452, not erroneous for the court to instruct the jury that if the assault was with-

out provocation, with aggravating circumstances, and showed a wicked disposition and intent on the part of the defendant, they might allow exemplary damages, and that the fact, if proved, that the defendant was intoxicated, was not a mitigating circumstance to be taken into consideration by the jury in determining the amount of the damages.

In *St. Ores v. McGlashen* (1887) 74 Cal. 148, 15 Pac. 452, it was held that an instruction was properly refused which made the right to exemplary damages in an action for assault depend on the existence of malice, and negatived the right to such damages if, by reason of intoxication, the defendant was incapable of forming any intent. The court referred to a statute providing that, in any action for the breach of an obligation not arising from contracts, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages "for the sake of example, and by way of punishing the defendant."

On the question of liability for exemplary damages where the action is against several defendants for a tort alleged to have been jointly committed, the authorities do not appear to be in accord. And even within the limits of the present note, this difference of opinion is illustrated by the cases.

e. Joint tort-feasors; imputed malice.

It has been held in an action for assault committed by two persons, that if one of the participants is actuated by malice, this condition of mind will be attributed to the other, and each held liable for all damages, both actual and exemplary, resulting from the assault. *Reizenstein v. Clark* (1897) 104 Iowa, 287, 73 N. W. 588. It was said: "The jury must have found, under the instructions, that the assault was a joint one. If so, and if one of the participants was actuated by malice, this condition of mind will be attributed to the other, and each held liable for all damages, both actual and exemplary, resulting from

the assault. So the court instructed, and such is undoubtedly the law." See also *Stark v. Epler* (1911) 59 Or. 262, 117 Pac. 276, citing the Iowa case.

But the rule is approved in *Davis v. Franke* (1880) 33 Gratt. (Va.) 413, that where the plaintiff sues several defendants jointly for an assault, he cannot rely upon the malignant motive of one of them to recover vindictive damages; that, by joining the others, he waives any special ground of action he may have against one of them; and that, if the plaintiff desires to show grounds of aggravation against one of the defendants, he should bring a separate action against him.

And it was held in *Walker v. Kellar* (1921) — Tex. Civ. App. —, 226 S. W. 796, an action against several parties for tarring and feathering the plaintiff because of alleged unpatriotic conduct during the late war with Germany, that one of the defendants, who, there was evidence tending to show, was present for a lawful purpose, and was not aware of the unlawful intentions of his associates, and did not advise or agree to or assist in the commission of the offense, had the right to a finding on the question of exemplary damages disconnected from the act of his codefendants; and that the question of exemplary damages as to him should have been submitted to the jury, since there was testimony tending to negative malice or wanton conduct on his part, and it was therefore erroneous to give a peremptory instruction to find for the plaintiff, and to submit to the jury merely the question of the amount of recovery of actual and exemplary damages. The court quoted the rule that if the defendants, or either of them, are actuated by malice, the plaintiff may, in the discretion of the jury, recover exemplary damages against either or all of them, and that it is not necessary, as in case of actual damages, that all of the defendants should be subjected to the same verdict, since some of them may have acted without malice, but in combination with others and that, as to such defendants, there would be no right to recover exemplary damages.

*V. Provocation.**a. In general.*

As to statutory provisions regarding opprobrious language or other matters of provocation, see VI. *infra*.

While the authorities do not appear to be in accord as respects compensatory damages, it is well settled that acts or words of provocation may be shown in mitigation of exemplary or punitive damages, provided they are of so recent occurrence, and are so connected with the assault, as to warrant an inference that it was committed under the influence of the passion produced by them. Without attempting to collect all the cases which refer to damages generally, and do not distinguish between those which are compensatory and those which are exemplary or punitive, the following illustrative cases, which, for the most part, except as indicated, expressly refer to exemplary or punitive damages, will show that the doctrine is well settled, at least as regards this class of damages.

United States.—*Cushman v. Waddell* (1830) *Baldw.* 57, *Fed. Cas. No.* 3,516.

Alabama.—*Mitchell v. Gambill* (1904) 140 *Ala.* 316, 37 *So.* 290; *Rarden v. Maddox* (1904) 141 *Ala.* 506, 39 *So.* 95 (damages generally); *Empire Clothing Co. v. Hammons* (1919) 17 *Ala. App.* 60, 81 *So.* 838 (insulting language can mitigate punitive damages only).

Arkansas.—*Ward v. Blackwood* (1883) 41 *Ark.* 295, 48 *Am. Rep.* 41; *McLaurin v. Murray* (1905) 75 *Ark.* 232, 87 *S. W.* 131; *Cooper v. Demby* (1916) 122 *Ark.* 266, 183 *S. W.* 185, *Ann. Cas.* 1917D, 580.

California.—*Badostain v. Graziade* (1896) 115 *Cal.* 425, 47 *Pac.* 118; *Marrriott v. Williams* (1908) 152 *Cal.* 705, 125 *Am. St. Rep.* 87, 93 *Pac.* 875 (newspaper articles).

Connecticut.—*Burke v. Melvin* (1877) 45 *Conn.* 243.

Delaware.—*Tatnall v. Courtney* (1881) 6 *Houst.* 434; *Armstrong v. Rhoades* (1902) 4 *Penn.* 151, 58 *Atl.* 435; *Armstrong v. Little* (1903) 4 *Penn.* 255, 54 *Atl.* 742.

Florida.—*Webb v. Brown* (1912) 63 *Fla.* 306, 58 *So.* 27.

Georgia.—*Thompson v. Shelverton* (1908) 131 *Ga.* 714, 63 *S. E.* 220 (damages generally); *Beckworth v. Phillips* (1909) 6 *Ga. App.* 859, 65 *S. E.* 1075.

Illinois.—*Donnelly v. Harris* (1866) 41 *Ill.* 126; *Huftalin v. Misner* (1873) 70 *Ill.* 55 (recognizing rule); *Scott v. Fleming* (1885) 16 *Ill. App.* 539.

Iowa.—*Thrall v. Knapp* (1864) 17 *Iowa*, 468 (damages generally); *Gronan v. Kukuck* (1882) 59 *Iowa*, 18, 12 *N. W.* 748.

Kentucky.—*Renfro v. Barlow* (1909) 131 *Ky.* 312, 115 *S. W.* 225 (statutory provision); *Sparks v. Sipple* (1910) 140 *Ky.* 542, 131 *S. W.* 389; *Robertson v. Woodfork* (1913) 155 *Ky.* 206, 159 *S. W.* 793 (provocation held under statute admissible only to mitigate punitive damages); *Doerhoefer v. Shewmaker* (1906) 123 *Ky.* 646, 97 *S. W.* 7.

Louisiana.—*Caspar v. Prosadame* (1894) 46 *La. Ann.* 36, 14 *So.* 317 (damages generally); *Munday v. Landry* (1899) 51 *La. Ann.* 303, 25 *So.* 66 (same).

Maine.—*Prentiss v. Shaw* (1869) 56 *Me.* 427, 96 *Am. Dec.* 475 (rule recognized); *Currier v. Swan* (1874) 63 *Me.* 323; *Lenfest v. Robbins* (1906) 101 *Me.* 176, 63 *Atl.* 729; *Robichaud v. Maheux* (1908) 104 *Me.* 524, 72 *Atl.* 334; *Newton v. Hawks* (1915) 113 *Me.* 44, 92 *Atl.* 936.

Maryland.—*Baltimore & O. R. Co. v. Barger* (1894) 80 *Md.* 23, 26 *L.R.A.* 220, 45 *Am. St. Rep.* 319, 30 *Atl.* 560, 8 *Am. Neg. Cas.* 360; *Baltimore & O. R. Co. v. Strube* (1909) 111 *Md.* 119, 73 *Atl.* 697; *Stockham v. Malcolm* (1909) 111 *Md.* 615, 74 *Atl.* 569, 19 *Ann. Cas.* 759.

Minnesota.—*Jacobs v. Hoover* (1864) 9 *Minn.* 204, *Gil.* 189; *Crosby v. Humphreys* (1894) 59 *Minn.* 92, 60 *N. W.* 843.

Missouri.—*BOND v. WILLIAMS* (reported herewith), *ante*, 755; *Yeager v. Berry* (1900) 82 *Mo. App.* 534; *Cook v. Neely* (1910) 143 *Mo. App.* 632, 123 *S. W.* 233; *Wolf v. Baum* (1919) — *Mo. App.* —, 211 *S. W.* 697.

New Jersey. — *Osler v. Walton* (1901) 67 N. J. L. 63, 50 Atl. 590.

New York. — *Voltz v. Blackmar* (1876) 64 N. Y. 440 (recognizing rule); *Kiff v. Youmans* (1881) 86 N. Y. 324, 40 Am. Rep. 543; *Keyes v. Devlin* (1854) 3 E. D. Smith, 518; *Hogan v. Ryan* (1886) 5 N. Y. S. R. 110; *Genung v. Baldwin* (1902) 77 App. Div. 584, 79 N. Y. Supp. 569, 12 N. Y. Anno. Cas. 236 (the question being whether actual damages might also be reduced).

North Carolina. — *Palmer v. Winston-Salem R. & Electric Co.* (1902) 181 N. C. 250, 42 S. E. 604 (damages generally).

Ohio.—*Mahoning Valley R. Co. v. De Pascale* (1904) 70 Ohio St. 179, 65 L.R.A. 860, 71 N. E. 633, 1 Ann. Cas. 896; *Menninger v. Taylor* (1908) 30 Ohio C. C. 717.

Oregon. — *Housman v. Peterson* (1918) 76 Or. 556, 149 Pac. 538 (rule recognized).

Pennsylvania.—*Robison v. Rupert* (1854) 23 Pa. 523.

South Carolina. — *Dean v. Horton* (1842) 27 S. C. L. (2 McMull.) 147; *Hayes v. Sease* (1898) 51 S. C. 534, 29 S. E. 259.

South Dakota. — *Bogue v. Gunderson* (1912) 30 S. D. 1, 137 N. W. 595, Ann. Cas. 1915B, 126.

Texas. — *Shapiro v. Michelson* (1898) 19 Tex. Civ. App. 615, 47 S. W. 746; *Galveston, H. & S. A. R. Co. v. Prelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488; *Leachman v. Cohen* (1906) — Tex. Civ. App. —, 91 S. W. 809; *Parham v. Langford* (1906) 43 Tex. Civ. App. 31, 93 S. W. 525 (statute providing that insulting and abusive words may be given in evidence in mitigation of the punishment); *Hall v. Hayter* (1919) — Tex. Civ. App. —, 209 S. W. 436; *Walker v. Kellar* (1920) — Tex. Civ. App. —, 218 S. W. 792, later appeal in (1921) — Tex. Civ. App. —, 226 S. W. 796 (tarring and feathering of alleged unpatriotic citizen during war).

Virginia.—*Davis v. Franke* (1880) 33 Gratt. 413; *Ward v. White* (1889) 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021.

Wisconsin. — *Birchard v. Booth* 16 A.L.R.—52.

(1855) 4 Wis. 67; *Morely v. Dunbar* (1869) 24 Wis. 183; *Wilson v. Young* (1872) 31 Wis. 574; *Brown v. Swineford* (1878) 44 Wis. 282, 28 Am. Rep. 582; *Corcoran v. Harran* (1882) 55 Wis. 120, 12 N. W. 468.

When exemplary damages are claimed, the defendant may prove, in mitigation, acts of the plaintiff showing reasonable provocation, not in justification of the assault, but to negative the allegation of malice. *Tatnall v. Courtney* (1881) 6 Houst. (Del.) 434.

It is proper to show the plaintiff's acts, conduct, and language, at the time of the fight or immediately prior thereto, as a part of the *res gestæ*, in mitigation of damages. *Albrecht v. St. Hedwig's Roman Catholic Benev. Soc.* (1919) 205 Mich. 395, 171 N. W. 461 (illustrative of cases which do not distinguish between exemplary and compensatory damages).

It is well settled that opprobrious and insulting language used by the plaintiff to the defendant at the time of the alleged assault is admissible on the question of vindictive damages. This rule is supported, for example, by *Hayes v. Sease* (1898) 51 S. C. 534, 29 S. E. 259; and *Mitchell v. Gam-bill* (1903) 140 Ala. 316, 37 So. 290.

And in *BOND v. WILLIAMS* (reported herewith) ante, 755, it is said: "Mere words are held not sufficient provocation to reduce homicide to manslaughter, but mere words, it is held, may produce a state of mind and arouse a passion that would mitigate damages caused by consequent assault."

Insulting language may be such a provocation as will negative the existence of malice, and therefore preclude recovery of exemplary damages. *Crosby v. Humphreys* (1894) 59 Minn. 92, 60 N. W. 843.

The whole theory of mitigation of damages in such cases is based upon the respect entertained by the law for the frailty of human passions, which looks with an eye of some indulgence upon the violation of good order produced, at the moment of irritation and excitement, from abusive

language. *Keiser v. Smith* (1882) 71 Ala. 481, 46 Am. Rep. 342.

The doctrine that opprobrious language used by the plaintiff at the time of the battery is admissible in mitigation of damages is supported also by *Rochester v. Anderson* (1809) 1 Bibb (Ky.) 428, among possibly other cases which do not indicate whether the court referred to exemplary or compensatory damages.

Insulting language was regarded as an aggravation for what appears to have been a technical assault, in *Yazoo & M. Valley R. Co. v. May* (1913) 104 Miss. 422, 44 L.R.A. (N.S.) 1138, 61 So. 449, and to justify an award of exemplary or punitive damages, it being held that the appellate court would not interfere with an award of \$6,000 against a railway company, as actual and punitive damages, for the application of the vilest and most insulting epithets by its agents to a youth who entered its office to collect money due him for labor performed.

Instructions were approved in *Bogue v. Gunderson* (1912) 30 S. D. 1, 137 N. W. 595, Ann. Cas. 1915B, 126, that while angry and threatening words and abusive language were not a justification for an assault and battery, still they might be considered by the jury in mitigation of damages, if it appeared that they were used, and were of such character as would naturally tend to incite the angry passions of man, and were spoken so immediately before the assault complained of as that the heat of passion which they were calculated to incite had not had time to cool.

And instructions were approved in *Robichaud v. Maheux* (1908) 104 Me. 524, 72 Atl. 334, which excluded the right to exemplary damages if the insulting language used by the plaintiff was a sufficient provocation to control the defendant's conduct in making the assault. This case seems to support the view that insulting language may preclude exemplary damages even for such an assault as the one in question, by which the plaintiff's jaw was broken.

The jury was instructed in *Tatnall v. Courtney* (1881) 6 Houst. (Del.) 434, that in actions for assault and

battery, when exemplary damages are claimed, the defendant may, in mitigation thereof, exhibit to the jury any relevant facts showing reasonable provocation, not in justification of the assault, but to negative the allegation of malice; that if the provocation be very great, and so recent as to lead to the presumption that the assault was committed under the immediate influence of the passion thus wrongfully excited, the jury would be warranted in regulating the amount of damages accordingly, but they should be well satisfied that the assault was the offspring of such passion, and that there was no time for it to cool. The court further instructed in this case, in which a newspaper publication seems to have been in evidence as provocation, that the jury were warranted under the testimony, if believed, in giving exemplary or punitive damages against the defendant unless they found that the newspaper article in question was calculated to excite and did excite violent passion on his part, and that, under its immediate influence, he committed the assault; but that if, on the contrary, they should find either that the article was not calculated to have any such effect, or, if it were so calculated, yet that the blood of the defendant had sufficient time to cool, and that, at the time of the attack, he was acting under the influence, not of impulses,—uncontrollable passion,—but of revenge, then his act was malicious, and was punishable with exemplary damages, and the publication was no palliation and no mitigating circumstance in the award of damages.

And in an action by a newspaper publisher for assault, the court in *Marriott v. Williams* (1908) 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875, approved instructions to the effect that the defendant might prove in mitigation of exemplary damages, although not in reduction of actual damages, the publication of alleged defamatory articles, which produced great indignation on his part and provoked the assault. The question as presented on appeal, however, related to actual damages.

Although an action for unlawful ar-

rest, the court in *Voltz v. Blackmar* (1876) 64 N. Y. 440, referred to the rule of damages generally in actions for assault or false imprisonment, stating that where exemplary or punitive damages are claimed, all the circumstances immediately connected with the transaction, tending to exhibit or explain the motive of the defendant, are admissible in evidence; that the defendant is entitled to the benefit of any circumstances tending to show that he acted under an honest belief that he was justified in doing the act complained of or under immediate provocation, or the impulse of sudden passion or alarm, excited by the conduct of the plaintiff.

And in *Frost v. Pinkerton* (1901) 61 App. Div. 566, 70 N. Y. Supp. 892, it was held erroneous to refuse an instruction, in an action for assault, to the effect that all the circumstances of the transactions should be considered by the jury in determining the question of malice, where the court had charged the jury that, if they found the assault was malicious, they might award a sum as punishment.

It was held prejudicial error, in *Menninger v. Taylor* (1908) 30 Ohio C. C. 717, to instruct the jury, in an action for assault, that if the defendant's conduct was not the result of fear of injury to himself, nor of such excitement as the circumstances of the case might arouse in the mind of a man of ordinary good temper, but was the result of provocation or sudden anger brought into action by the occasion, the jury might go beyond compensation for loss and suffering and add any sum they might think reasonable by way of punishment of the defendant and an example to the public, since this charge warranted exemplary damages notwithstanding the defendant's act arose from sudden anger, which may have been the result of some unlawful act of the plaintiff. In this case the error was held ground for reversal although, the court said, the evidence disclosed an unprovoked and malicious assault, and the jury, on a proper instruction, could hardly award a smaller sum as damages.

In *Cooper v. Demby* (1916) 122 Ark. 266, 183 S. W. 185, Ann. Cas. 1917D, 580, it was held that a requested instruction should have been given, that, although the jury might believe that the defendant was not acting in necessary self-defense, if, making due allowance for the infirmities of human temper, the defendant had a reasonable excuse arising from the provocation or fault of the plaintiff, but not sufficient to justify entirely the acts done, then damages ought not to be assessed by way of punishment, and the circumstances of mitigation should be considered.

On the issue of exemplary damages, in an action for assault, it was held in *Shapiro v. Michelson* (1898) 19 Tex. Civ. App. 615, 47 S. W. 746, that evidence was admissible that, a short time before the assault, the defendant was informed of an insulting message which the plaintiff had sent to the defendant's wife.

Cruel or inhuman punishment by a teacher of a pupil may be considered by the jury in mitigation of exemplary damages for assault committed by the father and brother of the pupil on the teacher. *Cook v. Neely* (1910) 143 Mo. App. 632, 128 S. W. 233.

And evidence as to the act of a servant set to guard convicts, in falling asleep and thus allowing some of the convicts to escape, was held, in *Ward v. Blackwood* (1883) 41 Ark. 295, 48 Am. Rep. 41, to be admissible in mitigation of exemplary damages, for an assault committed by the master.

In an action against a street car company for an assault by its motorman, it was held, in *Palmer v. Winston-Salem R. & Electric Co.* (1902) 131 N. C. 250, 42 S. E. 604, that the fact, that the plaintiff, who had been a passenger on one of the cars of the company, invited the assault by insulting language used to the motorman, was not a defense to the action, but a matter in mitigation of punishment.

That the mere fact that an assault is without any or slight provocation does not of itself warrant the allowance of punitive damages, see *Fink v. Thomas* (1909) 66 W. Va. 487, 66 S. E. 650, 19 Ann. Cas. 571, and other

cases cited under II. a, and II. b, supra.

But the mere fact that the plaintiff may have given provocation for an assault upon him by the defendant does not necessarily deprive him of the right to exemplary damages for such assault. *Kelly v. Sanderson* (1917) 204 Ill. App. 155.

And in *Abney v. Mize* (1908) 155 Ala. 391, 46 So. 230, a requested instruction in an action for assault and battery, that, if the plaintiff provoked and brought on the difficulty, he could not recover punitive damages, was said to be so manifestly bad that a discussion of it was unnecessary.

In *Nichols v. Brabazon* (1896) 94 Wis. 549, 69 N. W. 342, it was held that punitive damages might be recovered because of a blow inflicted on the plaintiff, a woman, by the defendant, which resulted in serious injury to her, although it was struck in retaliation for her act in kicking him.

While insulting language may be such a provocation as will negative the existence of malice, and therefore preclude recovery of exemplary damages, yet even though the assault originally is due to such provocation, it may be so extreme as to show malice, and to permit recovery of exemplary or punitive damages. *Crosby v. Humphreys* (1894) 59 Minn. 92, 60 N. W. 843. In this case it was held that an instruction permitting recovery of punitive damages if the jury found the assault was malicious was proper, even though the insulting language used by the plaintiff produced the assault, where there was evidence that the defendant kicked and struck the plaintiff after the latter had been knocked down and was lying on the floor. It was said: "The court charged the jury, in substance, that it was for them to determine whether the assault was malicious or premeditated, or whether the language used by plaintiff threw defendant suddenly into a heat of passion, and whether he committed the assault on the impulse of the moment, without premeditation; and that, if it was malicious, they would be at liberty, if they saw fit, to award punitive

damages. Appellant contends that there was no evidence in the case which will sustain an award of punitive damages. We are of the opinion that if the defendant had gone no further than to slap the plaintiff, or knock him down, on the impulse of the moment, and under the circumstances, the jury would have no right to ward punitive damages. There would then be no evidence to show malice of the character necessary to support an award of punitive damages. It sufficiently appears that the insulting language used by plaintiff towards defendant induced the assault, and, up to that point, malice of this character did not appear. But the defendant did go further, and, while the plaintiff was prostrate and helpless on the floor, kicked him several times, and, according to plaintiff's testimony, struck him also. . . . We are of the opinion that the evidence was sufficient to justify the jury in awarding, in their discretion, punitive damages."

And the rule was laid down in *Donnelly v. Harris* (1866) 41 Ill. 126, that while insulting or abusive words on the part of the plaintiff in an action for assault may repel the presumption of malice on the part of defendant, and should be considered by the jury on the question of exemplary damages, yet if the defendant exceeds the bounds of reason, and thereby manifests a wicked spirit by excessive injury, the provoking language would not mitigate such damages; that "when the evidence shows deliberate malice, a vindictive spirit, or a reckless disregard for the personal security of another, and the person committing the wrong does so to gratify his malice, the law has always authorized a jury to give smart money, as a kind of punishment for the aggravated wrong. But, when it is without malice, and it is not wanton and reckless, but is produced under highly provoking language, the law will not imply such malice as requires to be punished with vindictive damages. But this must be understood with some limitation, because, if the wrong is carried to an excess, and is greatly disproportioned to the provo-

cation, and beyond what a prudent man would have done, then it would manifest such malice as would require punishment by imposing smart money. And the provocation of the plaintiff must be direct, and must immediately concern the defendant, to authorize it to be considered even in mitigating vindictive damages."

The fact that the assault was, in a measure, the sudden impulse occasioned by derogatory remarks made by the plaintiff regarding the defendant's horse, was held in *Baumgartner v. Hodgdon* (1908) 105 Minn. 22, 116 N. W. 1080, not to preclude a finding that it was malicious, and to justify an award of exemplary damages.

It is for the jury to say whether the acts or opprobrious or abusive language used by the plaintiff amount to a justification, or whether they should be considered in mitigation of damages. *Cross v. Carter* (1897) 100 Ga. 632, 28 S. E. 390.

The question whether the language used was opprobrious, so as to mitigate the damages, is exclusively for the jury, and it is not incumbent upon the court, either with or without request, to charge the jury that particular words are opprobrious where the defendant, in an action for assault and battery, attempts to justify or mitigate the damages on account of alleged opprobrious language used to him by the plaintiff. *Beckworth v. Phillips* (1909) 6 Ga. App. 859, 65 S. E. 1075.

So, it was held in *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360, that provocation does not necessarily defeat exemplary damages for an assault by a conductor on a passenger, but that the conduct of both parties should be considered by the jury.

b. Cooling time.

See also *V. a, supra*. And see *Renfro v. Barlow* (1909) 131 Ky. 312, 115 S. W. 225, under VI., *infra*, construing the Kentucky statute as intended to render competent, in mitigation of punitive damages, matters of provocation which would otherwise have been

inadmissible because of a "cooling time."

On the question as to what is a sufficient "cooling time," cases of compensatory as well as of exemplary damages are evidently of value, and the note does not, therefore, at this point, undertake to distinguish between cases dealing with these two kinds of damages. So far as involves compensatory damages, however, the collection of cases should be regarded as illustrative rather than as exhaustive.

To be admissible in mitigation of damages, it must appear that the provocation was given immediately before the assault, or so recently before it as to induce the presumption that the assault was committed under the influence of the passion thus wrongfully excited.

United States.—*Brooks v. Carter* (1888) 34 Fed. 505.

Alabama.—*Keiser v. Smith* (1882) 71 Ala. 481, 46 Am. Rep. 342; *Birmingham R. Light & P. Co. v. Norris* (1911) 2 Ala. App. 610, 56 So. 739.

Arkansas.—*Laurin v. Murray* (1905) 75 Ark. 232, 87 S. W. 131.

Connecticut.—*Guernsey v. Morse* (1795) 2 Root, 252; *Bartram v. Stone* (1862) 31 Conn. 159.

Delaware.—*Tatnall v. Courtney* (1881) 6 Houst. (Del.) 434.

Illinois.—See *Huftalin v. Misner* (1873) 70 Ill. 55 (recognizing rule); and *Cummins v. Crawford* (1878) 88 Ill. 312, 30 Am. Rep. 558.

Indiana.—*Fullerton v. Warrick* (1833) 3 Blackf. 219, 25 Am. Dec. 99 (but see cases in this state under III. a, 2, *supra*).

Iowa.—*Ireland v. Elliott* (1857) 5 Iowa, 478, 68 Am. Dec. 715; *Shoemaker v. Jackson* (1905) 123 Iowa, 488, 1 L.R.A.(N.S.) 137, 104 N. W. 503; *Finn v. Stoddard* (1917) 179 Iowa, 904, 162 N. W. 1.

Kentucky.—*Slater v. Sherman* (1869) 5 Bush, 206; *Chandler v. Newton* (1892) 13 Ky. L. Rep. 927.

Maryland.—*Gaithers v. Blowers* (1857) 11 Md. 536.

Massachusetts.—*Mowry v. Smith* (1864) 9 Allen, 67; *Tyson v. Booth* (1868) 100 Mass. 258; *Bonino v.*

Caledonio (1887) 144 Mass. 299, 11 N. E. 98.

Minnesota. — Jacobs v. Hoover (1864) 9 Minn. 204, Gil. 189.

Mississippi.—See Martin v. Minor (1874) 50 Miss. 42.

Missouri.—BOND v. WILLIAMS (reported herewith) ante, 755.

New York.—Corning v. Corning (1851) 6 N. Y. 97; Lee v. Woolsey (1822) 19 Johns. 319, 10 Am. Dec. 230; Ellsworth v. Thompson (1835) 13 Wend. 658; Willis v. Forrest (1853) 2 Duer, 310; Genung v. Baldwin (1902) 75 App. Div. 195, 77 N. Y. Supp. 679, 11 N. Y. Anno. Cas. 329, reversed on other grounds in (1902) 77 App. Div. 584, 79 N. Y. Supp. 569, 12 N. Y. Anno. Cas. 236.

Tennessee. — Jacaway v. Dula (1834) 7 Yerg. 82, 27 Am. Dec. 492; Daniel v. Giles (1901) 108 Tenn. 242, 66 S. W. 1128.

Texas.—Leachman v. Cohen (1906) — Tex. Civ. App. —, 91 S. W. 809.

Wisconsin. — Birchard v. Booth (1855) 4 Wis. 67; Prindle v. Haight (1892) 83 Wis. 50, 52 N. W. 1134.

"Where there has been time for deliberation, the peace of society requires that men should suppress their passions, and neither reason nor law will suffer them to claim a diminution of their responsibility for their misconduct. If opprobrious words, for which the law allows an action, have been used of a man, the law furnishes a remedy, and will not permit him to redress his own wrong." Rochester v. Anderson (1809) 1 Bibb (Ky.) 428.

The testimony should be confined to such recent occurrences as would naturally leave behind them traces of resentment, and provoke the assault which occurred, and show that the prior relations of the parties were of an unfriendly character. Richards v. Hine (1875) 42 Conn. 206.

The rule was laid down by the Alabama court, in an assault and battery case, as follows: "In an action of this description, all circumstances of provocation immediately connected with the transaction, and occurring at the same time and place, or whatever may be considered as a part of

the *res gestæ*, are admissible in extenuation of damages. But remote circumstances not immediately connected with the transaction, or forming a part of the *res gestæ*, though they may produce a high and continued excitement, cannot be given in evidence. If, between the provocation and the assault, there has been sufficient interval for passion to subside, and for the understanding to deliberate, the injury must be imputed to the motive of revenge, and not to the frailty of human nature." Terry v. Eastland (1827) 1 Stew. (Ala.) 156.

"Any immediate provocation given to the defendants may be shown in evidence to mitigate damages; but any remote provocation shall not, for then we should have to go into quarrels and disputes that existed perhaps for years before the fighting; such should not be considered as stimulating the defendants to fall upon the plaintiff at so late a period, after there was time for the passions to cool and for the parties to reflect." Barry v. Ingles (1799) 3 N. C. (2 Hayw.) 102.

If the assault was committed after time for reflection and coolness, and in revenge, the party committing it is an original trespasser, and insulting words will not, in such a case, amount even to an extenuation. Thrall v. Knapp (1864) 17 Iowa, 468.

So, where a person has time to cool after a previous quarrel, and then, from a spirit of malice, renews the trouble, the previous difficulties cannot be considered in mitigation of damages. Davis v. Collins (1904) 69 S. C. 460, 48 S. E. 469; Ellsworth v. Thompson (1835) 13 Wend. (N. Y.) 658.

And if it appears that the assault was deliberately planned, even though the cause was the wrongful conduct or language of the person assaulted, the assault cannot apparently be regarded as committed under the influence of passion aroused by the provocation.

Thus, where the defendant in an action for assault admitted that he had deliberately decided to whip the plaintiff, who had assisted in the elope-

ment of the plaintiff's minor daughter, it was held in *Shoemaker v. Jackson* (1905) 128 Iowa, 488, 1 L.R.A. (N.S.) 137, 104 N. W. 503, that, in determining the amount of damages, the jury should not be permitted to take into consideration circumstances showing provocation, since the rule was applicable that provocation, to be admissible in mitigation of damages, must be so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited; and, if the assault was made after time for reflection, and under circumstances leading to the presumption that it was for revenge, the party committing the assault stood in the position of an original trespasser, and the conduct of the other party would not serve as an extenuation.

And although it does not appear whether the court referred to exemplary or compensatory damages, attention is called to *Avery v. Ray* (1804) 1 Mass. 12, where, in an action for an assault, which it appeared had been deliberately planned, evidence was held inadmissible that the plaintiff had previously slandered the defendant's sister, and that the assault was made in carrying out a threat made by the defendant against the plaintiff, that the former would chastise the latter for this act. This case is relied upon in *Matthews v. Terry* (1835) 10 Conn. 455, where, without referring to exemplary damages, the court held inadmissible in an action for assault and battery brought by a minor servant against his master, evidence of the plaintiff's conduct prior to the assault in maliciously destroying property of defendant, although it was contended that this evidence was admissible to rebut the presumption of malice on the part of the latter. It was said: "If the defendant were permitted to go beyond the transactions that took place, at the time of the assault, it would be difficult to draw a line between those acts which might, and those which might not, be proved. Besides, if the defendant were permitted to shew the

conduct of the plaintiff at other times, the plaintiff would have a right to introduce evidence to explain that conduct; and thus the attention of the jury would be distracted with a multiplicity of questions and issues."

It was held in *Lovelace v. Miller* (1907) 150 Ala. 422, 11 L.R.A. (N.S.) 670, 43 So. 734, that a defendant in an action for assault and battery cannot give in evidence, in mitigation of punitive damages, the exact words of insult to his daughter for which the assault was committed which were told to him sometime after he learned of the insult, and 30 minutes before the assault. The court applied the doctrine, that, "Remote circumstances, not immediately connected with the transaction or forming a part of the *res gestæ*, though they may produce a high and continued excitement, cannot be given in evidence. If between the provocation and the assault there has been sufficient interval for passion to subside and for the understanding to deliberate, the injury must be imputed to the motive of revenge, and not to the frailty of human nature."

It is said in *Huftalin v. Misner* (1878) 70 Ill. 55, an action for trespass, where acts of provocation were relied on to mitigate exemplary damages, that no reason was perceived why the same rule should not be applied as in an action for an assault and battery, in which the general rule was that the defendant cannot give in evidence, in mitigation of damages, the acts and declarations of the plaintiff at a different time, or any antecedent acts which are not fairly to be considered as part of the same transaction, although they may have been ever so insulting or provoking.

In *Gronan v. Kukuck* (1882) 59 Iowa, 18, 12 N. W. 748, an instruction was approved that words of provocation used just before and at the time of the assault should be considered in mitigation of exemplary damages, but that no words used by the plaintiff to the defendant before the day of the assault, or which came to the defendant's knowledge before that

time, should be considered by the jury for any purpose.

The doctrine is recognized (obiter) in *Warner v. Talbot* (1903) 112 La. 817, 66 L.R.A. 336, 104 Am. St. Rep. 460, 36 So. 743, that provocation to mitigate exemplary damages must be immediate, and evidence of alleged provocation five days before the assault is inadmissible.

But, when damages for the indignity, or punitive damages, are claimed, the provocation, conduct, and acts of the parties, which give character and color to the transaction, and are clearly and really a part of it, may be shown, though not transpiring at the precise moment of the assault. *Lenfest v. Robbins* (1906) 101 Me. 176, 63 Atl. 729. And it was held that under the above rule an instruction was too narrow which charged the jury that the conduct of the parties at the time of the assault, "not at some former time, but at that time, as a provocation, and as tending to lead to the result, may be taken into account, upon the question of punitive damages."

Thus, long, continuous, and extreme provocation, given by the plaintiff in the nature of threats and challenges to fight, and finally actual violence, begun early in the morning of the day of the assault, and continuing for several hours, up to the time the defendant struck the plaintiff, was held, in *Burke v. Melvin* (1877) 45 Conn. 243, to be competent in mitigation of damages.

Evidence of a series of provocations repeated and continued from day to day, and that, every time the parties met, the plaintiff would insult defendant with opprobrious language, such as to render him excited and partially insane; and that the plaintiff had committed a most grievous injury affecting the domestic relations of the defendant, which was one of the insults with which the plaintiff taunted the defendant,—was held, in *Dolan v. Fagan* (1872) 63 Barb. (N. Y.) 73, to have been erroneously excluded. The court said that the question should be, not how many hours have elapsed since the provocation was given, but

whether, in view of the circumstances of the case, the party has had a reasonable time to cool his blood.

A similar decision was rendered in *Fairbanks v. Witter* (1864) 18 Wis. 288, 86 Am. Dec. 765.

And although the court does not refer especially to exemplary or punitive damages, attention is called to *Stetlar v. Nellis* (1871) 60 Barb. (N. Y.) 524, where, in an action for assault and battery, the court regarded the rule as well settled that evidence of acts done, or words spoken by the plaintiff, long before the cause of action arose, is inadmissible for the purpose of showing provocation and mitigating the damages; but that where such acts or words are part of a series of provocations frequently repeated, and continued down to the time of the assault, they may be proved. And this rule was applied to admit evidence of slanderous and insulting words used by the plaintiff in reference to the defendant.

Also in *Davis v. Franke* (1880) 33 Gratt. (Va.) 413, the court, in considering provocations as a mitigation of damages generally for assault, stated that the rule which confined the defendant to proof of recent provocation received from the plaintiff was subject to modifications which more or less qualified it, according to the particular circumstances of each case; that in some cases it has been held that although a considerable time may have elapsed between the provocation and the time of the assault, if the provocation was communicated to the defendant immediately preceding the assault, it is admissible in evidence; and that the rule which restricts the proof to acts of recent provocation is not infringed by evidence of acts or declarations long anterior to the assault, when the plaintiff himself makes them a part of the res gestæ by repeating or by alluding to them at the time, in a manner which indicates the repetition or renewal of, or persistence in, the offensive acts or declarations.

Where the only excuse for an assault, which consisted in tarring and feathering the plaintiff, was his al-

leged unpatriotic conduct during the late World War, and especially his attitude toward the Red Cross, it was held that his refusal to join the latter organization in December, 1917, might be shown as one of a series of acts, each tending to show that he was unpatriotic, which culminated in the assault on the following May, even though, as a legal proposition, an assault committed in May could not have been provoked by passion aroused at something which happened in the preceding December. *Walker v. Kellar* (1920) — *Tex. Civ. App.* —, 218 S. W. 792, later appeal in (1920) — *Tex. Civ. App.* —, 226 S. W. 796.

But in *Fullerton v. Warrick* (1833) 3 *Blackf. (Ind.)* 219, 25 *Am. Dec.* 99, it was held erroneous in an action for assault and battery to admit evidence, for the purpose of mitigating damages (whether exemplary or compensatory is not stated), that for several years past, and up to the time of the commission of the assault and battery, the plaintiff had been in the constant habit of abusing and slandering the defendant, and had made certain slanderous statements a year or more before the assault.

In *Irwin v. Porter* (1853) 1 *Haw.* 93, the court admitted evidence of provocation given on the previous Saturday, although the assault did not take place until the following Monday.

That insulting language is competent on the issue of exemplary damages, for the purpose of showing provocation, although an hour and a half had intervened before the assault, after the defendant was aware of the offensive language, see *BOND v. WILLIAMS* (reported herewith), ante, 755.

The test is whether the blood had time to cool; or, in other words, whether there was a reasonable cooling time, between the giving of the provocation and the commission of the assault. The criterion is not alone how many days, or even hours, have elapsed since the provocation was given, although this consideration is of vast significance. *Keiser v. Smith* (1882) 71 *Ala.* 481, 46 *Am. Rep.* 342.

Under this principle, evidence of a libel published in plaintiff's newspaper on the morning of the day of the assault was held, in *Keiser v. Smith* (*Ala.*) supra, to be admissible, although the assault was not committed until the afternoon.

And the publication in the plaintiff's newspaper of an article insulting to the defendant, though on the day before the assault occurred, was held admissible in evidence in mitigation of damages, in *Ward v. White* (1889) 86 *Va.* 212, 19 *Am. St. Rep.* 883, 9 *S. E.* 1021, where it appeared that the plaintiff was absent from his home town from the time of the publication until the assault, and that this was the first opportunity for the defendant to express his anger at the insult.

But the publication of a libel relating to defendant's wife, about two days before the assault, was held, in *Coxe v. Whitney* (1845) 9 *Mo.* 531, not to be admissible.

The mere fact that the language used by plaintiff was repeated by a third person to defendant an hour or so before the assault was held, in *Le Laurin v. Murray* (1906) 75 *Ark.* 232, 87 *S. W.* 131, not to bring the case within the rule,—especially where there was but little that the defendant had not heard before.

Evidence that, on the day before the assault, the plaintiff had said that the defendant had stolen his money, was held, in *Jacaway v. Dula* (1834) 7 *Yerg. (Tenn.)* 82, 27 *Am. Dec.* 493, to have been properly excluded.

In *Collins v. Todd* (1853) 17 *Mo.* 537, proof of insulting language used toward the defendant's niece and sister-in-law, and communicated to the defendant a day or two before the assault, was held incompetent.

And even evidence showing that the wife of the defendant has been indecently insulted by the plaintiff several hours before, but that the defendant had learned of the fact about ten minutes before the assault, was held in *Dupee v. Lentine* (1888) 147 *Mass.* 580, 18 *N. E.* 465, to have been rightly excluded. The court said: "It is the settled rule in this

commonwealth that, in an action for an assault and battery, previous provocation is not admissible in mitigation of damages. Provocation cannot be shown unless it is so recent and immediate as to form part of the transaction. In other words, to be admissible, it must be provocation happening at the time of the assault.

... In the case at bar, the court, therefore, rightly rejected the evidence offered by the defendant to show provocation by the previous act of the plaintiff in insulting the defendant's wife. It was not a provocation occurring at the time of the assault, and formed no part of the transaction."

Evidence in respect of the conduct of the plaintiff at other times and upon other occasions cannot be given in evidence where the assault in question was committed without any provocation given at the time. *Murphy v. McGrath* (1875) 79 Ill. 594. In this case provocation occurring twenty-one days prior to the assault was held inadmissible.

It is not proper to show that, about six months prior to the assault, and pending litigation between the parties, the defendant, upon the plaintiff's complaint, was committed for contempt, and, after first being allowed the freedom of the limits of the town, the plaintiff persuaded the sheriff to imprison the defendant. *Millard v. Truax* (1891) 84 Mich. 517, 22 Am. St. Rep. 705, 47 N. W. 1100.

In *Carson v. Singleton* (1901) 23 Ky. L. Rep. 1626, 65 S. W. 821, evidence was held inadmissible in mitigation of punitive damages of an alleged provocation occurring the evening before the assault, and communicated at that time to the defendant, consisting of accusations made by the plaintiff in an interview with the defendant's niece.

See also, in this connection, among possibly other cases which do not distinguish between exemplary and compensatory damages;

Jarvis v. Manlove (1854) 5 Harr. (Del.) 452, where evidence of derogatory remarks made by the plaintiff regarding the defendant, several days

before the assault, was held inadmissible, as was also evidence of remarks made on the morning of the same day as the assault;

Hulse v. Tollman (1893) 49 Ill. App. 490, where evidence of former controversies between the parties, occurring some weeks before the assault, was held inadmissible;

Finn v. Stoddard (1917) 179 Iowa, 904, 162 N. W. 1, where evidence of an insult by the plaintiff to the defendant's wife about twelve hours before the assault, and communicated to the defendant at that time, was held too remote for admission in evidence in mitigation of damages, even assuming the rule to be that immediateness of provocation is not tested by closeness of time, but of causal relations, in view of the fact that there was evidence that the assault was premeditated, and the result of anger was revenge;

Schlosser v. Fox (1860) 14 Ind. 365, where evidence of provocation two or three days before the assault was held inadmissible;

Rochester v. Anderson (1809) 1 Bibb (Ky.) 428, where slanderous reports circulated by plaintiff regarding the defendant, prior to the day of the assault, were held inadmissible;

Reed v. Kelly (1816) 4 Bibb (Ky.) 400, where abusive language used by plaintiff to the defendant and his family on a day prior to the assault was held inadmissible;

Dungan v. Godsey (1820) 2 A. K. Marsh (Ky.) 352, where evidence of provocation at a time and place different from the time and place of the assault and battery was held inadmissible;

Anderson v. Johnson (1810) 3 Harr. & J. (Md.) 162, where evidence of a quarrel between plaintiff and the defendant's friends some time before the assault was held to have been improperly admitted;

Heiser v. Loomis (1881) 47 Mich. 16, 10 N. W. 60, where evidence was held inadmissible that, several days prior to the assault, the plaintiff had insulted the defendant's wife;

Martin v. Minor (1874) 50 Miss. 42,

where evidence was held inadmissible that the defendants had learned, about a month before the assault, that the plaintiff was the father of their sister's illegitimate child.

Evidence of insulting and offensive language used by the plaintiff to the defendant three days before the assault was held admissible in *Murphy v. Dundas* (1905) 38 N. B. 563, in mitigation of damages; but unless this ruling can be justified on the ground that there had been a series of provocations, of which the one in question was only cumulative (there being evidence offered but excluded of several prior acts of provocation), the decision does not appear to be in accord with the weight of authority.

What constitutes a sufficient cooling time, it was said in *Carson v. Singleton* (1901) 23 Ky. L. Rep. 1626, 65 S. W. 821, is always a question of law, and not of fact.

VI. Statutory provisions.

As to construction of a statute providing that in actions where exemplary damages are recoverable the petition shall state separately the amount of such damages sought to be recovered, see *Baxter v. Magill* (1907) 127 Mo. App. 392, 105 S. W. 679, under VII. b. *infra*.

For application of the Colorado statute authorizing recovery of exemplary damages in certain cases, see *Gourvoisier v. Raymond* (1896) 23 Colo. 113, 47 Pac. 284, under III. a, 2, *supra*.

As to construction and effect of the Mississippi statute providing that, in case of the death of a trespasser, punitive damages cannot be recovered from his estate, see *Wagner v. Gibbs* (1902) 80 Miss. 53, 92 Am. St. Rep. 598, 31 So. 434, under II. d, *supra*, holding the statute not applicable in case of the death of the person assailed.

Under the Georgia Code declaring that in torts, when there are aggravating circumstances, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff, it is

erroneous, in an action for assault and battery, to instruct the jury that, if they believe from the evidence that "justice and the public good require it," they are not confined in their verdict to the actual damages proved, but may give exemplary damages, not only as a "compensation for the wounded feelings of the plaintiff, but to punish the defendant, and to deter others from the commission of like offenses." *Ratteree v. Chapman* (1887) 79 Ga. 574, 4 S. E. 684. The court said in effect that the legislature had settled the question, and that the judge in his charge, by not confining the jury to the object set out in the statute, placed a heavier burden on the defendant than the law authorized.

A statute providing that in civil actions for damages for an assault the defendant "shall have the right to plead as a defense to the claim for punitive damages, and to introduce in evidence in mitigation of damages, any matter of provocation which preceded the assault," was construed in *Renfro v. Barlow* (1909) 131 Ky. 312, 115 S. W. 225, as intended to render competent in mitigation of punitive damages, matters of provocation occurring prior to the assault and battery which formerly would have been inadmissible because of an intervening "cooling time;" but the statute was held not to admit of evidence of such provocation for the purpose of mitigating compensatory damages. The court said: "It is manifest from the language used that the legislature intended that, before any matter of provocation could be introduced in evidence in mitigation of damages, there should first be a plea of provocation. In other words, the right to introduce in evidence any matter of provocation in mitigation of damages can mean nothing else than the damages in mitigation of which the plea was interposed. That being the case, it necessarily follows that the matter of provocation can be introduced in evidence in mitigation only of punitive damages."

The scope of the above statute, it was said in *Marshall v. Glover* (1921)

190 Ky. 118, 226 S. W. 398, should not be limited to provocation given directly to the defendant preceding the assault, but includes provocation caused the defendant by abuse or gross behavior towards members of his family. And it was held that evidence of information received by the defendant from his son as to the manner in which the plaintiff treated the son, when they met prior to the assault, was sufficient to authorize an instruction in accordance with the terms of the statute as to the effect of provocation in mitigation of punitive damages.

An assault, as well as the consequent battery, was held in *Stark v. Epler* (1911) 59 Or. 262, 117 Pac. 276, to be an unlawful act, within the meaning of a statute conclusively presuming "a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another."

In holding that exemplary damages might be allowed in actions for assault, the court in *McWilliams v. Bragg* (1854) 3 Wis. 424, called attention to the fact that a statute in that state, in providing that actions for assault and battery should survive, evidently contemplated the allowance of vindictive or exemplary damages in such cases, because it declared that the plaintiff should not be entitled to such damages when the action was prosecuted to judgment against the executor or administrator.

In *Chiles v. Drake* (1859) 2 Met. (Ky.) 146, 74 Am. Dec. 406, the validity of the Kentucky statute which authorized the recovery of punitive damages for the loss or destruction of the life of any person by the wilful neglect of another person was sustained as against the objection that unconstitutional double jeopardy would result.

A section of the Texas Penal Code providing that no verbal provocation justifies an assault and battery, but that evidence of abusive words may be admitted in mitigation of the punishment affixed to the offense, was held, in *Parham v. Langford* (1906) 43 Tex. Civ. App. 31, 93 S. W. 525,

while relating only to offenses for which a criminal prosecution might be maintained, to be but declaratory of the general principle applicable in mitigation of exemplary damages, in a case where the plaintiff provoked the assault upon himself by uttering defamatory statements concerning a female servant in the defendant's household.

A section of the Alabama Criminal Code authorizing one on trial for an assault and battery to show, in justification of the offense, that the person assaulted used opprobrious language toward him, was construed in *Mitchell v. Gambill* (1904) 140 Ala. 316, 37 So. 290, as inapplicable to civil actions for assault; but the court said, on the authority of *Keiser v. Smith* (1882) 71 Ala. 481, 46 Am. Rep. 342, that such proof was admissible under the general issue, in mitigation of punitive damages.

Without setting out the statute Rev. Stat. 1899, § 595), the court in *Johnson v. Bedford* (1901) 90 Mo. App. 43, said that the jury was required thereunder to state separately in the verdict the kind and amount of damages found, and that a verdict that assessed damages merely at a stated sum, where the plaintiff had prayed for punitive damages for the assault, was, to that extent, defective. But, conceding this, the court held that the defect was such as could be taken advantage of after judgment only by motion in arrest.

As to the effect of statutory provisions allowing recovery of double or treble damages in cases of trespass committed wantonly and maliciously upon the proportion which punitive damages should bear to actual damages in an action for assault, see *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith) ante, 761, set out under II. c, supra.

VII. *Matters of practice and procedure.*

a. *Jury questions; discretion of jury.*

It has been said that the question as to what constitutes a sufficient cooling time is always a question of law, and not of fact. *Carson v.*

Singleton (1901) 23 Ky. L. Rep. 1626, 65 S. W. 821.

The question whether particular words are opprobrious, so as to mitigate damages, is exclusively one for the jury. *Beckworth v. Phillips* (1909) 6 Ga. App. 859, 65 S. E. 1075. See also *Cross v. Carter* (1897) 100 Ga. 632, 23 S. E. 390, to the effect that the question whether the acts or opprobrious or abusive language used by the plaintiff amount to a justification, or whether they should be considered in mitigation of damages, is for the jury.

And it was held in *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360, that provocation did not necessarily defeat recovery of exemplary damages for assault, but that the conduct of both parties should be submitted to the jury.

The question whether exemplary or punitive damages should be allowed is particularly one for the jury, which may, under some circumstances, award such damages, but is not bound to do so, it seems, even under the most aggravating circumstances.

In *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith) ante, 761, it was said that punitive damages are not given as a matter of right; that the plaintiff cannot claim them for any reason; but that the jury is at perfect liberty, no matter how wanton or reckless the defendant has been, to refuse such damages.

The granting of exemplary damages for assault is not a matter of legal right, but is for the jury's discretion. *Berg v. St. Paul City R. Co.* (1905) 96 Minn. 513, 105 N. W. 191.

And an instruction in an action for assault that if the jury found the assault was malicious, they might award exemplary damages, that is, a sum sufficient to show disapproval of the act, or as an example to deter others from doing likewise, and that the amount thereof, in case they should be awarded, "rested solely in the discretion of the jury," was held not erroneous in *Reizenstein v. Clark* (1897) 104 Iowa, 287, 73 N. W. 588, as against the objection that the matter

was not one entirely for the jury's discretion. It was said: "We think that there was sufficient evidence to justify the giving of the instruction, and that the instruction, as given, is correct. It is true that we have said, in considering allowances made by juries in some cases, that this discretion is not unlimited,—which is, no doubt, true; but these statements were made when considering the question as to excessiveness of verdict, and had no reference to what should be embodied in an instruction given by a trial judge. The paragraph of the charge which is challenged is in accord with instructions approved by the almost universal voice of authority."

The contention was overruled in *Blow v. Joyner* (1911) 156 N. C. 140, 72 S. E. 319, that the allowance of punitive damages on a given state of facts was a question of law for the court, and should not be submitted to the discretion of the jury.

And in a number of cases instructions have been held erroneous which infringed on the jury's discretion with respect to the allowance of exemplary damages.

Thus, in *Huber v. Teuber* (1879) 3 MacArth. (D. C.) 484, 36 Am. Rep. 110, it was held erroneous to instruct the jury that if they found that the assault and battery was without immediate or recent provocation, and was malicious or wanton, they must, in addition to compensatory damages and damages for wounded feelings, give punitive damages.

And an instruction which the court regarded as virtually telling the jury that they should find vindictive damages was held erroneous in *Hawk v. Ridgway* (1864) 33 Ill. 473.

So, an instruction in an action for assault which directed the jury to allow exemplary damages under certain circumstances was held erroneous in *Johnston v. Wells* (1905) 112 Mo. App. 557, 87 S. W. 70. The court said that exemplary damages were allowed as a punishment to the defendant, and whether such punishment should be inflicted was within the jury's discretion; that it was proper to inform the

jury of their province to allow such damages if they saw fit to do so, but there should not be a direction given them, which, fairly interpreted, withdrew such discretion and made the allowance mandatory. To a similar effect is *Fink v. Thomas* (1909) 66 W. Va. 487, 66 S. E. 650, 19 Ann. Cas. 571.

Also in *Carmody v. St. Louis Transit Co.* (1907) 122 Mo. App. 338, 99 N. W. 495, it was held error to instruct the jury that they "should" assess punitive damages for the assault under certain conditions, since such damages are not allowable as matter of right, but are for the jury's discretion.

In *Wabash, St. L. & P. R. Co. v. Rector* (1882) 104 Ill. 296, 2 Am. Neg. Cas. 648, the court in an action for assault by a railroad conductor, held erroneous an instruction to the effect that if the plaintiff, under conditions named, was wantonly, wilfully, and maliciously expelled from the train, he was "entitled" to such additional damages, in addition to compensatory damages, as the jury might, in their judgment, assess by way of punishment. It was said: "The vice of this instruction consists chiefly in the fact it states the rule as to vindictive or punitive damages broader than the law will warrant. Where an injury is wantonly and wilfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrongdoer vindictive or punitive damages by way of punishment for such wilful injury, but it is not understood the injured party is 'entitled' to such damages as a matter of right, and an instruction that tells the jury, as a matter of law, the injured party is 'entitled' to such damages, goes too far, and is for that reason vicious. A party may recover the actual damages inflicted by the wrongdoer, but whether he may have damages in addition thereto rests largely in the discretion of the jury, under the circumstances, and they should be left free to exercise their judgments in that respect. It was prejudicial error to tell the jury, as the court did in this charge, that plaintiff was 'en-

titled' to such damages above the actual damages sustained. It may be it was a case where the jury might give exemplary damages, but that was a question the court could not pass upon without invading the province of the jury."

See also, as illustrative of similar cases not on facts within the scope of the note, *Sneve v. Lunder* (1907) 100 Minn. 5, 110 N. W. 99, holding that the court should not instruct the jury in effect that they must allow punitive damages, since this was a matter for their discretion.

But the use of the expression "will find" in an instruction that, if the jury believed from the evidence that there was malice on the part of the defendant toward the plaintiff which caused him to commit the assault, they "will find" for the plaintiff exemplary or vindictive damages, was regarded as not constituting prejudicial error, in *Barlow v. Lowder* (1880) 35 Ark. 492, although the court stated that it would have been better, in view of the province of the jury, to have used the words "may find."

The jury was instructed in *Brann v. Leavitt* (1918) 117 Me. 144, 103 Atl. 12, in action for assault and battery, that whether they would add punitive damages was left solely to their discretion; that they were not required, but were allowed, to assess such damages, under circumstances named.

It was said in *Webb v. Gilman* (1888) 80 Me. 177, 13 Atl. 688, an action for assault, that exemplary or punitive damages could not be demanded as a matter of right, the court distinguishing in this respect between exemplary and actual damages.

And it was said in *Anderson v. International Harvester Co.* (1908) 104 Minn. 49, 16 L.R.A. (N.S.) 440, 116 N. W. 101, that recovery of punitive damages is not a matter of legal right, and that it is reversible error for the court to direct the jury to award exemplary damages. The latter statement, however, was unnecessary to the decision, as in this case the question of exemplary damages was held properly left to the discretion of the jury.

In *Johnson v. Smith* (1875) 64 Me. 553, instructions were approved in an action for assault and battery, which included the proposition that, in case of gross and malicious assault, the jury might, in their discretion, if they deemed proper, award exemplary damages, "but there is no rule of law by which the plaintiff can claim it as a legal right." It was unnecessary, however, in the appellate court, the judgment being for the plaintiff, to determine the correctness of that part of the instruction quoted. To a similar effect is *Macintosh v. Bartlett* (1877) 67 Me. 130.

See also, among other cases of assault, to the effect that the allowance of punitive damages is for the discretion of jury, *Barlow v. Hamilton* (1907) 151 Ala. 634, 44 So. 657, and *Stowers Furniture Co. v. Blake* (1908) 158 Ala. 639, 48 So. 89.

The question has arisen as to whether the jury's discretion is too broadly stated by an instruction authorizing them to award such punitive damages as they "see fit."

Thus, an instruction to the effect that, if the jury believed from the evidence that the assault was malicious, wanton, wilful, or capricious, they might assess punitive damages, and that, in the event they decided to award such damages, they were empowered to allow therefor such sum as they might "see fit," not to exceed the sum demanded, was held not erroneous, in *Yazoo & M. Valley R. Co. v. Williams* (1905) 87 Miss. 344, 39 So. 489, because of the use of the words quoted, as giving to the jury an unrestrained discretion. The court said: "It is the long-settled and uniformly adhered-to rule in our jurisprudence that the amount of such punitive or exemplary damages is solely within the discretion of the jury; and, no matter what the sum of their finding might be, interference therewith, unless for exceptional causes, is discouraged . . . ; the reason being that, as the jury are the sole judges of the amount which ought properly to be assessed in order to inflict adequate punishment, the courts should scrupulously avoid any

undue interference with their prerogative. . . . It is plain to our minds that the instruction, while inaptly phrased, does still, in the main, announce the true rule defining the duty and power of the jury with reference to punitive damages. It charges them, in effect, that if they decided that the plaintiff was entitled to actual damages under the conditions detailed in a previous instruction, and if they further believed 'from the evidence' that the conduct of the conductor was malicious, wanton, wilful, or capricious, then they might, in addition, find punitive damages in such sum as they should 'see fit,' not to exceed the amount sued for. The instruction also advises the jury that the punitive damages were 'damages by the way of punishment to the defendant, so as to compel it to have a due and proper regard for the rights of the public.' It is the exclusive province of the jury in proper cases to award such punitive damages as they "see fit" subject to the power of the court to set aside or reduce where it is manifest it was rendered through improper motives or is greatly excessive. The words 'see fit,' 'deem proper,' 'in their discretion,' and phrases of like import, have been repeatedly approved in similar cases."

See also, in this connection, *Cooper v. Johnson* (1884) 81 Mo. 483, where the court, in an action for assault, instructed the jury that if the act was done wilfully and maliciously, they might also allow such damages as they "see fit" as smart money or in exemplary damages, not exceeding the amount claimed. The judgment for the plaintiff was affirmed, but the correctness of this part of the instruction is not discussed. And in *Hall v. Hayter* (1919) — Tex. Civ. App. —, 209 S. W. 436, the court said, in reversing the judgment and remanding the case for a new trial, that if the evidence should be such as to show that the assault on the plaintiff was wilful and unprovoked, then the jury should be instructed that they may, in the exercise of their discretion, allow such a sum by way of punitive or exem-

plary damages as they might think proper under the circumstances.

An instruction which the court regarded as assuming that the case in question was one in which exemplary damages might be given, in other words, that a wanton and wilful assault had been committed, was held erroneous in *Collins v. Waters* (1870) 54 Ill. 485. The instruction in this case was: "The rule of damages for unlawful and wilful injuries to the person is: (1) Compensation for the actual damage sustained; and (2) the jury may give smart money to the plaintiff, not only to compensate him for the pain of mind, the grief, the humiliation to which he has been subjected, but also to punish the perpetrators of such injuries;" the jury being also instructed that, for the purpose of determining how much damages they should give as smart money, they had a right, and it was their duty, to take into account the pecuniary ability of both the plaintiff and the defendant.

And an instruction that, if the jury awarded exemplary damages for the assault, they "should" consider the defendant's wealth, as such damages "should" be proportionate in some general way to the defendant's ability to respond, was regarded in *Thomas v. Williams* (1909) 139 Wis. 467, 121 N. W. 148, as objectionable, in that the language was mandatory when it should have been permissive; but in this case it was held that the instruction did not constitute prejudicial error, in view of the entire charge by which the jury were instructed that exemplary damages could not be awarded unless the acts of the defendant were done maliciously, and that such damages, when allowable, might always be awarded or withheld, in the jury's discretion.

So an instruction in an action for assault and false imprisonment which charged the jury that, in making up their verdict, they were authorized to take into consideration the pecuniary circumstances of the defendant, was held erroneous in *Hawk v. Ridgway* (1864) 33 Ill. 473, as likely to mislead them to understand that they were required to assess vindictive damages.

b. Pleadings.

It is not necessary that the petition in an action for assault use the term "malice" in describing the defendant's act, in order to sustain an award of punitive damages. *Lyddon v. Dose* (1899) 81 Mo. App. 64.

And it was held in *Klein v. Thompson* (1869) 19 Ohio St. 569, that a petition in an action for assault and battery need not contain an express averment of malice in order to permit the introduction of evidence of malice on the part of the defendant.

Malice need not be expressly alleged in order to admit evidence to prove it, where the complaint alleges facts from which malice may be inferred, as that the assault was made without any cause or provocation, with great force and violence. *Elfers v. Wooley* (1889) 116 N. Y. 294, 22 N. E. 548.

So, in *Sloan v. Speaker* (1895) 68 Mo. App. 321, it was held that, in an action for assault and battery, it is not necessary that the petition should charge malice in express words; but that it is sufficient if it charges that the assault and battery was unlawfully committed, in a rude, angry, and insolent manner.

To recover exemplary damages for an assault, it was held that it was unnecessary that the petition expressly allege that the act was done maliciously, where the charge was that the defendant criminally and unlawfully assaulted the plaintiff with a club, and broke his arm. *Hilbert v. Doebricke* (1882) 8 Ohio Dec. Reprint, 518, 8 Ohio L. J. 268.

So, failure of a petition to allege that the assault was maliciously committed was held, in *Howard v. Lillard* (1885) 17 Mo. App. 228, not to preclude recovery of exemplary damages, where the petition alleged that the defendant unlawfully assaulted the plaintiff with a neck yoke, inflicting serious injuries.

Also, in *Jaeger v. Metcalf* (1908) 11 Ariz. 283, 94 Pac. 1094, it was held that a charge of wanton and malicious assault, so as to justify a recovery of exemplary damages under the rule that such damages will not be

awarded unless sustained by proper averments in the complaint, was alleged by a complaint which charged the defendant with having made an attack on the plaintiff without cause or provocation, while the latter was occupied with his ordinary duties, and with having struck the plaintiff in the eye with false knuckles, knocking him down, and inflicting serious injuries upon him.

And the fact that the petition did not use the word "malice" was held, in *Mallett v. Beale* (1885) 66 Iowa, 70, 23 N. W. 269, not to preclude recovery of exemplary damages as for a malicious assault, where the petition unmistakably charged the defendant with such an assault, in wilfully, wickedly, and violently assaulting the plaintiff in her home during her husband's absence, for the purpose of committing adultery with her.

It was held that malice was sufficiently alleged in the petition to authorize a recovery of exemplary damages by averments that the defendant "wilfully and wantonly made a vicious and brutal assault upon the plaintiff," inflicting serious physical injuries. *Fleming v. Loughren* (1908) 139 Iowa, 517, 115 N. W. 506.

And where the plaintiff alleged that the defendant, without just cause or provocation, wilfully, unlawfully, and violently beat the plaintiff, the court, in *Johnson v. Bedford* (1901) 90 Mo. App. 43, held that the allegation that the assault was wilful in legal effect was the equivalent of an allegation that it was malicious, and that there was merely a redundancy, and not the statement of another cause of action, by a further allegation that the acts complained of were committed "wilfully, unlawfully, violently, and maliciously." The court said that the allegation that the assault was wilfully and violently made would have been sufficient to authorize a recovery of both compensatory and punitive damages before the enactment of the statute, citing, but not setting out, § 594, Revised Statutes 1899; and was still sufficient if it stated, as the court was of the opinion it did, separately the 16 A.L.R.—53.

amount of punitive damages which the plaintiff sought to recover.

And allegations in a petition that the defendant, "without just cause or provocation, wilfully, wrongfully, and unlawfully, assaulted, beat, and wounded the plaintiff," causing great pain and suffering, were held, in *Pierce v. Carpenter* (1896) 65 Mo. App. 191, 2 S. W. 1182, sufficient to authorize the admission of evidence of aggravating circumstances of an indecent assault, so as to justify an award of exemplary damages. The court said: "It is an established rule of pleading at common law, and one which has received the sanction of courts of this state, that matters of aggravation do not constitute a part of the cause of action. . . . Under this rule it has been held, in actions like we have here, that such matter need not be pleaded, but may be given in evidence where it is averred that the assault was unlawfully made."

Under a statute providing that in actions where exemplary damages are recoverable "the petition shall state separately the amount of such damages sought to be recovered," it was held that a petition was sufficient to authorize exemplary damages which charged that the defendant "wilfully, maliciously, wrongfully, and unlawfully assaulted and beat the plaintiff," and that the plaintiff was damaged by such wrongful acts in the sum of \$2,000, and prayed judgment for \$2,000 actual damages and \$1,000 exemplary damages. It was unsuccessfully contended that, in view of the statute, "the petition is insufficient to support the recovery of punitive damages, as it does not proceed by separate specification, after the case of actual damages is stated and recovery prayed therefor, to restate such facts of aggravation as will authorize a recovery for exemplary damages, and conclude by asking \$1,000 exemplary damages because of the facts last stated. The point is not well taken." *Baxter v. Magill* (1907) 127 Mo. App. 392, 105 S. W. 679.

It was said in *Louisville & N. R. Co. v. Ray* (1898) 101 Tenn. 1, 46 S. W. 554, that while it is necessary to set

out in a declaration the facts constituting fraud, malice, oppression, etc., upon which the claim for exemplary damages is predicated, it is not necessary that it be claimed, in so many words, that some or all of the damages are exemplary or punitive.

In *Stark v. Epler* (1911) 59 Or. 262, 117 Pac. 276, the court, in considering the sufficiency of the complaint in an action for assault to justify exemplary damages, said that the rules of pleading do not require that the allegations relating to exemplary damages should be set out separately; but that such damages are so intimately connected with general damages that, if the general allegations are sufficient to show that the wrong complained of was inflicted with malice or oppression, or other like circumstances, the complaint would be sufficient to authorize the infliction of punitive or exemplary damages.

So, a general allegation in an action for assault, that the plaintiff had been damaged in the sum of \$2,000, was held sufficient in *Shoemaker v. Sonju* (1906) 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173, to sustain recovery of exemplary damages, it being alleged that the injury was inflicted wilfully and maliciously. The court said that it was unnecessary to itemize the elements of such damages, and that where the complaint alleges and the proof shows facts such as will warrant a recovery of exemplary damages, they need not be claimed by name in the complaint, but may be recovered under the claim for damages generally.

While of the opinion that punitive damages for an assault might be recovered under a claim for damages generally, the court, in *Hirabelli v. Daniels* (1912) 40 Utah, 513, 121 Pac. 966, without deciding the point, intimated that punitive damages were not recoverable on a complaint alleging merely special damages, as for loss of services and expense for medical attention.

In *Selland v. Nelson* (1911) 22 N. D. 14, 132 N. W. 220, in holding that a complaint alleging merely that the defendant "violently assaulted" the plaintiff, twisted and bruised her

arm, and otherwise injured her, and that, owing to the "wrongful act" of the defendant, she had sustained certain damages, was insufficient to authorize punitive damages for the assault, the court said: "From a careful consideration of the complaint, it is evident that it was drawn on the theory of compensatory damages only. The only words used in charging the assault are that it was a 'violent assault.' While it is true that in the fourth and fifth paragraphs of the complaint the words 'wrongful acts' and 'unlawful assault and battery' are used, yet it is nowhere directly alleged in the complaint that the assault and battery was wrongful and unlawful. But, conceding that such allegations had been directly made or charged, it would not authorize a recovery for punitive damages. It nowhere appears in the complaint that the alleged assault and battery was wilfully, wantonly, or maliciously done, and there is nothing in the allegations of the complaint from which malice could necessarily be inferred or presumed; and from a careful consideration of the evidence in the case there is no evidence in the record of actual malice or oppression. The mere doing of a wrongful or unlawful act will not, of itself, warrant or authorize the inference of malice therefrom. Of course, malice may be inferred or presumed from the act itself, if the act warrants such inference or presumption. Before punitive damages can be recovered, or before that question can rightfully be submitted to the jury, the complaint must be drawn on a theory that will necessarily include such damages by inference or presumption of law, unless malice is shown on the trial without objection. And while it may not be necessary to use the word 'malice' in the complaint before a recovery for punitive damages may be had, yet words of equal import must be used, and it must at least appear from the allegations of the complaint that the assault was a malicious one, and that, from the acts charged, it would necessarily follow that malice would be presumed or inferred."

Where the petition alleged that the assault and battery was committed maliciously, it was held in *White v. Spangler* (1885) 68 Iowa, 222, 26 N. W. 85, that an instruction was not erroneous, as inapplicable to the pleadings, which authorized the jury to assess exemplary damages for a wrongful act "wilfully" or "wantonly" or "maliciously" committed, since the allegations that the assault was committed maliciously necessarily implied that it was wilfully and wantonly committed.

The note does not cover in general the question whether the facts which will justify an award of exemplary damages must be pleaded, since this question is not peculiar to actions for assault.

c. Evidence.

1. In general.

The present note does not, of course, purport to cover questions of evidence generally, but only to consider certain questions which are more or less distinctive to exemplary damages.

Evidence that the assault was made in self-defense would, of course, tend to negative the existence of malice, and therefore to preclude exemplary damages. See, for example, *Hogan v. Ryan* (1886) 25 N. Y. Week. Dig. 349. But such questions cannot be covered in the present note, because they are not distinctive to exemplary, as distinguished from compensatory, damages. Of this class of questions appears to be that presented in *Fairbanks v. Witter* (1864) 18 Wis. 288, 86 Am. Dec. 765, where, in an action for assault and battery occurring in and near a highway which crossed the land of the defendant, it appeared that, in passing the defendant's premises, the plaintiff had alighted from his wagon and advanced toward the defendant, evidently for the purpose of engaging in a fight; and it was held that evidence was admissible that, at different times and frequently for several years previous to the

assault, the plaintiff had tried to provoke quarrels with the defendant, and had threatened on various occasions to take his life, some of which threats had been made to the defendant, and all of which were brought to his knowledge prior to the assault.

Evidence as to threats made by the plaintiff against the life of the defendant some twenty days before the assault for which the action was brought, was held, in *Cummins v. Crawford* (1878) 88 Ill. 312, 30 Am. Rep. 558, not admissible in mitigation of punitive or exemplary damages, where the assault consisted in the defendant's deliberately lying in wait and shooting the plaintiff, with intent to take his life, when the latter was not even aware of the defendant's presence.

And to prove malice in making an assault, so as to justify recovery of exemplary damages, it was held in *Irwin v. Yeager* (1888) 74 Iowa, 174, 37 N. W. 136, that evidence of a threat made two years before the assault, by the defendant against the plaintiff, when the parties were engaged in a lawsuit which did not appear to have any connection with the assault, was improperly admitted.

Of course, evidence of circumstances tending to show provocation, or an honest belief that he was justified in doing the act complained of, is admissible on behalf of the defendant. *Voltz v. Blackmar* (1876) 64 N. Y. 440, and see cases cited under *V.*, *supra*.

To rebut the charge of malice in an action for assault by a teacher on a pupil, on the ground of excessive punishment, inflicted by whipping with a small rawhide, it was held, in *Lander v. Seaver* (1859) 32 Vt. 114, 76 Am. Dec. 156, that evidence was admissible that the rawhide was used in other schools in the vicinity to punish pupils. And the court was of the opinion that evidence that the general character of the defendant, as a master in governing the school, was mild and moderate, was admissible, where there was evidence tending to

show that he had acted in this instance maliciously and wantonly.

It was held in *Hess v. Marinari* (1918) 81 W. Va. 500, 94 S. E. 968, that where, in an action for assault, a recovery of punitive or exemplary damages is sought, it is proper for the defendant to prove his good character for peace and quietude, as a guide to the jury in determining what amount would be adequate to punish him for the offense charged. It was said: "How may the jury arrive at these punitive damages? What would be punishment for one man might be inadequate punishment for another. Surely the jury would not conclude that a man of good character for peace and quietude in the community should be punished by a fine as large as one who is a notorious bully. In fixing the punishment for crime, one of the very important elements to be considered is the subject of the punishment; and no reason is perceived why the jury should not be advised as to the character of a man who committed the acts complained of, not only for the purpose of weighing this evidence upon the question of criminal intent, or the malice charged against him, but upon the question of ascertaining the amount they think necessary to fine him in order to inflict adequate punishment."

The above conclusion seems also to find support in such rulings as that in *Goldsmith v. Joy* (1889) 61 Vt. 488, 4 L.R.A. 500, 15 Am. St. Rep. 923, 17 Atl. 1010, that, in an action for assault, where exemplary damages may be awarded, an instruction is proper that the influence of an example depends on the character and standing of the parties involved; in other words, that the jury may consider the character and standing of the parties in determining liability for exemplary damages.

To show malice in an action for assault and battery, all the circumstances immediately connected with the transaction, tending to exhibit and explain the motive of the defend-

ant, are competent. *Elfers v. Woolley* (1889) 116 N. Y. 294, 22 N. E. 548.

So, it was held in *Walker v. Chancellor* (1908) 153 Cal. 118, 17 L.R.A. (N.S.) 455, 126 Am. St. Rep. 61, 94 Pac. 606, that, on the question of exemplary damages for assault in attempting to force an occupant from land, evidence was admissible that defendant had title to the property, took advice of counsel, and that he entered the land in good faith.

And where the alleged assault arose over the right of the defendant, for his convenience in the work of constructing a highway, to cross a strip of land owned by the plaintiff, adjoining the highway, it was held in *Rogers v. Bigelow* (1916) 90 Vt. 41, 96 Atl. 417, that, while the defendant could not show, in mitigation of actual damages, that he was acting under an honest, though mistaken, belief that he had a right to cross the plaintiff's land, such evidence was admissible on the question of exemplary damages, and any circumstance tending to confirm his claim in this regard was competent. As to removal of trespassers, see VIII. g, *infra*.

It was held also in *Ellis v. Wahl* (1914) 180 Mo. App. 507, 167 S. W. 582, that where exemplary damages are claimed in an action for assault and battery, evidence is admissible on the part of the defendant to show the motive which prompted him to visit the plaintiff's place of business, where the assault occurred, and that he may show that, on that occasion, he went at the solicitation of the plaintiff.

It was held in *Jessee v. Kenney* (1921) — Mo. App. —, 229 S. W. 219, that evidence was properly admitted, in an action for assault and battery, as to the defendant's conduct several hours before the encounter, in tearing down a certain fence which was one of the matters of dispute between the parties, since, although this was a separate transaction yet it was in the chain of causes that led to the difficulty, and was admissible on the issue of punitive damages.

Evidence that the defendant intervened in an altercation between the plaintiff and a third person, in order to preserve the peace, and that this intervention constituted the alleged assault, was held admissible in *Merrifield v. Davis* (1906) 130 Ill. App. 162, in mitigation of exemplary damages, although, under the pleadings, it was not competent for the purpose of establishing a substantive ground of defense in bar of the action.

And in *Boyle v. Case* (1883) 9 Sawy. 386, 18 Fed. 880, it was held that while the action of a vigilance committee which has been formed during an emergency due to a fire, in taking in the nighttime, one who has refused to obey their order to leave town, and punishing him by whipping, was unjustifiable, the motives and causes actuating the committee might be taken into consideration by the jury on the question of punitive damages for such action.

In awarding punitive damages for an assault, the jury may take into consideration the pecuniary circumstances of the defendant (see VII. c, 2, *infra*), as well as the age, sex, and position in society of the plaintiff, and the injuries received, with all the other circumstances in evidence. *Jones v. Jones* (1874) 71 Ill. 562.

And, as supporting the rule that all the circumstances surrounding the assault are proper for the consideration of the jury on the question of exemplary damages, attention is called also to *Dubois v. Roby* (1911) 84 Vt. 465, 80 Atl. 150, among other cases to this effect, where evidence that the defendant had chased boys who had come to the plaintiff's assistance in response to her call, and had thrown missiles at them, together with other circumstances, was admitted on the question whether he acted from a wanton, evil, and wicked motive, so as to be liable for exemplary damages.

In determining whether an assault is malicious, the jury may consider, among other circumstances, the instrument with which it was committed. *White v. Spangler* (1885) 68

Iowa, 222, 26 N. W. 85, where the defendant used a heavy whip. See cases under VIII. b, *infra*.

The sick or feeble condition of the plaintiff, known to the defendant, may be shown on the question of punitive damages. *Jackson v. Wells* (1896) 13 Tex. Civ. App. 275, 35 S. W. 528, where the plaintiff had had hemorrhages from the lungs, and there was evidence from which the jury might infer that the defendant knew, at the time of the assault, of the plaintiff's weak condition.

In many of the cases the courts have referred, in connection with the question of exemplary damages, to the relative age, size, and strength of the defendant and of the plaintiff, it being apparently assumed or conceded that if the defendant is, for instance, a much stronger and more vigorous person than the one whom he assaulted, this fact may be shown as bearing on the question of exemplary damages. See, for example, *Crosby v. Humphreys* (1894) 59 Minn. 92, 60 N. W. 843, and *Ellis v. Wahl* (1914) 180 Mo. App. 507, 167 S. W. 582. And it is said in the syllabus by the court in *Trahan v. Benoit* (1916) 139 La. 626, 71 So. 893, that "where a stronger man, without sufficient provocation, assaults a weaker one, though the latter may sustain no serious physical injury, damages will be awarded for the injury to his feelings, and by way of discouraging his assailant and others from so readily and unlawfully availing themselves of the accident of superior strength." See other cases under VIII. c, *infra*.

Although there was no evidence as to the circumstances of the assault and battery, and it appeared only that after the assault was committed, the assailant appeared before a magistrate and pleaded guilty on a charge that the assault was committed "wilfully, maliciously, and unlawfully," it was held, in *Wagner v. Gibbs* (1902) 80 Miss. 53, 92 Am. St. Rep. 598, 31 So. 434, that the record in the criminal proceeding was sufficient to authorize an award of punitive damages.

2. Of pecuniary circumstances of parties.

As to instructions infringing on the jury's discretion by, in effect, requiring them to consider the defendant's pecuniary circumstances, see *Thomas v. Williams* (Wis.) and *Hawk v. Ridgway* (Ill.) under VII. a, *supra*.

The rule that, in determining the amount of exemplary or punitive damages for a tort, the jury may properly consider the pecuniary circumstances of the defendant, has been applied, or at least approved, in many actions brought for assault and battery.

Arkansas.—*Davis v. Richardson* (1905) 76 Ark. 348, 89 S. W. 318.

California.—*Marriott v. Williams* (1908) 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

Colorado.—*Courvoisier v. Raymond* (1896) 23 Colo. 113, 47 Pac. 284.

Delaware.—*Tatnall v. Courtney* (1881) 6 Houst. (Del.) 434.

Illinois.—*McNamara v. King* (1845) 7 Ill. 433; *Jones v. Jones* (1874) 71 Ill. 562; *Schmitt v. Kurrus* (1908) 234 Ill. 578, 85 N. E. 261; *Michalak v. Tomkiewicz* (1916) 199 Ill. App. 405; see also *Johnson v. Lamm* (1910) 156 Ill. App. 287.

Kentucky.—*Gore v. Chadwick* (1838) 6 Dana, 477; *Crosby v. Bradley* (1890) 11 Ky. L. Rep. 954 (but see later decisions cited *infra*, this subdivision, to a contrary effect).

Maine.—*Johnson v. Smith* (1875) 64 Me. 553; *Macintosh v. Bartlett* (1877) 67 Me. 130; *Webb v. Gilman* (1888) 80 Me. 177, 13 Atl. 688.

Maryland.—*Sloan v. Edwards* (1883) 61 Md. 89; *Stockham v. Malcolm* (1909) 111 Md. 615, 74 Atl. 569, 19 Ann. Cas. 759.

Mississippi.—*Bell v. Morrison* (1854) 27 Miss. 68; *Yazoo & M. Valley R. Co. v. Williams* (1905) 87 Miss. 344, 39 So. 489.

Missouri.—*Dailey v. Houston* (1874) 58 Mo. 361; *Morgan v. Durfee* (1879) 69 Mo. 469, 33 Am. Rep. 508; *Beck v. Dowell* (1892) 111 Mo. 506, 33 Am. St. Rep. 547, 20 S. W. 209; *Berryman v. Cox* (1898) 73 Mo. App. 67; *Baxter v. Magill* (1907) 127 Mo. App. 392, 105 S. W. 679; *McMillen v. Elder* (1911) 160 Mo. App. 399, 140 S.

W. 917; *Schafer v. Ostmann* (1913) 172 Mo. App. 602, 155 S. W. 1102, earlier appeal supporting rule is reported in (1910) 148 Mo. App. 644, 129 S. W. 63; see also *Traw v. Heydt* (1919) — Mo. App. —, 216 S. W. 1009.

New Hampshire.—*Belknap v. Boston & M. R. Co.* (1870) 49 N. H. 358.

North Carolina.—*Pendleton v. Davis* (1853) 46 N. C. (1 Jones, L.) 98.

North Dakota.—*Stockwell v. Brington* (1913) 26 N. D. 1, 142 N. W. 242.

Ohio.—*Hendricks v. Fowler* (1898) 16 Ohio C. C. 597, 9 Ohio C. D. 209.

Oklahoma.—*Willet v. Johnson* (1904) 13 Okla. 563, 76 Pac. 174.

South Carolina.—*Rowe v. Moses* (1856) 43 S. C. L. (9 Rich.) 423, 67 Am. Dec. 560; *Harris v. Marco* (1882) 16 S. C. 575; *Calder v. Southern R. Co.* (1911) 89 S. C. 287, 71 S. E. 941, Ann. Cas. 1913A, 894.

South Dakota.—*Bogue v. Gunderson* (1912) 30 S. D. 1, 137 N. W. 595, Ann. Cas. 1915B, 126.

West Virginia.—*PENDLETON v. NORFOLK & W. R. Co.* (reported herewith), ante, 761.

Wisconsin.—*Birchard v. Booth* (1855) 4 Wis. 67; *Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670; *Brown v. Swineford* (1878) 44 Wis. 282, 28 Am. Rep. 582; *Draper v. Baker* (1884) 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527; *Spear v. Sweeney* (1894) 88 Wis. 545, 60 N. W. 1060; *Thomas v. Williams* (1909) 139 Wis. 467, 121 N. W. 148; *Ogodziski v. Gara* (1921) — Wis. —, 181 N. W. 231.

But the doctrine that, in an action for assault, where punitive damages are allowable, the pecuniary circumstances of the defendant may be shown, was repudiated in *Givens v. Berkley* (1900) 108 Ky. 236, 56 S. W. 158, where, in an action for assault, the court said: "If it be competent in such cases to admit evidence as to the wealth or ability of the defendant to pay, it seems to us inevitable that proof should be admitted to show his poverty or inability to pay, and, incidental thereto, it would be proper to show what family was dependent entirely upon him for support. The tendency of this class of testimony would be to lead the jury to consider chiefly

the pecuniary condition of the defendant, rather than the enormity or wantonness of the act for which punitive damages might be allowed. And, if pecuniary condition of the defendant can be proven for the purpose of influencing the verdict of the jury, it would seem that like evidence should be admitted as to the plaintiff. After a careful consideration of this question, we are clearly of the opinion that no evidence as to the financial condition of either defendant or plaintiff should be admitted in any case in which punitive damages might be recovered. To the extent that the decisions hereinbefore referred to conflict with this opinion, the same are overruled." This decision is followed in an action for assault, in *Beavers v. Bowen* (1902) 24 Ky. L. Rep. 882, 70 N. W. 195.

The wealth of the defendant at the time of the trial, and not that at the time of the injury, is the proper criterion, in assessing exemplary damages for an assault. *Marriott v. Williams* (1908) 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

The rule that where more than one tortfeasor is sued for damages, the wealth or financial standing of one of the defendants cannot be shown for the purpose of augmenting damages against him, because the admission of such evidence necessarily has the effect of improperly augmenting the damages against the other defendant whether rich or poor, was applied in an action for assault and battery in *Walker v. Kellar* (1920) — Tex. Civ. App. —, 218 S. W. 792, later appeal in (1920) — Tex. Civ. App. —, 226 S. W. 796, where exemplary as well as actual damages were claimed because the plaintiff had been tarred and feathered by the defendants for unpatriotic conduct during the late war with Germany.

And where there are several defendants jointly sued for an assault, an instruction authorizing the jury, in determining punitive damages, to take into consideration the pecuniary ability of each of the individual defendants, has been held erroneous. *Lister v. McKee* (1898) 79 Ill. App.

210, citing *Smith v. Wunderlich* (1873) 70 Ill. 426 (an action of trespass on realty).

So, in *Schafer v. Ostmann* (1910) 148 Mo. App. 644, 129 N. W. 63, it was held that where several defendants were sued for an assault and battery, evidence of the wealth of one of the defendants could not be considered on the issue of punitive damages. The court said that while it was entirely clear that the evidence tended to prove a case for punitive damages against both of the defendants, it was equally clear that so much of the damages as was predicated on the wealth and financial standing of one of them ought not to be allowed jointly against him and his codefendant; that punitive damages are such as are allowed beyond and above the amount which the plaintiff has really suffered, and are awarded upon the theory that they are a punishment to the defendant; and that, while both of the defendants were liable for compensatory damages, it was highly unjust to mulct one of them by inflating the verdict against him because of the wealth of his codefendant.

To a similar effect are *Ogodziski v. Gara* (1921) — Wis. —, 181 N. W. 227; *Ogodziski v. Gara* (1921) — Wis. —, 181 N. W. 231.

And while an action for libel, the statement of the Federal Supreme Court in *Washington Gaslight Co. v. Lansden* (1899) 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296, seems applicable to the class of cases under consideration. It was said: "While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only. As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that when a plaintiff voluntarily joins several parties as defendants, he must be held thereby to waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several de-

fendants to pay them. This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined. What the true rule is in such case is not, perhaps, certain. . . . But we have no doubt it prevents evidence regarding the wealth of one of the defendants as a foundation for computing or determining the amount of such damages against all."

It was said in *Yazoo & M. Valley R. Co. v. Williams* (1905) 87 Mass. 344, 39 So. 489, that evidence of the wealth of the defendant in an action for assault is admissible on the question of punitive damages only after proof is first made that the injury was committed wantonly, maliciously, wilfully, or capriciously; this question being important not as affecting liability, but solely for the purpose of assisting the jury in inflicting the punishment.

There is authority on both sides of the question whether, in an action for assault and battery, the defendant may introduce evidence of his financial circumstances in the absence of any evidence in that regard offered by the plaintiff. Thus, in *Mullin v. Spangenberg* (1884) 112 Ill. 140, evidence offered by the defendant as to his pecuniary circumstances was held inadmissible in mitigation of damages (apparently the case was a proper one for exemplary damages), where no evidence of this character had been offered by the plaintiff. It was said: "Where a plaintiff entitled to vindictive damages offers no evidence of the defendant's wealth with a view of enhancing them, he in effect says; 'I ask no damages against the defendant except as a mere individual, without any regard to his property or estate, whether it be much or little,'—and in that kind of a case the jury have no right to give any more damages than they would if it had affirmatively appeared the defendant was without pecuniary resources. But where the testimony is offered by the plaintiff, he does it for the purpose of enhancing the damages. By offering it he in effect says; 'I ask in the way of damages something more than I would be

entitled to recover from the defendant as a mere individual, without regard to his pecuniary circumstances.' In doing this, the plaintiff tenders a new issue of fact, which opens up the question to both sides."

But it has been held that the defendant in an action for assault may show, on the issue of exemplary damages, his want of wealth, even though the plaintiff has offered no proof on this point, and claimed no damages by reason of the defendant's wealth or pecuniary ability. *Johnson v. Smith* (1875) 64 Me. 553. The court said: "It is true the plaintiff offered no proof upon this point and claimed no damages by reason of defendant's 'wealth or pecuniary ability;' but if it was competent for the plaintiff to prove defendant's wealth to increase his damages, it was equally competent for the defendant to show a want of it to diminish them; and the waiving of the right by the one is no reason why it should be taken from the other. Nor does the mere nonclaim of damages on that ground, the right to punitive damages being still insisted upon, take it from the consideration of the jury. Hence, the exclusion of the testimony left them in darkness where they were entitled to light. If the plaintiff really intended to admit that the defendant was without means, the testimony would have done him no harm; but such an admission was not distinctly made, and, in the absence of it, the exclusion of the testimony would be injurious to the defendant. It certainly deprived him of a legal right."

And on the question whether evidence of reputed wealth, or of actual wealth only, is admissible, some distinctions of importance have been made.

In *Johnson v. Smith* (Me.) *supra*, where the defendant was seeking to show his pecuniary resources on the issue of exemplary damages, the court took the view that only evidence of actual wealth was material on this issue, although evidence of the defendant's reputation for wealth was regarded as competent on the issue of compensatory damages for in-

jury to character or insult to the person.

But evidence of the reputed wealth of defendant in an action for assault and battery was held admissible for the plaintiff on the issue of exemplary damages, in *Draper v. Baker* (1884) 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527, as against the objection that only evidence of actual wealth should be received. The court said it would seem that where the pecuniary circumstances of a defendant are held to be admissible on the question of compensatory damages, evidence of the actual wealth of the defendant should not be admitted; but that, where evidence of the defendant's wealth is admitted for the purpose of enhancing the exemplary or punitive damages, the actual wealth of the defendant may be shown; but that, in most cases, evidence of reputed wealth would be the only evidence the plaintiff could make upon the point, and that in cases where such reputed wealth is not to conclude the defendant, he always has it in his power to present the real facts to the jury in answer to the general proofs of the plaintiff. Distinguishing the case of *Johnson v. Smith* (Me.) supra, the court said: "The point of that case is that where the plaintiff had made out a case which would entitle him to demand exemplary damages, and had given no evidence as to the financial circumstances of the defendant, the defendant might introduce evidence of his real financial condition as bearing upon the question as to the amount of the exemplary damages which the jury ought to assess against him; and that in such case the rule that the reputed wealth of the defendant could only be shown, did not apply. But the case does not decide that the plaintiff may not, in such case, show the reputed wealth of the defendant to enhance the exemplary damages; but it does hold that when no evidence is given on the subject, and, impliedly, that when such evidence is given, the defendant may answer it by showing his real financial condition."

Evidence that the defendant in an

action for assault operated and owned a drug store, that he was in the newspaper business, and was president of a publishing company, was held, in *Michalak v. Tomkiewicz* (1916) 199 Ill. App. 405, sufficient to warrant a conclusion as to his pecuniary condition, and to justify an instruction authorizing the jury to take into consideration the defendant's pecuniary circumstances in assessing punitive damages.

But to prove the pecuniary circumstances of the defendant in an action for assault, on the question of exemplary damages, the witness should not be permitted to testify merely that the pecuniary condition of the defendant was "generally considered good," where it does not appear that he had any personal knowledge upon the subject, or that his information was derived from any competent or proper source. *Sloan v. Edwards* (1883) 61 Md. 89. In such a case his answer conveys no idea of the extent of the defendant's wealth, and the jury ought not to be left to speculate thereon.

In the absence of evidence of the amount of the fine, an offer to prove that the defendant, in a civil action for assault, had been prosecuted and fined for the same assault, was held inadmissible, in *Dubois v. Roby* (1911) 84 Vt. 465, 80 Atl. 150, on the issue of his present resources.

The reasons for allowing the jury to consider the pecuniary resources of the defendant on the issue of exemplary damages for an assault seem clear, but it is not so clear on what grounds they should be permitted to consider the plaintiff's financial condition. And the courts have failed to state any very satisfactory reasons for the latter doctrine, although there are several decisions supporting it. Thus, in *Baxter v. Magill* (1907) 127 Mo. App. 392, 105 S. W. 679, it was held that where exemplary damages are proper, evidence of the plaintiff's financial condition in an action for assault is competent.

Also in *Beck v. Dowell* (1890) 40 Mo. App. 71, affirmed in (1892) 111 Mo. 506, 33 Am. St. Rep. 547, 20 S. W.

209, it was held that, in an action for assault, where exemplary or punitive damages are proper, evidence is admissible of the financial condition of the plaintiff and her family.

And it was held in *Heneky v. Smith* (1882) 10 Or. 349, 45 Am. Rep. 143, that, where exemplary damages are proper in an action for assault, evidence is admissible of the financial circumstances of the plaintiff as well as of the defendant. The court quoted the doctrine as applicable that the jury may proceed upon higher grounds of damages than those arising merely from bodily wounds and bruises, and assert determination to vindicate the rights of the poor as against the aggressions of power and violence.

In approving an instruction in an action for assault that the jury, in estimating damages, might take into consideration the "condition in life of plaintiffs, and their pursuits and nature of their business," and might add exemplary damages as a punishment to the defendants, if the assault was wantonly made, the court, in *Dailey v. Houston* (1874) 58 Mo. 361, said there was no doubt but that, in estimating the damages in such cases, the jury might properly take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness or atrocity, or want of atrocity, tending to characterize the assault.

An instruction on the question of exemplary damages, that the influence of an example in a case of this kind (assault and battery) depended on the character and standing of the parties involved, was approved in *Goldsmith v. Joy* (1889) 61 Vt. 488, 4 L.R.A. 500, 15 Am. St. Rep. 923, 17 Atl. 1010.

d. Excessiveness of verdict.

See, in this connection, II. c, *supra*. And in many of the cases under VIII. *infra*, the alleged excessiveness of the verdict in particular instances has been noted.

Where exemplary or punitive damages are proper in an action for assault, the amount of such damages is a question of which the jury is the

sole judge, and their verdict should not be interfered with unless it appears that the amount awarded is so apparently excessive as to evince passion and prejudice. *Yazoo & M. Valley R. Co. v. May* (1913) 104 Miss. 422, 44 L.R.A.(N.S.) 1138, 61 So. 449.

And it is said in the syllabus by the court in *Hunt v. Di Bacco* (1911) 69 W. Va. 449, 71 S. E. 584, that in a case where the jury may properly assess exemplary damages, the court will not set aside their verdict for excessiveness, unless the amount is so great as to evince passion, prejudice, partiality, or corruption.

In an action for assault and battery, the view was taken in *Crosby v. Bradley* (1890) 11 Ky. L. Rep. 954, that the court will not set aside a verdict for damages as excessive unless it appears at first blush to have resulted from passion or prejudice; and that the reasons for the court's refusal to interfere with the verdict are much stronger where exemplary damages are allowed than where only compensatory damages may be given.

But it has been held that while there is a distinction between cases in which punitive damages are involved and cases in which only compensatory damages are allowable, with respect to the duty of the court in reducing damages because they are excessive, the court is not prohibited from reducing a general verdict for a certain sum as damages for assault merely because the case is a proper one for punitive damages, but may, in such a case, hold the damages excessive if they are so large as to "shock the conscience of the court," or to satisfy it that the jury has been improperly influenced, or has acted from passion, prejudice, or partiality. *Wilmot v. Bartlett* (1915) 37 R. I. 568, 94 Atl. 427.

In *Flannery v. Wood* (1903) 32 Tex. Civ. App. 250, 73 S. W. 1072, the court held that a verdict for exemplary damages was excessive as out of all proportion to the actual damages sustained, and remanded the case for a new trial unless the appellee would remit all exemplary damages above a certain sum.

So, it is held in *Hess v. Marinari* (1918) 81 W. Va. 500, 94 S. E. 968, that the court may set aside as excessive a verdict for punitive damages in an action for assault. In this case a verdict for \$9,000 damages was held excessive, where it appeared that the amount of pecuniary loss was inconsiderable, and no peculiar circumstances were shown respecting the character or habits or financial condition of the defendant which would warrant dealing with him differently from any other person for the same or a similar offense. The court stated that it might be generally said that, in order to justify a recovery of punitive damages largely in excess of what might ordinarily be expected for punishment for the particular offense, some evidence must be introduced to show that the defendant's condition was so different from that of the ordinary person that it was necessary to award punitive damages against him in excess of what would ordinarily be considered as punishment for the acts complained of.

And that an excessive award of punitive damages for an assault will be set aside is held in *PENDLETON v. NORFOLK & W. R. Co.* (reported herewith) ante, 761, the court laying down the rule that "in a case in which it is proper for a jury to award punitive damages, it is competent to consider the station of the parties, and particularly the financial and social standing of the defendant, in order that it may be determined what will be adequate and sufficient punishment; and where, after considering these elements, as well as the nature and character of the offense committed, the amount found is so out of proportion to the injury inflicted that it is patent that the jury were actuated by motives of ill feeling toward the defendant in ascertaining such damages, and not alone by the purpose to punish the defendant, such verdict will be set aside as excessive."

VIII. Applications.

a. In general.

Without repeating at this point all of the cases which have been previ-

ously cited in the note, it is the purpose to show here the circumstances under which the rules heretofore considered have been applied, so far as somewhat distinctive facts are set out in the particular cases.

The rule that punitive or exemplary damages may be allowed for assault committed wantonly or maliciously, or under aggravating circumstances, has been applied, or at least recognized as applicable, in actions for assault and battery—

— where the defendant, who had had an altercation with the plaintiff over money which the defendant unjustifiably demanded, followed him to a telephone booth, and, while the plaintiff was attempting to use the telephone, struck the glass door of the booth with his fist, breaking it, and causing a piece of the glass to enter the plaintiff's eye, *Schmitt v. Kurrus* (1908) 234 Ill. 578, 85 N. E. 261;

— where a clergyman, while peacefully walking along a public street, was attacked by the defendant, knocked down, and severely injured, *Tucker v. Green* (1832) 27 Kan. 355;

— where there was evidence of an unjustifiable and brutal attack by several persons upon an election officer, *Ryan v. Quinn* (1903) 24 Ky. L. Rep. 1513, 71 S. W. 872;

— where the defendant violently assaulted the plaintiff merely because the latter made remarks derogatory of the defendant's horse, *Baumgartner v. Hodgdon* (1908) 105 Minn. 22, 116 N. W. 1030;

— where there was evidence that the defendant, without other provocation than the failure of the plaintiff to return his salutation, applied to the latter a most opprobrious epithet, assaulted him, and bit his ear practically off, the plaintiff being held entitled to recover \$250 as actual and \$250 as exemplary damages, *Turnbow v. Wimberly* (1901) 106 La. 259, 30 So. 747;

— where the action was for wantonly assaulting and maiming the plaintiff by biting off a part of his nose, *Pike v. Billing* (1861) 48 Me. 539;

— where the defendant sought out the plaintiff and severely beat him because the latter had killed the defendant's dog, *Johnson v. Smith* (1875) 64 Me. 553;

— where there was evidence that the defendant sought the plaintiff with a view of punishing him for kicking the former's minor son, and that the first hostile demonstration was a blow by the defendant, which knocked the plaintiff senseless, *Shook v. Peters* (1883) 59 Tex. 393;

— where there was evidence that the plaintiff, while a guest at the defendant's hotel, was assaulted without cause, and that after the assault within the building, he was pursued by the defendant to the sidewalk, and subjected to renewed indignity and violence, *Sargent v. Carnes* (1892) 84 Tex. 156, 19 S. W. 378;

— where the plaintiff, while eating in a hotel dining room, was approached by the defendant and compelled to sign a so-called "retraction," by a show of violence and force on the part of the defendant, who accompanied the assault with threatening and offensive language, *Trogdon v. Perry* (1916) 172 N. C. 540, 90 S. E. 583;

— where the defendant violently assaulted the plaintiff and inflicted serious injuries, because the latter declined to be a witness for the defendant in a pending action, stating that he knew nothing about the case; a verdict for \$500 compensatory and \$500 punitive damages was held not excessive, *Gieske v. Redemeyer* (1920) — Mo. App. —, 224 S. W. 92;

— where there was evidence that, because of a dispute as to the correctness of certain testimony offered in a suit between the plaintiff and defendant's son, the defendant violently assaulted the plaintiff without provocation, *McMillen v. Elder* (1911) 160 Mo. App. 399, 140 S. W. 917;

— where the assault consisted in spitting in the face of an opponent, in the presence of a large number of persons in a court room, *Alcorn v. Mitchell* (1872) 63 Ill. 553; to a similar effect is *Draper v. Baker* (1884) 61 Wis. 450, 50 Am. Rep. 143, 21 S. W.

527 (a verdict of \$1,200 damages was held not excessive);

— where the assault was made in the presence of the court, the plaintiff being struck on the head with a stick, in consequence of an angry conversation between the parties, *Pendleton v. Davis* (1853) 46 N. C. (1 Jones, L.) 98; see also *Bernard v. Kelley* (1907) 118 La. 132, 42 So. 723, in which, without expressly referring to the matter of exemplary damages, the court allowed damages in the sum of \$500, although the physical injury seems to have been slight, where a witness who was being cross-examined by his opponent in court was struck with a stick by such opponent, because, apparently, he did not answer to the latter's satisfaction;

— where a tenant was grossly abused, insulted, and menaced with a gun by the owner's husband, who entered upon and interfered with the possession of the premises, resulting in serious impairment of the tenant's health, *Hickey v. Welch* (1901) 91 Mo. App. 1;

— where there was evidence that the defendant's agent, who had been sent to the plaintiff's residence for the purpose of foreclosing a chattel mortgage, struck the plaintiff a blow in the face while the latter was attempting to pass through a door in order to assist his wife, who had been attacked by a third party, *Anderson v. International Harvester Co.* (1908) 104 Minn. 49, 16 L.R.A.(N.S.) 440, 116 N. W. 101;

— where the evidence showed that the plaintiff had been violently assaulted by the defendant while the former was sitting in a store, the alleged provocation being an opprobrious epithet which the defendant claimed the former had used respecting him, and, although the plaintiff endeavored to escape, he was knocked to the floor and so severely kicked and beaten that his jaw was broken and he was rendered unconscious, *Baxter v. Magill* (1907) 127 Mo. App. 392, 105 S. W. 679;

— where the defendant followed the plaintiff, with whom he had had an altercation, some 10 or 15 feet

after the latter had been taken in charge by a policeman, and struck the plaintiff a blow in the face while the latter was powerless to defend himself, *White v. Barnes* (1893) 112 N. C. 323, 16 S. E. 922;

—where the defendant, who had walked away after a dispute between him and the plaintiff, turned suddenly on the latter, who was following with his hand in his pocket, and struck him a violent blow, the defendant's excuse being merely that he had heard that the plaintiff was a fighting man, and, thinking him under the influence of liquor, had turned suddenly without looking, and struck him, *Rhodes v. Rodgers* (1892) 151 Pa. 634, 24 Atl. 1044;

—where, on a public street, in the presence of a large crowd, the plaintiff, during a dispute between him and the defendant over business matters, was struck such a blow by the latter as knocked him down and rendered him unconscious, there being evidence that the act was committed without sufficient provocation and without any justifiable excuse, *Marble v. Jensen* (1919) 53 Utah, 226, 178 Pac. 66;

—where there was evidence in an action for an assault committed in a store on a clerk by his employer, which showed that the latter deliberately sought a quarrel, threatened the clerk with acts of violence, and finally struck him a severe blow on the head, the court saying that these facts, if believed, would support a conclusion that actual malice existed, *Bloomberg v. Laventhal* (1919) 179 Cal. 616, 178 Pac. 496;

—where there was evidence of an unprovoked and unjustifiable assault by the defendant in attempting to obtain possession from the plaintiff of personal property, of which the plaintiff was at least a joint owner with the defendant, *Wingate v. Bunton* (1916) 193 Mo. App. 470, 186 S. W. 32.

Where the alleged assault was committed by the defendant in protecting personal property which he claimed, and which was in his possession, from seizure by the plaintiff, the court, in *Barnes v. Martin* (1862) 15 Wis. 240, 82 Am. Dec. 670,

held that an instruction should have been given that the jury had no right to award punitive or exemplary damages unless they found that the act of the defendant in resisting the taking of the property from him was governed by wanton or malicious motives and was without apparent cause. The court said: "It would seem to be one of the clearest principles of justice that a party resisting the forcible and unlawful act of another ought not to be punished by way of exemplary damages, unless he be guilty of excess and act from motive of malice."

b. Assaults with weapons likely to produce serious injury.

See *Saunders v. Gilbert*, under VIII. f, *infra*.

For assaults on women, see VIII. c, *infra*.

An instruction authorizing exemplary damages in case of an assault of a grievous or wanton nature is justified where it appears that defendant, while having an altercation with the brother of plaintiff, who went to the brother's assistance, cut her across the face, through her ear and into her neck, with a pocket knife. *BANNISTER v. MITCHELL* (reported herewith) ante, 768.

And exemplary damages have been considered proper—

—where there was evidence that the defendant stabbed the plaintiff with a knife, seriously injuring him, the jury being instructed that if they believed the attack was wanton and unprovoked, and with a deadly weapon, they should give exemplary, or even vindictive damages, if necessary, to repress the practice of carrying and using deadly or dangerous weapons, *Porter v. Seiler* (1854) 23 Pa. 424, 62 Am. Dec. 341;

—where the defendant, during a personal conflict with the plaintiff, stabbed the latter several times with a knife, which penetrated to the lung, *Edwards v. Warnkey* (1901) 63 Kan. 889, 66 Pac. 987;

—where the action was for assaulting and stabbing the plaintiff with a

knife, *Slater v. Sherman* (1869) 68 Ky. (5 Bush) 206;

—where a loaded pistol, while presented by the defendant in a room where many persons were present, was discharged, the load striking and killing the plaintiff's husband, although the individual killed was not the person with whom the defendant was quarreling, nor the one whom he intended to injure; the decision was under a statute authorizing recovery of punitive damages for the loss or destruction of the life of any person by the wilful neglect of another person, *Chiles v. Drake* (1859) 2 Met. (Ky.) 146, 74 Am. Dec. 406;

—where the defendant laid in wait and deliberately shot the plaintiff, with intent to take his life, the only excuse being threats made by the plaintiff against the life of the defendant some twenty days before the shooting, *Cummins v. Crawford* (1878) 88 Ill. 312, 30 Am. Rep. 558;

—where there was evidence that the defendant wantonly shot into a crowd of persons from the neighborhood, who had come to charivari him, and were not intent on mischief, *Palmer v. Smith* (1911) 147 Wis. 70, 132 N. W. 614;

—where the defendant shot several times at and wounded the plaintiff, who had run away with and married the defendant's daughter, but had been invited to return to the defendant's house, the attack being made as the plaintiff approached the house, and the only excuse being excessive drinking of liquor by the defendant, and rage on seeing the plaintiff, *Wirsing v. Smith* (1908) 222 Pa. 8, 70 Atl. 906;

—where there was evidence that the defendant assaulted the plaintiff by striking him over the head with a stick, and shooting him in the abdomen, *Carson v. Singleton* (1901) 23 Ky. L. Rep. 1626, 65 S. W. 821;

—where the evidence disclosed a most wanton, brutal, and malicious assault on the plaintiff by the defendant with deadly weapons, accompanied by threats to take the plaintiff's life, and without any provocation whatever; in this case a verdict for damages for \$5,000 was held not

excessive, but the amount of compensatory damages or extent of physical injuries is not shown, *Webb v. Gilman* (1888) 80 Me. 177, 13 Atl. 688;

—where the defendant assaulted the plaintiff with a club, so violently that he broke the plaintiff's arm, *Hilbert v. Doebricke* (1882) 8 Ohio Dec. Reprint, 518, 8 Ohio L. J. 268;

—where a policeman on an Indian Reservation, although he knew that the plaintiff, a person of Indian blood, had come to the train to meet his wife and child, knocked him down with a club, and then imprisoned him because he disregarded the officer's directions to keep back from the entrance to the train, *Deragon v. Sero* (1908) 137 Wis. 276, 20 L.R.A. (N.S.) 842, 118 N. W. 839;

—where severe and permanent injuries were inflicted by striking the plaintiff, without provocation, a number of heavy blows upon the head with a padlock, *Drohn v. Brewer* (1875) 77 Ill. 280;

—where a bartender struck a small, one-armed man, who was a guest in the saloon, several blows with a pick handle, knocking him unconscious and causing serious injury, the excuse being that the latter was quarrelsome and had struck the "boss," who was attempting to put him out of the saloon, *Hunt v. Di Bacco* (1911) 69 W. Va. 449, 71 S. E. 584;

—where a weakly old man, who was on the premises in question under authority of one who was at least the cotenant of the defendant was violently assaulted by the defendant with a large stick, loaded with lead, apparently because of no other reason than that he was, according to the defendant's view, a trespasser, *Causee v. Anders* (1839) 20 N. C. 388 (4 Deo. & B. L. 246);

—where it was alleged that the defendant unlawfully assaulted the plaintiff with a neck yoke, inflicting serious injuries, *Howard v. Lillard* (1885) 17 Mo. App. 228;

—where there was evidence that the assault was made by the defendant's intentionally throwing vitriol on the plaintiff while he was standing in front of the defendant's house, in

quiet conversation with other persons, the only excuse being a business disagreement; in this case an award of \$1,000 damages was sustained, although it does not appear that the plaintiff suffered actual damage to any considerable extent, *Munter v. Bande* (1876) 1 Mo. App. 484;

—where the defendant, who was the aggressor, severely cut the plaintiff in the face with a razor, *Happy v. Prichard* (1905) 111 Mo. App. 6, 85 S. W. 655;

—where a school-teacher, because he had whipped a boy at school for using vile and profane language, was assaulted by the father and brother of the boy, who severely beat him, using some kind of metal weapons, *Cook v. Neely* (1910) 143 Mo. App. 632, 128 S. W. 233; see also *Cushman v. Waddell* (1830) Baldw. 57, Fed. Cas. No. 3,516, where the fact that the plaintiff, a schoolmaster, had severely punished the defendant's son, was considered a matter for the jury's consideration on the issue whether the assault by the latter on the schoolmaster was wanton and malicious;

—where the assault consisted in a violent beating and wounding, with an ax, of an old and intoxicated man, *Gore v. Chadwick* (1838) 6 Dana (Ky.) 477;

—where the plaintiff, who was in a crowd at a railroad station, was injured by an assault deliberately planned and carried out by the defendant, who had armed himself with brass knucks, and had come to the station for the purpose of whipping an expected arrival, *Davis v. Collins* (1904) 69 S. C. 460, 48 S. E. 469;

—where it was alleged that the defendants, without cause or provocation, made an attack on the plaintiff while the latter was occupied with his ordinary duties, striking him in the eye with false knuckles, thereby inflicting a serious injury, *Iaeger v. Metcalf* (1908) 11 Ariz. 283, 94 Pac. 1094;

—where the defendant struck the plaintiff on the head with a pitchfork while the latter was attempting to enter a field which he had leased from the defendant, in order to remove personal property, *Hinton v. Muhl-*

man (1916) 201 Ill. App. 177; as to use of pitchfork, see also *Jessee v. Kenney*, under VIII. c, *infra*;

—where there was evidence that while the plaintiff was sitting in a chair, the defendant approached secretly and struck him a violent blow upon the head with a heavy chair, felling him to the ground, and rendering him unconscious, *Von Reed- en v. Evans* (1893) 52 Ill. App. 209;

—where the defendant used a heavy whip as well as his fist in assaulting the plaintiff, *White v. Spangler* (1885) 68 Iowa, 222, 26 N. W. 85;

—where an employer severely whipped a servant, attacking him while the latter was in bed, because he had failed to perform his farm duties, *Reddin v. Gates* (1879) 52 Iowa, 210, 2 N. W. 1079;

—where the assault consisted in the defendant's deliberately, severely, and without provocation, whipping the plaintiff, at the same time threatening him with a pistol, *Mitchell v. Robinson* (1874) 72 Ill. 382; see also *Rogers v. Bigelow* (Vt.) under VIII. c, *infra*, for a case of assaulting a woman with a horsewhip;

—where there was evidence that the defendant made an unprovoked assault upon the plaintiff, striking him over the head with the heavy end of a whipstock, whereby the plaintiff was knocked senseless, and sustained serious injuries, *Germolus v. Sausser* (1901) 83 Minn. 141, 85 N. W. 946;

—where the defendant struck the plaintiff violently on the head with a pistol, while the latter was assisting in an arbitration proceeding, the court saying that the evidence showed that the attack was unprovoked, premeditated, brutal, and ferocious, although the defense was offensive and insulting language used by the plaintiff toward the defendant; in this case the court allowed \$500 exemplary damages, *Scheen v. Poland* (1882) 34 La. Ann. 1107;

—where a large water bottle was thrown by the manager at an employee in a restaurant, striking the latter in the back and causing serious injury,

Hickey v. Booth (1909) 29 R. I. 466, 132 Am. St. Rep. 832, 72 Atl. 529;

—where a dispute arose between the defendant and the plaintiff over a seat in a hotel dining room to which the defendant unjustifiably claimed he was entitled, and the defendant struck the plaintiff a severe blow on the head with a bottle, because, as he testified, he saw there was going to be difficulty, and concluded to strike the first blow, *Borland v. Barrett* (1882) 76 Va. 128, 44 Am. Rep. 152;

But in an action for assault and battery in which the plaintiff claimed that, while standing in a gap in a hedge along the highway, he was struck on the head by a bottle thrown by the defendant from a passing automobile, it was held, in *McGlothlin v. Peters* (1916) 201 Ill. App. 181, that the mere throwing of an empty bottle from a passing automobile into a hedge along the side of a country highway, where no persons are in view, and where the one throwing the bottle might not reasonably expect any person to be, was not such an unlawful or reckless act as to make it wanton or malicious, so as to warrant the giving of an instruction on punitive damages.

And where a guard at a penitentiary was struck with a board by his employer, who became enraged because the guard had fallen asleep and permitted convicts to escape, the court was of the opinion in *Ward v. Blackwood* (1883) 41 Ark. 295, 48 Am. Rep. 41, that the case was not one for the allowance of exemplary damages, in view of the provocation for the assault.

So, provocation was considered as precluding exemplary damages where the defendant fired a gun charged with shot into a crowd of boys and injured the plaintiff, who was one of the crowd, which was intent on disturbing the plaintiff in the nighttime, although he had warned them to quit; the circumstances being regarded as proper for consideration even in mitigation of actual damages. *Robison v. Rupert* (1854) 23 Pa. 523. The court said that the plaintiff could not possibly recover vindictive damages in such a case as this.

c. Assaults on women or on feeble or invalid persons.

As to assaults on women who are trespassers, see VIII, g, *infra*.

For a case of a violent assault with a pick on a small, one-armed man, see *Hunt v. Di Bacco* (W. Va.) *supra*, VIII. b. See also *Causee v. Anders* (N. C.) *supra*, VIII. b, where a weakly old man was assaulted with a stick loaded with lead.

It is said in the syllabus by the court in *Trahan v. Benoit* (1916) 139 La. 626, 71 So. 893, that "where a stronger man, without sufficient provocation, assaults a weaker one, though the latter may sustain no serious physical injury, damages will be awarded for the injury to his feelings, and by way of discouraging his assailant and others from so readily and unlawfully availing themselves of the accident of superior strength." In this case, where the plaintiff and the defendant were both past sixty years of age, but the plaintiff was not robust, weighing only about 118 pounds, while the defendant was strong and active, and weighed about 200 pounds, and the evidence showed that the blow which knocked down the plaintiff was without apparent provocation, the court awarded damages in the sum of \$500, although stating that the plaintiff sustained no physical injury.

And exemplary or punitive damages have been held proper—

—where the assault consisted in whipping a weak-minded boy suspected of theft, *Ously v. Hardin* (1860) 23 Ill. 403;

—where a merchant assaulted a customer who had returned to the store to return an article purchased, and had insisted on a refund of his money, the testimony showing an unprovoked assault on an old and feeble man, *Webb v. Rothschild* (1897) 49 La. Ann. 244, 21 So. 258, where \$500 exemplary damages were allowed;

—where the evidence showed unnecessarily rough treatment under a warrant of arrest, of a frail, sick man, and his confinement in a cold jail, resulting in illness, *McConathy v. Deck* (1905) 34 Colo. 461, 4 L.R.A.

(N.S.) 358, 83 Pac. 135, 7 Ann. Cas. 896;

—where there was evidence that the defendant, a large man, thirty-seven years of age, assaulted without provocation, the plaintiff, who was a small, weak man, over sixty years old, beat and kicked him to unconsciousness, and then set his dog on him, *Cody v. Gremmler* (1906) 121 Mo. App. 359, 99 S. W. 46;

—where an old and intoxicated man was severely beaten and wounded, with an axe, *Gore v. Chadwick* (1838) 6 Dana (Ky.) 477;

—where the evidence showed that the defendant, without provocation, viciously assaulted the plaintiff, who was a much smaller man and somewhat crippled, and beat him into unconsciousness, the defendant's son kicking and striking the plaintiff with a club while the defendant was holding him down; a verdict and judgment for \$1,200 in actual damages and \$1,200 punitive damages were held not excessive, it being shown that the defendant was worth something over \$60,000, *Schafer v. Ostmann* (1913) 172 Mo. App. 602, 155 S. W. 1102;

—where the defendant, while the plaintiff, an old man, was engaged in conversation with another person in a hotel, without warning or provocation, grabbed him and threw him to the floor, inflicting serious injury, there being evidence that the plaintiff and the defendant had been drinking intoxicants, and that the latter was chargeable only with implied, as distinguished from actual, malice, *Shoemaker v. Sonju* (1906) 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173;

—where the defendant, finding a tenant, whose term had expired, sick in bed, proceeded to remove the furniture out of the house, and, although he did not touch the person of the tenant, tried "to smoke her out" by removing a stove lid and pouring in water, afterwards locking the door and carrying away the key, *Wood v. Young* (1899) 20 Ky. L. Rep. 1931, 50 S. W. 541;

—where the plaintiff, a woman, was assaulted by the defendant at a public sale, in the presence of a number of persons, the defendant

accompanying the blows with vile epithets, and the provocation being that the plaintiff plucked some flowers which the defendant claimed to own, *Crosby v. Bradley* (1890) 11 Ky. L. Rep. 954;

—where a woman, while scrubbing a floor in the house of a neighbor for whom she was at work, was, without provocation, kicked twice in the side; a verdict for \$385.25 was sustained, although the injuries sustained were not serious, *Rogers v. Foote* (1912) 109 Me. 564, 84 Atl. 643;

—where the plaintiff, a woman, was struck and seriously injured by a blow from the defendant, although he struck the blow in retaliation for her act in kicking him, *Nichols v. Brabazon* (1896) 94 Wis. 549, 69 N. W. 342;

—where the action was for assault in striking the plaintiff, a woman, with a horsewhip, the controversy leading up to the assault arising over the right of the defendant to cross, for his convenience in the work of constructing a highway, a strip of land owned by the plaintiff, adjoining the highway, *Rogers v. Bigelow* (1916) 90 Vt. 41, 96 Atl. 417; for other cases involving the use of whips in the assault, see VIII. b, *supra*;

—where there was evidence that the defendant maliciously struck the plaintiff, a woman, over the head with a pitchfork handle, *Jessee v. Kenney* (1921) — Mo. App. —, 229 S. W. 219; as to use of pitchfork, see also *Hinton v. Muhlman*, under VIII. b, *supra*;

—where a woman in delicate health was caught by the wrists and jerked from the door to the ground, a distance of two steps of 8 inches each, and seriously injured, when she refused to allow the defendant to enter the house, the controversy arising over business matters, *Willet v. Johnson* (1904) 13 Okla. 563, 76 Pac. 174;

—where the defendant hugged and kissed the plaintiff, a married woman, against her will, a verdict for \$700 being held not excessive, *Ragsdale v. Ezell* (1889) 20 Ky. L. Rep. 1567, 49 S. W. 775;

—where the manager of a store wrongfully, and in a public and

forcible manner, searched a saleswoman for money which he claimed she had received from a customer and placed in her pocket, *Kress v. Lawrence* (1908) 158 Ala. 652, 47 So. 574.

And in various cases involving indecent assaults on females, exemplary or punitive damages have been recovered, or the case has at least been regarded as a proper one for the allowance of such damages.

Arkansas. — *Davis v. Richardson* (1905) 76 Ark. 348, 89 S. W. 318.

Connecticut. — *List v. Miner* (1901) 74 Conn. 50, 49 Atl. 856.

Illinois. — *Dickey v. McDonnell* (1866) 41 Ill. 62; *Palmer v. Baum* (1905) 123 Ill. App. 584; *Hidden v. Baker* (1914) 190 Ill. App. 561.

Iowa. — *Mallett v. Beale* (1885) 66 Iowa, 70, 23 N. W. 269.

Michigan. — See *Elliott v. Van Buren* (1875) 33 Mich. 49, 20 Am. Rep. 668 (see Michigan decisions under II. e, supra).

Minnesota. — *Gardner v. Kellogg* (1877) 23 Minn. 463.

Missouri. — *Pierce v. Carpenter* (1896) 65 Mo. App. 191; *Mohelsky v. Hartmeister* (1897) 68 Mo. App. 318.

New York. — *Cook v. Ellis* (1844) 6 Hill, 466, 41 Am. Dec. 757; *Whitney v. Hitchcock* (1847) 4 Denio, 461 (holding, however, that exemplary damages could not be allowed in an action by a father for the loss of the services of his daughter).

Vermont. — *Newell v. Whitcher* (1880) 53 Vt. 589, 38 Am. Rep. 703; *Parker v. Coture* (1890) 63 Vt. 155, 25 Am. St. Rep. 750, 21 Atl. 494 (rule assumed); *Niebyski v. Welcome* (1919) 93 Vt. 418, 108 Atl. 341.

Where the evidence showed that the defendant and others, after drinking intoxicating liquor, went to the home of the plaintiff and her husband, after midnight, and called out the husband, after which the defendant entered the plaintiff's bedroom and made an assault upon her, it was held that "where an assault is wilful and wanton, it is not necessary to prove actual damages in order to recover exemplary damages," and that a judgment for \$1,000 damages was not

excessive. *Hidden v. Baker* (1914) 190 Ill. App. 561.

But in *Palmer v. Baum* (1905) 123 Ill. 584, it was held that the case was not one in which exemplary damages should be allowed, where the seduction was not accomplished by force or fraud, but was of a mature person, whose conduct amounted almost to an invitation to the defendant to commit the act.

And in *Wolf v. Trinkle* (1885) 103 Ind. 355, 3 N. E. 110, the doctrine that exemplary damages cannot be allowed for an assault and battery for the reason that such acts are punishable criminally, and that to subject the defendant to exemplary or punitive damages in the civil action would, in effect, result in double jeopardy (see III. a, 2, supra), was applied to a case of deliberate assault on a married woman at her home in the nighttime, in her husband's absence.

As to sufficiency of allegations in petition to warrant punitive damages for an indecent assault, see *Pierce v. Carpenter* (1896) 65 Mo. App. 191, and *Mallett v. Beale* (1885) 66 Iowa, 70, 23 N. W. 269, under VII. b, supra.

Where there was nothing of a malicious or premeditated character about the assault, although there was evidence that the defendant had struck the plaintiff, a woman, on the mouth, but the evidence was conflicting as to the force and nature of the blow, as well as regarding the provocation, the court, in *Steeve v. Smith* (1910) 153 Ill. App. 630, held that the jury was not warranted in awarding vindictive damages.

An instruction permitting an award of exemplary damages if the jury found that the defendant treated the plaintiff "with reckless violence and indignity" was held sustained by evidence that the plaintiff refused to admit the defendant into her house during her husband's absence, and that he forcibly raised a window with the apparent purpose of effecting an entrance, struck at her three or four times through the window, and effected a violent blow from which she suffered for several weeks. *Thillman v. Neal* (1898) 88 Md. 525, 42 Atl. 242.

It may be inferred from one of the charges requested that there was evidence that the defendant went to the plaintiff's house for the purpose of identifying certain property to the sheriff, and that this was not a case of indecent assault for an immoral purpose.

d. Assaults on children.

As to assaults on minors who are trespassers, see VIII. g, *infra*.

The allowance of exemplary or punitive damages has been considered proper—

—where an adult man seized a fourteen-year-old boy by the throat, threw him on the ground, and struck him five or six blows, the only provocation being that the boy had called the man a liar, in reply to the charge that the former was trying to steal the latter's dog, *Kitteringham v. McClutchie* (1906) — *Miss.* —, 41 So. 65;

—where a saloon keeper, an adult man, enraged because a sixteen-year-old newspaperboy refused to put his newspaper on the table instead of on the floor of the saloon, pursued the boy into the street, struck him such a blow as rendered him almost unconscious, and forced him to return to the saloon and place the paper on the table, at the same time using offensive language toward the lad; in this case a verdict of \$50 actual and \$250 punitive damages was sustained, *Lyddon v. Dose* (1899) 81 Mo. App. 64;

—where there was evidence of an assault made without justification or reasonable excuse on the plaintiff, a sixteen-year-old girl, by which she was thrown down a stairway and severely injured, *August v. Finnerty* (1908) 30 Ohio C. C. 330;

—where an eleven-year-old child, who had been taken by the defendant to raise, was brutally treated by him under the excuse of chastisement, there being evidence, among other acts of cruelty, that the defendant compelled the child in the winter season to remove her clothes out of doors and enter and remain in a trough of ice water, after which, without allowing her to dress, he took her to the house, whipped her, and compelled

her to stand on a hot stove, *Devine v. Rand* (1866) 38 Vt. 621;

—where a fifteen-year-old boy was severely assaulted by the defendant, on the pretext that the former had insulted the latter by vile language, when the evidence sustained the former's contention that the language had been used by another, *Doerhoefer v. Shewmaker* (1906) 123 Ky. 646, 97 S. W. 7;

—where a twelve-year-old boy was assaulted by the defendant, a grown man, in a public park, in the presence of others, without justification or excuse, *Hollins v. Gorham* (1902) 23 Ky. L. Rep. 2185, 66 S. W. 823;

—where there was evidence that the defendant, under pretext of defending his son, who was having an altercation with the plaintiff, a sixteen-year-old boy, struck the latter with a stick while he was stooping down for a stone to throw, the court stating that an instruction should be given, authorizing the jury to award punitive damages, if they believed that the defendant, not in the necessary, or to him apparently necessary, defense of his son, assaulted and beat the plaintiff, and further believed that he did so wantonly and maliciously, *Downs v. Jackson* (1910) — Ky. —, 128 S. W. 339;

—where there was evidence that, because he had cut the defendant's buggy tire, the plaintiff, a sixteen-year-old boy, was seized and knocked down by the defendant, was threatened with imprisonment, and taken before the county judge, *Crocker v. Haley* (1906) 29 Ky. L. Rep. 174, 92 S. W. 574;

—where the defendant, who was quietly reading when the plaintiff, a ten-year-old boy, was pointed out to him on the opposite side of the street as the boy who, fifteen minutes before, had quarreled with his son, crossed the street, seized the boy by the neck, threw him violently against an iron slot machine, and at the same time kicked him, *Perovich v. Domansky* (1911) 231 Pa. 66, 79 Atl. 877.

In *Yazoo & M. Valley R. Co. v. May* (1913) 104 Miss. 422, 44 L.R.A. (N.S.)

1138, 61 So. 449, although there appears to have been a technical assault committed by a railway company's agent on the plaintiff, a youth who had entered the company's office to collect money due him for labor performed, the damages, actual and punitive, which were allowed, appear mainly to have been awarded because of the insulting language used by the agent, it being held that a verdict against the railroad company for \$6,000 would not be disturbed.

e. Assaults by officers.

The case has been considered a proper one for the allowance of exemplary or punitive damages—

—where there was evidence of violence on the part of a game warden in making an arrest for violation of the game law, *Lamb v. Stone* (1897) 95 Wis. 254, 70 N. W. 72;

—where there was evidence that a constable, in executing a process of arrest, committed acts of violence without justification, and indulged in offensive and profane language; an instruction was approved that if the jury believed from the testimony that the parties sought the occasion, under process, to wreak their vengeance on the plaintiffs by harassing and insulting them, they might allow vindictive damages, *Louder v. Hinson* (1857) 49 N. C. (4 Jones, L.) 369;

—where there was evidence that an officer, in executing a writ, which the jury might have found was void, for possession of real property, against a tenant who had defaulted, used excessive force and intimidation, and threatened the plaintiff with a revolver, *Rauma v. Lamont* (1901) 82 Minn. 477, 85 N. W. 236.

f. Assault by one as member of a crowd or mob.

See, in this connection, IV. e, and VII. c, 2, *supra*.

Exemplary damages have been held recoverable, in the discretion of the jury—

—where the defendant, as a member of a mob, assisted in forcing the plaintiff to seek refuge in his own home by threats and hostile demonstrations,

and fired a pistol at him after he reached there. *Saunders v. Gilbert* (1911) 156 N. C. 463, 38 L.R.A.(N.S.) 404, 72 S. E. 610;

—where the plaintiff was tarred and feathered and compelled to leave the county because of his alleged unpatriotic conduct and attitude, especially toward the Red Cross during the late war with Germany, *Walker v. Kellar* (1920) — Tex. Civ. App. —, 218 S. W. 792, later appeal in (1920) — Tex. Civ. App. —, 226 S. W. 796.

But for a case where provocation was considered as sufficient to preclude recovery of punitive damages for shooting into a crowd of boys, which had gathered around the defendant's house at night, for the purpose of annoying him, see *Robison v. Rupert* (Pa.), under VIII. b, *supra*.

And while the action of a vigilance committee which has been formed during an emergency due to a fire, in taking in the nighttime, one who had refused to obey their order to leave town, and punishing him by whipping, is unjustifiable, the motive and causes actuating the committee may be taken into consideration by the jury on the question of punitive damages for such action. *Boyle v. Case* (1883) 9 Sawy. 386, 18 Fed. 880. See VII. c, I, *supra*, as to evidence of motive.

g. Removing trespassers.

See also *Causee v. Anders* (N. C.) *supra*, VIII. b.

The question whether exemplary or punitive damages may be recovered where the alleged assault consists in removing a trespasser from the assailant's property is one which has provoked some discussion by the courts which is not entirely harmonious, but the rule appears to be that while the owner may be justified in his act in attempting to remove the trespasser, his conduct may be so violent, or attended with such circumstances of aggravation, as to show malice, and to render him liable for exemplary damages, although the mere use of excessive force, which would render him liable for compensatory damages, might not, of itself, be sufficient to warrant an inference of malice, so as

to permit and award of punitive or exemplary damages.

The question whether an owner who ejects a trespasser from his premises is liable for exemplary or punitive damages in case he acts wantonly or maliciously is presented in *Kiff v. Youmans* (1881) 86 N. Y. 324, 40 Am. Rep. 543, reversing 20 Hun, 123, where an instruction was held erroneous to the effect that if the defendant exercised more force than was necessary to prevent the plaintiff from completing his trespass, the plaintiff would be entitled to a verdict for compensatory damages, and that, in case the jury found that the defendant's acts were wanton and malicious, they might, in addition to compensatory damages, return a sum by way of punitive or exemplary damages. The court took the view that while a landowner, in removing a trespasser, might take the opportunity, under pretense of right, to inflict on the trespasser a wanton and malicious assault, yet this instruction was erroneous because "the attention of the jury was not directed to such a question. They were not asked to inquire whether this was, in fact, the purpose of the defendant. If it had been, and they had so found, it is not necessary to deny that, under adjudged cases, the charge, in the respect objected to, could be upheld. But, on the contrary, it was assumed that the object of the defendant was to stop a trespass, and restrain a trespasser. Yet the jury might well have understood the charge as applying to the whole procedure of the defendant, and to the motive with which any degree, as well as the excessive force, was applied. In that aspect it is clearly erroneous."

And the decision in *Kiff v. Youmans* (N. Y.) *supra*, apparently supports the proposition that (abstractly considered) the mere use of excessive force by the landowner in removing a trespasser is not in itself sufficient to show malice, so as to justify an award of punitive damages, and that for this reason also the instruction above referred to was erroneous. The court said: "Let us take another view of the charge. Assume that it relates

simply to the excess of force, and that the jury were called upon to determine whether it was applied wantonly or maliciously. Still the intention of removal was lawful, and the injury was done in executing it. The wilful and deliberate act of the plaintiff, which constituted him a trespasser, was its proximate cause. . . . Yet it must be conceded that the defendant was nevertheless bound to confine the force used by him to reasonable limits, defined by the necessity of the case. If he used more, he became responsible for all consequences of the excess . . . ; or, to present the point more distinctly, let us concede for that purpose that, inasmuch as the law gave authority to the defendant to repel with only necessary force the intruder, he, by excess, abusing that authority, became a trespasser *ab initio*. It still remains that the plaintiff provoked the trespass, was himself guilty of the act which led to the disturbance of the public peace. . . . If satisfaction is to be made for the breach of public order, it is not due to him, for his own wrong is the consideration upon which it stands, and for that he cannot be allowed to profit. Otherwise he would receive compensation for damages occasioned by himself. Yet we have this spectacle before us,—a fine laid upon the defendant that the rights of others may be respected, and its payment ordered, not into the public treasury, but the hand of the first aggressor. The law is careful and exact in its dealings. It denies compensation to him who, by his own negligence, contributed to injuries from which he suffers. Much less will it allow one who excites public disorder to profit by punishment imposed upon his adversary for the protection of the community. In offending the plaintiff came first. If he had kept the peace there would have been no second. It would very much impair that sense of security which grows out of the legal right to hold and enjoy property, and defend by reasonable force its possession, if the owner, when his rights are invaded, was required to answer not only for a failure to measure with

precision the degree of strength applicable to the aggressor, but respond to him in a civil action according to the estimate which a jury, influenced by the impassioned appeals of private counsel, might place upon the value of public order."

It was said in *Maloney v. McAlpin* (1914) 147 N. Y. Supp. 453, that there can be, as a general rule, no punitive damages for ejecting a trespasser; that in such cases, where excessive force is used, compensatory damages only may be awarded. In this case it was held that an instruction authorizing punitive damages was erroneous where the evidence showed that the defendant did not strike the plaintiff, who was in the position of a trespasser at the time, but grabbed her by the arm and shook her.

So, it was held that, while there was a technical assault and battery, only nominal damages could be recovered, and that there was no basis for the imposition of exemplary damages, where a tenant sublet to another, in violation of the conditions of the lease, and a guest of the latter was dispossessed by the owner without legal process, the landlord's agent in such dispossession taking the visitor by the arm and leading him off the premises, but causing no physical hurt. *Shaffer v. Austin* (1904) 68 Kan. 234, 74 Pac. 1118.

And an instruction which authorized the jury to award exemplary damages for a merely negligent exercise of a right to eject the plaintiff, a servant, from the defendant's hotel, after she had refused to go, upon the latter's request, was held erroneous in *Noonan v. Luther* (1907) 119 App. Div. 701, 104 N. Y. Supp. 684. The instruction was that if the assault was wanton, malicious, and attended with insults or oppression, or there were aggravating circumstances, or if the defendant "was guilty of culpable negligence," the jury might allow a further element of damage as smart money.

But the fact that the alleged assault occurred in attempting to remove a trespasser from the defendant's land was held, in *Morely v. Dunbar* (1869)

24 Wis. 183, not to preclude recovery of punitive damages if the assault was malicious. In this case the plaintiff, a woman, was on unclosed land of the defendant, picking berries, and the defense was that the defendant had used no more force than was necessary to compel the plaintiff to leave after ordering her to do so. The court said that if the defendant was actuated by malice, even if provoked, he might still be compelled to pay smart money; and approved an instruction that if the defendant inflicted the injuries complained of under circumstances of aggravation, insult, or cruelty, with vindictiveness and malice, the jury was authorized to impose damages over and above actual damages, as a punishment to the defendant and a warning and example to him and others, but that, in deciding whether this was a proper case for exemplary damages, the jury should take into consideration all the facts and circumstances; and that the fact that the plaintiff was on the defendant's premises, gathering his berries, was one of these facts.

And exemplary damages have been regarded as proper—

—where a ten-year-old boy, who was in the defendant's yard, stealing grapes, was seized by the defendant, and carried or thrown over a picket fence, on which he was injured, *Wilmoth v. Bartlett* (1915) 37 R. I. 568, 94 Atl. 427;

—where there was evidence that the defendant deliberately went into his house and secured a gun, and, when within killing distance, shot twice directly at the plaintiff, an unarmed boy, who was a trespasser on his property, and, as on former occasions, had been taking apples, *Lewis v. Fleer* (1906) 80 Pa. Super. Ct. 237;

—where there was evidence that while the plaintiff and other boys were passing through the defendant's yard for the purpose of going from one street to another, without injuring or intending to injure the premises, the defendant, without warning, threw a brick at them, seriously injuring the plaintiff, *Connors v. Walsh* (1892) 131 N. Y. 590, 30 N. E. 59;

—where the plaintiff, who was seeking to interview the defendant, the manager of a cannery, on business, entered the office of the latter without, as he testified, noticing the sign of “no admission,” and was violently attacked by the defendant while he, the plaintiff, was attempting to comply with the order to get out, *Seelye v. Harvey* (1920) — Cal. App. —, 189 Pac. 311;

—where an agent of a railway company used excessive force in ejecting a trespasser, who was attempting to induce employees to strike, *Canfield v. Chicago, R. I. & P. R. Co.* (1894) 59 Mo. App. 354;

—where there was evidence that, in ejecting a workman from his premises, the defendant used excessive force, with little or no provocation, *Moore v. Fisher* (1912) 117 Minn. 339, 135 N. W. 1126;

—where there was evidence that the plaintiff, while engaged in picking berries in an uninclosed woodland on the defendant's premises, was ordered off the premises by the defendant, who pursued her, and kicked her, and struck her with a stick, causing severe injuries, the assault being accompanied with oaths, and with threatening and indecent language, *Morely v. Dunbar* (1869) 24 Wis. 183;

—where excessive and brutal force was used by the defendant in compelling the plaintiff, a woman, to leave his premises, *Jones v. Jones* (1874) 71 Ill. 562.

It was held in *White v. Barnes* (1893) 112 N. C. 323, 16 S. E. 922, that the fact that, at the time the plaintiff was first attacked by the defendant, he was a trespasser, and was removing property claimed by both parties, would not prevent recovery of exemplary damages for a subsequent attack made by the defendant on him after he had been taken in charge by a policeman, and was powerless to defend himself.

h. Unauthorized surgical operation.

It was held that the case was a proper one for the allowance of exemplary damages, where a serious surgi-

cal operation, resulting in the removal of important organs, was performed without the patient's consent, and without the consent of anyone authorized to act for her. *Pratt v. Davis* (1905) 118 Ill. App. 161. It was said: “It is also urged that exemplary damages are only proper ‘when malice, violence, oppression, or wanton recklessness’ are shown. This may be considered as true, if to these words are attached only their precise and technical meaning in the law. It will not do to say that neither malice, violence, nor recklessness was shown on the part of the defendant, because there is no claim that he was actuated by dislike, hatred, or a desire ultimately to injure the plaintiff in what he did. He probably thought, as it is in evidence he said to plaintiff's brother-in-law, that the operation would do no ultimate harm, and might do good. If the act was an unauthorized trespass on the body of the plaintiff,—if it was an act, in other words, in the mutilation of her body, which he knew, or was bound, in the eye of the law, to know, he had no legal right to do,—the absence of such a morally evil intention as is before indicated does not relieve it from the imputation of malice in its legal sense. It was wilful, and the deliberate intention to commit an act which defendant was bound, in the eye of the law, to know was illegal, was there. That makes malice in the legal sense. It was violent, oppressive, wanton, and reckless, in the same sense. To hold otherwise would be to throw around intentional and wilful indefensible acts protection, because of ignorance of the law, which every man is presumed to know, or because of a disposition to ignore and defy the law for ends deemed justifiable by the offender. It could be argued on such a basis that exemplary damages were not proper in a given assault and battery case, because the defendant had chosen to believe his victim would be in the end, morally better for a beating. The law does not approve or tolerate such reasoning. In such a case of intentional disregard of the rights of others, it allows exemplary

damages." The decision is affirmed in (1906) 224 Ill. 300, 7 L.R.A.(N.S.) 609, 79 N. E. 562, 8 Ann. Cas. 197.

IX. Miscellaneous.

The questions whether expenses of litigation may be taken into consideration where punitive damages are allowed, or whether such damages must be limited to the expenses of the litigation, are not peculiar or distinctive to actions for assault and battery, and the authorities thereon are not apparently in accord. Without attempting to state any general rule, attention is called to several cases of assault and battery which illustrate the conflict of opinion on these questions. In Connecticut there are cases of this kind to the effect that the expenses of litigation may be taken into consideration where punitive damages are allowed: See *Welch v. Durand* (1869) 36 Conn. 182, 4 Am. Rep. 55; *Maisenbacker v. Society Concordia* (1899) 71 Conn. 369, 71 Am. St. Rep. 213, 42 Atl. 67 (punitive damages for assault should be limited to the plaintiff's expenses, less taxable costs). To a similar effect as the last case are *Hanna v. Sweeney* (1906) 78 Conn. 492, 4 L.R.A.(N.S.) 907, 62 Atl. 785; *Shupack v. Gordon* (1906) 79 Conn. 298, 64 Atl. 740; *Distin v. Bradley* (1910) 83 Conn. 466, 76 Atl. 991. The same doctrine was applied in an action for assault and battery in *Titus v. Corkins* (1879) 21 Kan. 722. And the rule that the plaintiff's expenses in the litigation are a proper

element of punitive damages for malicious torts is supported by other cases than those involving assault,—for example, *Winters v. Cowen* (1898) 90 Fed. 99, affirmed in (1899) 37 C. C. A. 628, 96 Fed. 929; *New Orleans, J. & G. N. R. Co. v. Allbritton* (1859) 38 Miss. 242, 75 Am. Dec. 98; *Finney v. Smith* (1877) 31 Ohio St. 529, 27 Am. Rep. 524 and *Peckham Iron Co. v. Harper* (1884) 41 Ohio St. 100.

But in *Earl v. Tupper* (1873) 45 Vt. 275, an action for assault and battery, an instruction was held erroneous which permitted the jury to consider the expenses of the suit to the plaintiff for his counsel fees and trouble, outside of taxable costs, and to allow these expenses to him as a part of the exemplary damages. And to the same effect is *Hoadley v. Watson* (1873) 45 Vt. 289, 12 Am. Rep. 197. And see *Howell v. Scoggins* (1874) 48 Cal. 355, and *Fairbanks v. Witter* (1864) 18 Wis. 288, 86 Am. Dec. 765, denying the right of the jury, in assessing punitive damages for assault and battery, to take into consideration the plaintiff's expenses in the prosecution of the action.

In conflict, apparently, with the rule declared by the Connecticut cases cited above, attention is called also to the following, among other, decisions, where the action was for a tort other than assault and battery: *Day v. Woodworth* (1851) 13 How. (U. S.) 363, 14 L. ed. 181; *Kelly v. Rogers* (1874) 21 Minn. 146; *Falk v. Waterman* (1874) 49 Cal. 224. R. E. H.

CHARLES JOHNSON, Respt.,

v.

FOLEY MILLING & ELEVATOR COMPANY, Appt.

Minnesota Supreme Court — October 15, 1920.

(— Minn. —, 179 N. W. 488.)

Sale — seed — warranty.

1. Upon a sale of seed wheat by a particular name, a warranty that the seed was of the kind named arises.

[See note on this question beginning on page 859.]

Headnotes by QUINN, J.

(— Minn. —, 179 N. W. 488.)

Trial—instruction—propriety.

2. An instruction as to what will constitute a warranty that seed sold for seeding purposes is true to name considered, and held to be proper under the pleadings and proofs.

Damages—breach of warranty of seed.

3. A purchaser of seeds under a

warranty of kind is entitled to recover, for the breach of such warranty, the difference between the value of the crop raised from the seed furnished and that of a crop such as would ordinarily have been raised from the seed had it been of the kind as warranted.

[See 24 R. C. L. 263.]

APPEAL by defendant from an order of the District Court for Benton County (Roeser, J.) denying a motion for new trial of an action brought to recover damages for alleged breach of warranty as to kind of wheat furnished by defendant to plaintiff for seed. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Paul Ahles and R. B. Brower, for appellant:

Statements and representations made in connection with sales of personal property may be representations for the falsity of which no action will lie, representations which are fraudulent, and those which are made a part of the contract and known as warranties.

Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139.

Statements made by defendant's agent when the seed wheat was bought for plaintiff did not constitute a warranty.

40 Cyc. 493; Torkelson v. Jorgenson, 28 Minn. 383, 10 N. W. 416.

Mr. J. D. Sullivan, for respondent:

To constitute a guaranty or a warranty, it is not necessary to use the words "guarantee" or "warrant."

Siegel v. Rieboldt, 110 Minn. 344, 125 N. W. 582; Warder v. Bowen, 31 Minn. 335, 17 N. W. 943.

The trial court gave to the jury the correct measure of damages.

Barthelemy v. Foley Elevator Co. 141 Minn. 283, 170 N. W. 513.

Quinn, J., delivered the opinion of the court:

Action to recover damages upon the ground of a breach of warranty as to the kind of wheat furnished by the defendant to the plaintiff, pursuant to a contract between them which contemplated that the wheat was to be used for seed upon plaintiff's farm. The contract was made orally, and, as claimed by the plaintiff, with a warranty on the part of the defendant that the wheat was "genuine Marquis wheat." There was a verdict for the plaintiff for \$296. From an order denying its

motion for a new trial defendant appealed.

The contract for the sale and purchase of the wheat was made under these circumstances: The defendant was engaged in the milling and grain business at Foley, and in the spring of 1915 procured a carload of wheat for sale to the farmers in that vicinity for seed. The plaintiff is a farmer residing near Foley.

Plaintiff contends, and there was evidence offered upon the trial to bear out such contention, that he saw in a local paper an advertisement to the effect that the defendant had Marquis seed wheat for sale; that he then sent his neighbor Benofski to defendant's place of business to procure for him 25 bushels of such wheat for seed upon his farm; that Benofski accordingly went to defendant's place and inquired of its manager, Mr. Feddema, what kind of seed wheat he had; that Feddema replied that it was genuine Marquis wheat, that he bought it for Marquis wheat, and that was what he was selling it for; that Benofski then purchased some of the wheat for himself, and stated to Feddema that he wanted 25 bushels for Johnson (the plaintiff); that Feddema then said, "He can have 25 bushels, and you tell him he has got the genuine Marquis wheat;" that Benofski took the 25 bushels, delivered it to the plaintiff, and at the same time told him what Feddema had said about the kind of wheat it was; that, relying upon such statements as to the kind of

wheat, plaintiff paid the defendant \$1.84 per bushel therefor, and sowed the same upon his farm; that the seed proved not to be Marquis wheat, but produced a bearded variety much inferior in quality and yield than it would have produced had the seed been Marquis wheat, to his damage and loss in the sum of \$535.

In its answer the defendant denies that it ever stated, represented, or guaranteed to plaintiff that the grain procured by him from defendant, if any was procured, was Marquis wheat, or that the plaintiff has suffered damages by reason or on account of any act of the defendant as alleged in the complaint or otherwise.

There is testimony in the record to the effect that Marquis wheat was a beardless variety, and yielded an average of 40 bushels per acre in the vicinity of Foley in 1915; that the plaintiff sowed the seed which he purchased from defendant upon 16 acres of good, new ground, with proper care and cultivation so as to raise a crop; that the crop produced therefrom was not Marquis wheat, but a bearded variety of a very inferior quality and yield.

It is urged upon this appeal by counsel for the defendant: First, that the verdict is not justified by the evidence; second, that the court erred in instructing the jury upon the question as to what constituted a warranty; and, third, that the court erred in instructing the jury as to the measure of damages.

1. The doctrine that a bargain and sale of a chattel of a particular description imports a contract or warranty that the article sold is of that description is sustained by a great weight of authority. *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Dec. 595; *Dounce v. Dow*, 64 N. Y. 411. And where a dealer sells an article, describing it by name the identity of which is not known to the purchaser, he must understand that the latter relies on the description as a representation by the seller that it is the thing described. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep.

13. So, on a sale of seed by name, a warranty that the seed was of the kind named arises. ^{Sale—seed—warranty.}

Ibid.; 35 Cyc. 409; *Gubner v. Vick*, 6 N. Y. S. R. 4; 24 R. C. L. 413; *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. Rep. 916, 81 N. W. 491; *Rauth v. Southwest Warehouse Co.* 158 Cal. 54, 109 Pac. 839; *Gardner v. Winter*, 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136. See note in 37 L.R.A.(N.S.) 80. We think the jury was justified under the evidence and instructions in finding that the defendant warranted the wheat sold to the plaintiff to be Marquis wheat, and that the seed delivered was not of the kind named.

2. The contention that the court erred in defining a warranty can hardly be sustained. After outlining what the claims of the parties were, the court instructed the jury as follows: "To constitute a warranty it is not necessary that the word 'warranty' or its precise equivalent be used, nor is it necessary that it should be in writing. It is enough if the seller definitely undertakes that the thing sold shall be of a certain kind or a certain quality, and any positive statement of fact and not of opinion that this was Marquis wheat, made by Feddema to Johnson in the course of the conversation leading to the sale, which would show that he or the company intended to bind themselves by his statements, and which was understood and relied upon by the buyer, constitutes a warranty."

Again, the court instructed the jury: "If from the evidence you find that certain words were spoken under such circumstances by Feddema, representing the company, that you are satisfied that they were intended and were understood to be that the milling company undertook and contracted that this seed wheat was Marquis wheat, and not another kind, and that plaintiff had the right to understand that this company intended to be bound by it as part of the contract of sale, and that plaintiff believed and relied

upon such statements in making the purchase, then you may find that there was a warranty that this was Marquis wheat. If you believe, however, from all of the testimony, that what was said by the parties there was not intended or taken as a warranty, but as an expression of opinion or so-called trade talk, or that plaintiff bought the grain without relying on what was said, or on his own inspection and judgment, then you must find that the company is not liable."

The instruction, when considered in its entirety, was as favorable to defendant as could be expected. It presented to the jury the real issue in clear and unmistak-

able terms, and in our opinion could have left no room for doubt in the minds of the jurors as to what the legal rights of the parties were.

3. The measure of damages was the difference between the value of the crop raised from the seed furnished and that of a crop such as would ordinarily have been raised from the seed, had it been of the variety contracted for. *Barthelemy v. Foley Elevator Co.* 141 Minn. 423, 170 N. W. 513. There was no error in the instruction given upon this phase of the case.

The order appealed from is affirmed.

Damages—
breach of
warranty of
seed.

ANNOTATION.

Warranties and conditions upon sale of seed, nursery stock, etc.

- I. Distinction between express and implied warranties and conditions, 859.
- II. Implied warranties:
 - a. In general, 860.
 - b. Implied warranty as affected by relation of seller to goods sold, 862.
 - c. Exclusion of implied warranty by express warranty, 865.
 - d. Character of implied warranties:
 1. In general, 866.
 2. As to germinative qualities, 867.
 3. Condition, fitness, suitability, 869.
 4. Variety, 871.
 5. Freedom from noxious weed seed, 875.
 6. Miscellaneous, 875.
- III. Express warranties:
 - a. In general, 876.
 - b. Scope, 878.
- IV. Effect of disclaimer of warranty clause:
 - a. In general, 880.
 - b. Effect of buyer's ignorance of clause, 882.
- I. Distinction between express and implied warranties and conditions.

The language generally employed in
- IV.—continued.
 - c. As affected by distinction between implied warranty and condition, 883.
- V. Measure of damages:
 - a. In general, 885.
 - b. Breach as to germinative quality, 885.
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 - d. Variety, 887.
 - e. Presence of noxious weed seed, 894.
 - f. Miscellaneous, 895.
 - g. Effect of negligence of buyer or failure to mitigate damage, 896.
- VI. Waiver of breach, 896.
- VII. Time of breach as affecting limitation of right to maintain action, 897.
- VIII. Evidence:
 - a. As to warranty, 897.
 - b. To show condition of goods:
 1. In general, 899.
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 3. Manner of cultivation, 900.
 - c. To show breach as to variety, 901.
 - d. To show breach as to noxious weed seed, 902.
 - e. Miscellaneous, 902.
- a contract for the sale of seeds, bulbs, or nursery stock is usually sufficiently descriptive to indicate that the sub-

ject of the sale is a certain variety or species of the article named, destined to be used for agricultural or horticultural purposes. This view of the contract imposes upon the seller an obligation the precise character of which the courts are not agreed upon. In some jurisdictions it is characterized as an express warranty, in others, as an implied warranty, and in still others, as a condition in the nature of an implied warranty. As this obligation on the part of the seller, even when regarded as a condition rather than a warranty, undoubtedly survives acceptance by the buyer as to defects which no practicable inspection would disclose, the distinction is, for many purposes, unimportant, and has been quite generally disregarded by the cases in this country; but as it does affect some practical questions that arise in connection with these contracts, e. g., the question whether such an obligation on the part of the seller is excluded by a clause disclaiming all warranties (see *infra*, IV. c.), attention is called at this point to an explanation of the distinction in an English case, and a further reference to the point will be found *infra*, IV. c. It is to be observed that the undertaking on the part of the seller which is properly characterized as a condition is one which goes to the essential identity of the subject of the sale,—e. g., that the article furnished is rapeseed, or perhaps a given variety of rapeseed,—as distinguished from one which goes to the mere quality of the subject of the sale, e. g., the freedom of the rapeseed from admixture with obnoxious seed the latter obligation, if it exists, is properly characterized as a warranty rather than a condition.

In *Wallis v. Pratt* [1911] A. C. (Eng.) 394, holding that a clause to the effect that the seller gave no warranty, express or implied, as to growth, description, or any other matters, did not relieve the seller from liability, where a different variety was furnished than the seed stipulated for, Lord Loreburn, L. C., said: "If a man agrees to sell something of a particular description, he

cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it, but he may treat the breach of the condition as if it was a breach of warranty; that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty, or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*; but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty."

II. Implied warranties.

a. In general.

Contracts for the sale of seed, bulbs, nursery stock, etc., at least in so far as they may be said to include implied warranties, are sufficiently distinctive to justify consideration independently of contracts for the sale of other articles. Ordinarily the seller is in a better position to know the variety and condition of the goods of the character under consideration, than the buyer is or can be. While, usually, an inspection will enable the buyer of goods to determine whether or not the articles tendered by the seller comply with the terms of his contract, this is not generally true as to seeds, bulbs, and nursery stock. Hence, it is the general rule that the circumstances attending the sale of such goods raise certain express or implied conditions, warranties which do not arise in the usual contracts of sale.

In *Shaw v. Smith* (1891) 45 Kan. 334, 11 L.R.A. 681, 25 Pac. 886, the court said: "The maxim of the common law, 'caveat emptor,' is a general rule applicable to purchases and sales of personal property so far as the quality of the property is concerned;

and under such maxim, the buyer, in the absence of fraud, purchases at his own risk, unless the seller gives him an express warranty, or unless, from the circumstances of the sale, a warranty may be implied. In the present case no express warranty was given, and the question then arises, Was there any implied warranty? At the time when the contract for the purchase and sale of the flaxseed was entered into, such seed was not present so that it could be inspected by the purchaser, and when it arrived and was delivered to him, the defect in the seed was not apparent, and was probably not discoverable by any ordinary means of inspection, and it was not discovered until after it was sowed and when it failed, to germinate. When the original contract for the purchase and sale of the flaxseed was made, the flaxseed was purchased and sold for the particular purpose known to both the buyer and the seller, of sowing it in a field and of raising a crop from it, and therefore this purpose was a part of the contract and demanded that the seed should be sufficient for such purpose. It in effect constituted a warranty on the part of the seller that the seed should be the kind of seed had in contemplation by both the parties when the contract was made. The purchaser had to rely upon the seller's furnishing to him the kind of seed agreed upon, and the seller in effect agreed that the seed furnished should be the kind of seed agreed upon. The entire contract, when made, was executory, and it was to be executed and performed afterward, and to be performed in parts and at different times. The seller was first to furnish the seed, and he did so in about ten days after the contract was made, and of course the seed was to be the kind of seed that would grow. The purchaser was afterwards to sow it and to raise a crop. And afterward the purchaser was to sell, and the seller was to buy, the crop upon certain terms and conditions expressed in the contract. We think there was an implied warranty on the part of the seller that the seed

should be sufficient for the purpose for which it was bought and sold."

Upon this point, in *Moore v. McKinlay* (1855) 5 Cal. 471, the court said: "The plaintiff maintains that the word 'seeds,' thus used, amounts to an express warranty; that it has an express signification, importing an article which will germinate or grow, and that it would be error to apply this term to any seeds not possessing these properties. And second, that, if not an express warranty, the law will imply a warranty, or, in other words, raise the presumption that the article sold is merchantable and fit for the use for which it was sold. At common law, the rule 'caveat emptor' applied to all sales of personal property, except where the vendor gave an express warranty, which is said to be such recommendations or affirmations, at the time of the sale, as are supposed to have induced the purchase. To constitute a warranty, no precise words are necessary; it will be sufficient if the intention clearly appear. During the time of Lord Holt, the doctrine was established that to warrant no formal words were necessary, and therefore a warranty might be implied from the nature and circumstances of the case; and the maxim was thus introduced that a sound price imports a sound bargain or warranty. This doctrine was afterward exploded by Lord Mansfield, since which time it has undergone some modifications in the English and American courts, tending in the former somewhat, and in some of the states of the Union, to the rule of civil law which implies that the goods sold are merchantable and fit for the purpose for which they were bought. The better opinion, however, I think, as deduced from English and American decisions, is that a warranty will not be implied, except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or provisions for domestic use."

In *Ordway v. Olson* (1911) 4 Sask. L. R. 343, it is held that under the Sales of Goods Act, which provides that there is no implied warranty or

condition as to quality or fitness for any particular purpose of goods supplied under contract of sale, except where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, no implied warranty arises on the sale of seed by description, where, although the buyer made known to the seller the purpose for which he required the seed, nothing was said to intimate that he relied upon the skill and judgment of the seller to provide grain suitable for seed.

In *Yandell v. Anderson* (1915) 163 Ky. 702, 174 S. W. 481, the court said that, while a warranty that the seed is reasonably suitable for the purpose for which it is sold may be implied from the circumstances attending the sale, yet the facts under which the sale is made may be such as to repel the implication. Thus, it frequently happens that a purchaser and seller have equal means of knowledge as to kind or fitness of the seed for the purpose for which it is sold, or the seller informs the purchaser that he has no knowledge of the article purchased, or the language used may be sufficient to show that the sale is made with the understanding that the purchaser is to take the goods as they are. "Where the purchaser is so informed, he necessarily purchases on his own judgment and at his own risk. In such cases the doctrine of caveat emptor applies. . . . If this principle of law was applicable to the facts in this case, and we think it was, the instruction on the subject is not erroneous because it nullified the instruction on implied warranty, for, if the facts were true,—and that was a question for the jury,—there was no implied warranty. Nor is there any merit in the contention that the defense set forth in instruction No. 5 was not pleaded. Plaintiff sought a recovery on both an express and implied warranty. Defendants denied the warranty. Under this denial it

was competent for them to show, not only that there was no express warranty, but to establish facts negating an implied warranty, and to have this phase of the case submitted to the jury without a plea to that effect, which, as a matter of fact, would have amounted to nothing more than an affirmative denial."

In *Moore v. McKinlay* (1855) 5 Cal. 471, where seed was sold to be shipped by vessel, and the buyer was requested to open and inspect the same, but declined to do so, and paid for it, and it was afterwards tested and found to be almost wholly worthless, it was held he could not rely upon an implied warranty of merchantability or fitness for the use for which it was sold, since he had an opportunity, but declined, to inspect the seed before accepting it.

b. Implied warranty as affected by relation of seller to goods sold.

A distinction has sometimes been made as to implied warranties relative to seed or nursery stock when sold by the grower, and when sold by a middleman, jobber, or dealer, and in this regard sales by the latter classes of sellers do not so readily raise an implication of warranty of kind, variety, condition, or quality as do sales by a grower.

For example, it has been held that a middleman, ignorant of the character of seed which he is selling, does not warrant its germinative power. *Coleman v. Simpson* (1913) 158 App. Div. 461, 143 N. Y. Supp. 587, subsequent appeal in (1914) 162 App. Div. 335, 147 N. Y. Supp. 865.

Although the seller of seed is a dealer and not a grower, if he elects to repeat as facts statements as to the variety of the seed made to him by the parties from whom he purchased, he is liable upon the statements, if untrue and acted upon to the damage of a purchaser. *Hise v. Romeo Stores Co.* (1921) — Colo. —, 199 Pac. 483.

In *Calhoon v. Brinker* (1907) 17 Ohio Dec. 705, in holding that a seedsman, by giving a packet marked with the name of a variety of seed asked for, did not warrant that these seeds

would grow that variety of plant, said: "It seems to me that the law may be different in the case of a seedsman in a large city, selling and delivering seeds, from what it is where the seeds are bought from a farmer or a gardener who sells what he has grown. Without evidence on the subject, a court must not be blind to the ordinary facts of life, and the fact about the business of a seedsman in a large city is, that he handles chiefly goods which he gets from others; some of them from foreign countries. The evidence in this case is explicit that the defendant did not himself produce these seeds. He said to plaintiff, 'They were raised for me,' in other words, 'I did not produce them; I got them from the producer'—and while it is not of much, or any, importance in this case, it might in some cases be important to determine whether the seeds were sold by a person in the commercial business of selling seeds, or by a gardener or a farmer selling that which he himself produced. The rule manifestly must be different. If one go to a farmer and ask him for certain seeds, the natural inference—the one which the producer has a right to draw—is that the seeds furnished are those which the farmer himself has taken from the squash, and the case would be very different from that of a man who gets his material, perhaps in carload lots, from foreign states and foreign countries. Passing from the character of defendant's business and the manner in which he handles seeds, we come to the subject of the seeds themselves. This is the determining thing in this case. And here we must recognize the facts of vegetable life, even without any evidence. We all know that no human being can take those seeds that were sold and tell what variety of the species they belong to, until the fruit is ripened. We know that no one can tell by simple inspection whether the seed is alive or dead, whether or not it will germinate. We know that farmers in the springtime, in order to know whether or not seed will grow, put some of it in water to see whether or not it will germinate,

or sprout, as they call it. That is the sort of subject-matter that is being dealt with here. It is something of which the life and character are hidden and in mystery. No amount of diligence on the part of any of us would enable us to take these seeds as they were brought into this court room yesterday, and tell what they would produce. In this case a special variety of squash seed was asked for. We all know that varieties are not permanently fixed qualities; that under different conditions of soil and climate they quickly change, if not carefully protected against that. We know, for instance, that if a seed be planted in one lot, and in a near-by lot there be a different variety of the same species, the insects will fly from one to the other and carry the pollen from one to the other; and while one variety is planted, a different variety is produced. Take the ordinary sweet corn that is used for the table, and plant it near a field of common yellow corn, and the first season the sweet corn will deteriorate by the transmission of the pollen, by insects or by the wind, from the other field. Considering the nature of this man's business, considering the nature of the subject-matter with which he was dealing, it seems clear that if all that had been done were what I have thus far enumerated, this court is of opinion there would be no warranty that the product would be 'mammoth golden yellow-bush squash.'"

This distinction, however, is apparently not ordinarily recognized by the courts, and, as shown by the following cases, a strict rule of accountability is enforced against sellers of seeds, nursery stock, etc., without reference to the manner in which they became possessed of the articles they sell for seeding and planting.

For example, in *Buckbee v. P. Hohenadel, Jr., Co.* (1915) L.R.A. 1916C, 1001, 139 C. C. A. 478, 224 Fed. 14, Ann. Cas. 1918B, 88, the court, after reviewing the authorities, added: "We are impressed with no doubt that the doctrine on which damages are awarded for misrepresentation in

the sale of seed is equally applicable to both classes of sale, as upheld in *Randall v. Raper* (1858) 4 Jur. N. S. 662, El. Bl. & El. 84, 120 Eng. Reprint, 438, 27 L. J. Q. B. N. S. 266, 6 Week. Rep. 445; that no substantial distinction exists to authorize one rule of just recovery when a sale is made directly to the grower, and a different and plainly inadequate measure when sold to a dealer for resale to growers of the seed. The seller who gathers and packs the seed for sale is necessarily required to know its variety for the intended use by growers, and his warranty thereof, whether directly made to the grower or to the intermediate dealer for resale to growers, may justly render him chargeable for the damages suffered by the growers, when the circumstances of his sale authorize the inference that the warranty was to be thus carried forward to the growers. Indemnity for misrepresentation so carried forward is within the contemplation of his contract of sale to the dealer, and allowance thereof is not open to the objection of remote or speculative damages. Under the facts above stated, the vendee Marsh undoubtedly stands in the relation of producer of the crop, which he obtained through placing out the seed with the actual growers; and the distinction from the facts involved in *Randall v. Raper* (Eng.) *supra*, arises out of the intervention of Hohenadel as the actual vendee. Although the purchase was made for his use and benefit, such purpose was not disclosed to the defendant in making the contract. Nevertheless the negotiations were entirely with Hohenadel, who drafted and executed the contract on the part of the corporation, and the question whether the defendant understood that the seed, as warranted by him, was to be resold to a grower, as averred in the declaration, does not impress us to be materially affected by such personal relation of Hohenadel in the transaction. The crucial inquiry was of defendant's understanding of such purpose of direct resale to the grower, and thereupon we believe the finding, under the cir-

cumstances in evidence, is not reviewable under the present inquiry. On the other hand, however, we are of opinion that the principle of the rule for this extraordinary allowance of growers' damages requires its limitation, as defined in the above quotation from *Sutherland on Damages*. The warranty direct to the growers imposes such liability *per se*. Not so in the case of sale to a dealer, wherein various interpositions may arise before ultimate sale to growers, all beyond oversight on the part of the original seller; and without his concurrence, either express or implied, for carrying forward the warranty to a grower, we believe the ordinary liability for breach of contract must arise, which does not extend to loss suffered by the grower. So, in making such sale, he may either decline or accept the extraordinary liability involved in a sale to the grower. But if he warrants to the dealer, with the understanding that resale is to be made directly to growers of the seed, he may rightly become bound for the loss thus brought directly within the contemplation of his sale and warranty. The issue raised herein as to such understanding on the part of the defendant in making the contracts must be determined from the evidence, circumstantial or direct, with the burden resting on the plaintiff to establish such understanding as an issue of fact."

In *Sanford v. Brown Bros.* (1913) 208 N. Y. 90, 50 L.R.A. (N.S.) 778, 101 N. E. 797, it is held that where a nursery company sold trees, which it raised in part and purchased in part from other growers, for the purpose of having the same set out for commercial orchards, the buyer was entitled to have trees of the several species named by him furnished by the defendant. The court said: "The defendant upon acceptance of the order undertook to deliver the trees specified by plaintiff and paid for by him. If defendant assumed to fill the order by trees in part purchased from other dealers, the risk was assumed by defendant and not by the plaintiff, and failure on the part of defendant

to deliver the goods ordered and of the quality prescribed, or the delivery of trees other than the trees it agreed to deliver, renders it liable for breach of contract."

In *Cline v. Mock* (1910) 150 Mo. App. 431, 131 S. W. 710, the seller of orange cane seed ordered the same at the request of the buyer, knowing that the buyer intended to use it for seed. The seller, however, was not engaged in the retail seed business, but in the retail hardware business, and ordered the seed simply as an accommodation for the buyer, although he made a small profit on the transaction. Under these circumstances it was held that there was an implied warranty that the seed was true to name, or, as stated by the court, an implied warranty that the seed was suitable for seed, it appearing that the seed was a mixture of cracker corn, broom corn, and various kinds of cane seed so that the crop was worthless.

And see cases referred to *supra*, II. a.

c. Exclusion of implied warranty by express warranty.

It has been held that an express warranty as to quality, etc., of seed, bulbs, and nursery stock, will preclude an implied warranty relative to the same subject-matter.

Thus, in *Slinger v. Totten* (1917) 38 S. D. 249, L.R.A.1917C, 539, 160 N. W. 1008, a provision in a contract for the sale of corn for seed that the seller guaranteed all seed sent out from his house, and that he was willing to guarantee a satisfactory test, with the further provision: "Ten days after you receive the goods will be allowed for you to make a thorough test. Test them any old way you like, and if not satisfied, let me know, and I will refund your money," constituted an express warranty of the germinative power or quality of the seed and excluded any implied warranty in this regard, and that, since it was limited to a test of the seed, where the grower, without testing the seed, planted the same, he could not rely upon a breach of this warranty for damage due to the

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fact that the seed did not germinate and grow. The court said: "It is a well-settled principle of law, as applied to sales, that an implied warranty arises only when there is no express warranty, and that an express warranty always excludes an implied warranty. . . . While the warranty expressed in the contract and the implied warranty contended for by the plaintiff are stated in different language, both warranties relate to the same quality of the seed corn, to wit, to its germinating qualities. The only difference is in the manner of ascertaining the existence of this quality. Under the terms of the contract as set out in plaintiff's amended complaint, he had it in his power to protect himself from any loss whatever, except the trifling expense of testing the corn. He alleges in his amended complaint that he purchased the corn on or about the 1st day of February, and that he did not plant it until between the 11th and 20th days of the following month of May. Had he availed himself of his rights under the terms of the contract, and as defendant urged him to do, by testing the corn within ten days after he purchased it, he would have ascertained that it was not fit for seed, and would not only have been able to return it and had his purchase money returned to him, but could have procured other seed before planting time. Having failed to make the test of the said seed corn, as provided for in the contract, and having planted the same without testing it, he assumed the risk of its germinating qualities, and the defendant was relieved from further liability."

It is proper for the court to submit the case to a jury on the theory both of an express warranty and implied warranty as to the quality and condition of the article. *Totten v. Stevenson* (1912) 29 S. D. 71, 135 N. W. 715. In this case, and upon this point, the court said: "It seems to be generally held, with some exceptions, that there can be no implied warranty of fitness where there is an express warranty upon the same subject; but that rule would not necessarily ren-

der erroneous the instruction in question, as there might exist either one or the other, where the opposite of either one or the other is found not to exist, and both might be considered on the trial of the suit, without finding that both existed. At the time the instruction in question was given, the trial court would not be presumed to know what the finding of the jury might be as to whether or not there was an express warranty. If the jury found there was an express warranty, of course, there could not be an implied one, and the question of implied warranty then ceased to be an issue; but, on the other hand, if the jury found there was no express warranty, then there was evidence in the case sufficient to warrant the court in instructing the jury that, before defendant would be entitled to a verdict under his counterclaim for breach of contract in plaintiff's refusing to receive the corn, he must show that the corn tendered by him to plaintiff was reasonably fit for the purpose for which plaintiff agreed to purchase the same; the evidence further showing that the defendant grew the corn in question, that the same was not present at the place where said contract was made, and was not inspected by plaintiff."

d. Character of implied warranties.

1. In general.

Warranties arising from the sale of seed plants, vines, and nursery stock, are of different kinds. The warranty may be as to variety, or as to condition, germinative qualities, or fitness and suitability. Cases involving these different warranties are herein classified according to the character of the warranty.

The obligation of the seller is based upon the inference that, under a contract of sale of this character, the description is regarded by the parties as an essential term of the contract; hence the seller will be held impliedly to warrant that the articles delivered shall be of the variety indicated by the description, and that they shall be in a condition fit and suitable for use as seed, bulbs, or nursery stock.

For example, under the usual warranty or condition that the seller shall tender an article which in all substantial respects is identical with the article described in the contract of sale, the seller of seed, bulbs, or nursery stock must deliver an article of the variety designated in the contract, and, properly to come within the designation of "seed," the grain delivered must possess germinative properties, and bulbs and nursery stock must be in a condition to grow under ordinary conditions. The presence or absence of these characteristics cannot ordinarily be determined by any inspection available to the average buyer, and hence, whether regarded as conditions or warranties, they survive acceptance. And, as hereinafter pointed out, these warranties are not limited to warranties as to variety and germinative properties, but also include other specific warranties inferred from the obligation of the seller to deliver articles in variety true to the description, and which are suitable and fit for use as seed, bulbs, or nursery stock.

The scope of the warranty depends upon the circumstances of the particular case, as shown by the pleadings and the evidence. In this regard it has been pointed out that the jury may conclude that the warranty or undertaking of the seller did not extend beyond the fact that the grain was of the kind specified, but, in view of the admission in the answer, it may be assumed further that it was furnished for the express purpose of being used for the production of a crop, and hence that by implication, if not expressly, the defendant warranted it reasonably fit for that purpose. *Shatto v. Abernethy* (1886) 35 Minn. 538, 29 N. W. 325.

In *Grisinger v. Hubbard* (1912) 21 Idaho, 469, 122 Pac. 853, Ann. Cas. 1913E, 87, the court pointed out that growers of young fruit trees which are to be sold to persons who desire to cultivate commercial fruit orchards are presumed to produce such trees for the purpose of development into commercial trees,—that is, trees that will produce fruit, suit-

able for commercial purposes,—and that they shall be suitable for the purpose for which they are sold, and of the kind and quality which fulfil the purpose for which they were originally produced, and in such a physical condition that they will grow after being transplanted, if ordinary care and attention are given them in their planting and cultivation; and it will be presumed that the trees are procured for the purpose of growing and developing commercial orchards, and with a belief that the trees are in such a condition that they will grow, if properly planted and cultivated. This being the intention of both the seller and the purchaser at the time the contract was made, the facts raise an implied warranty on the part of the seller that the trees are of the kind and quality indicated, and in a healthy and growing condition at the time they were sold and delivered to the purchaser. The purpose of the parties becomes a part of the contract of purchase and sale, and constitutes a warranty on the part of the seller that the fruit trees ordered and sold are of the kind and in the condition contemplated.

In *Kelly v. Lum* (1913) 75 Wash. 135, 49 L.R.A.(N.S.) 1151, 134 Pac. 819, the court said that "each case depends, of course, somewhat upon its own circumstances, but, where the article sold is of such a character that the purchaser cannot know all of the conditions to which it has been subjected, he must rely as to that upon the representations of the vendor. Hence, where the evidence shows that the buyer made known to the seller the variety of articles desired and the purpose for which they were intended, and the seller claimed to have such articles, and undertook to fill the buyer's order, there was an implied warranty that the articles had not been so far maltreated as to prevent them from growing.

In *Depew v. Peck Hardware Co.* (1907) 121 App. Div. 28, 105 N. Y. Supp. 390, affirmed in (1909) 197 N. Y. 528, 90 N. E. 1158, the court said: "The cases cited by the appellant to the effect that there is no implied war-

ranty of quality, only in exceptional cases, do not apply to the facts presented in this record. The plaintiff paid for, and supposed he was purchasing, a valuable seed of a certain kind, and after the crop partially matured he discovered that he had obtained a worthless kind of seed, and a valueless crop had resulted. He did not get what he bought. If the alfalfa seed had been defective, not up to the standard in quality, there would have been no implied warranty. A purchaser innocently buying seed, the kind of which he cannot ascertain by reasonable inspection, may assume in ordinary circumstances that he is getting what he purchased. The plaintiff knew nothing of alfalfa seed. He was not capable of making a discriminating inspection of it. Whatever inspection he made was fruitless. The evidence shows that the trefoil closely resembles the alfalfa seed. They are very similar in shape and color and size, . . . remarkably like that of the alfalfa in general appearance. Only an expert can distinguish them is the effect of the testimony of Mr. Stewart, the botanist of the state agricultural experiment station at Geneva. The authorities sustain the finding of the jury that there was an implied warranty by the defendant, surviving acceptance that the seed sold the plaintiff was alfalfa seed."

2. As to germinative qualities.

By the weight of authority, the sale of seed to be sowed or planted also raises an implied warranty that the seed possesses at least usual and ordinary germinative qualities, so that, under usual and ordinary conditions, it will sprout and grow. *Shaw v. Smith* (1891) 45 Kan. 334, 11 L.R.A. 651, 25 Pac. 886; *Prentice v. Fargo* (1900) 53 App. Div. 608, 65 N. Y. Supp. 1114, affirmed without opinion in (1903) 173 N. Y. 593, 65 N. E. 1121; *Coleman v. Simpson* (1913) 158 App. Div. 461, 143 N. Y. Supp. 587, subsequent appeal in (1914) 162 App. Div. 335, 147 N. Y. Supp. 865; *Kelly v. Lum* (1913) 75 Wash. 135, 49 L.R.A.

(N.S.) 1151, 134 Pac. 819; *Flick v. Wetherbee* (1866) 20 Wis. 393.

In *Shaw v. Smith* (Kan.) *supra*, the court said: "The maxim of the common law, 'caveat emptor,' is the general rule applicable to purchases and sales of personal property, so far as the quality of the property is concerned; and under such maxim, the buyer, in the absence of fraud, purchases at his own risk, unless the seller gives him an express warranty, or unless, from the circumstances of the sale, a warranty may be implied. In the present case no express warranty was given, and the question then arises, Was there any implied warranty? At the time when the contract for the purchase and sale of the flaxseed was entered into, such seed was not present so that it could be inspected by the purchaser, and when it arrived and was delivered to him the defect in the seed was not apparent, and was probably not discoverable by any ordinary means of inspection, and it was not discovered until after it was sowed and when it failed to germinate. When the original contract for the purchase and sale of the flaxseed was made, the flaxseed was purchased and sold for the particular purpose, known to both the buyer and the seller, of sowing it in a field and of raising a crop from it, and therefore this purpose is a part of the contract and demanded that the seed should be sufficient for such purpose. It, in effect, constituted a warranty on the part of the seller that the seed should be the kind of seed had in contemplation by both the parties when the contract was made. The purchaser had to rely upon the seller's furnishing to him the kind of seed agreed upon, and the seller in effect agreed that the seed furnished should be the kind of seed agreed upon. The entire contract when made was executory, and it was to be executed and performed afterward, and to be performed in parts and at different times. The seller was first to furnish the seed, and he did so in about ten days after the contract was made, and of course the seed was to be a kind of seed that would grow. The purchas-

er was afterwards to sow it and to raise a crop. And afterward the purchaser was to sell, and the seller was to buy, the crop upon certain terms and conditions expressed in the contract. We think there was an implied warranty on the part of the seller that the seed should be sufficient for the purpose for which it was bought and sold."

In *Prentice v. Fargo* (1900) 53 App. Div. 608, 65 N. Y. Supp. 1114, affirmed without opinion in (1903) 173 N. Y. 593, 65 N. E. 1121, it is held that a sale by a grower of wheat for seed raises the implied warranty that it is free from latent defects arising from the manner of cultivation, harvesting, and storing it, and this warranty is breached where, by reason of the seed becoming wet, it was so injured as to affect its germinative properties. The fact that the seller offered the seed at a lower price if the buyer would take it just as it was, without cleaning it, did not affect this implied warranty.

In *Flick v. Wetherbee* (Wis.) *supra*, it was held that a requirement in a lease of a farm on shares that the lessor shall furnish good seed is breached, where the lessor furnishes corn for seed which does not possess sufficient germinative properties to sprout and grow.

In *Coleman v. Simpson* (1913) 153 App. Div. 461, 143 N. Y. Supp. 587, it is held that a sale of seed oats by a dealer, who, the buyer knew, purchased the same upon the market for delivery to him, did not raise an implied warranty as to the germinative property of the oats. In this regard the case is distinguished from other New York cases holding that an implied warranty was raised upon a sale by a grower. Upon subsequent appeal in (1914) 162 App. Div. 335, 147 N. Y. Supp. 865, it was held that, where the seller asserted that the oats were tested oats, this constituted an express warranty which was breached, where it appeared that the oats had been sulphured in order to destroy impurities, since such a treatment also injured, if it did not destroy, the germinative properties of the seed.

When the purchaser of nursery trees makes known to the seller the character of trees desired, and the purpose for which they are intended, the sale to him by the seller raises an implied warranty that the trees are reasonably fit for the purpose for which they are purchased—that they are true to name and will germinate and grow. *Kelly v. Lum* (1913) 75 Wash. 135, 49 L.R.A.(N.S.) 1151, 134 Pac. 819. The court said: "The general rule is that, on a sale of nursery trees for planting, there is an implied warranty that the trees are reasonably fit for the purpose for which they are purchased; that they are true to name and will germinate and grow. In other words, they are warranted to be free from defects arising from negligent cultivation or handling. Each case depends, of course, somewhat upon its own circumstances, but the foregoing is the rule where the article sold is of such a character that the purchaser cannot know all of the conditions to which it has been subjected, but must rely as to that upon the representations of the vendor. Here the evidence shows that the vendee made known to the vendor the character of trees desired, and the purpose for which they were intended; that the vendor claimed to have such trees, and, on the vendee's order, sent to him the trees here in question. We think unquestionably there was an implied warranty that the trees had not been so far maltreated as to prevent them from growing."

But it has been held that where a grower buys a specific article, such as western German millet seed, and such article is furnished him, there is no implied warranty that the seed will germinate and produce good crops, or that it is reasonably fit for the purpose for which it is to be applied. *Gardner v. Winter* (1904) 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143.

In *Jacot v. Grossman Seed & Supply Co.* (1913) 115 Va. 90, 78 S. E. 646, involving a sale of seed by a wholesale house to a dealer, it was held that, where a dealer sold the seed by description and by sample, this did not raise an implied warranty of the

germinative properties of the seed sold, but there was an implied warranty that the seed was of the kind and quality first set out in the contract, and as shown by the sample. The jury were also informed that they must not consider any evidence or statement of any witness as to the failure of such seed to sprout or germinate, except as evidence tending to show that the quality or condition of the seed when delivered, as compared with the quality of the seed sold, with reference to the sample by which the sale was made.

3. Condition, fitness, suitability.

It has also been held that a sale of seed to be sowed or planted raises an implied warranty that it is fit for that use. The warranty in this regard is apparently treated as substantially similar to a warranty as to germinative qualities. *Weller v. Bectell* (1891) 2 Ind. App. 228, 28 N. E. 333; *Shatto v. Abernethy* (1886) 35 Minn. 538, 29 N. W. 325; *White v. Miller* (1877) 71 N. Y. 118, 27 Am. Rep. 15; *Totten v. Stephenson* (1912) 29 S. D. 71, 135 N. W. 715; *Kelly v. Lum* (1913) 75 Wash. 135, 49 L.R.A.(N.S.) 1151, 134 Pac. 819; *Flick v. Wetherbee* (1866) 20 Wis. 393.

The seller of nursery trees impliedly warrants that the trees are sound, healthy, and vigorous. *Kitchin v. Oregon Nursery Co.* (1913) 65 Or. 20, 130 Pac. 408, modified on rehearing in (1913) 65 Or. 27, 130 Pac. 1133. See also (1913) 65 Or. 28, 132 Pac. 956, where the case is presented on a petition to recall mandates involving questions relative to the rate of interest upon judgments.

Where a nursery company is producing and putting upon the market young fruit trees for fruit raising, a sale thereof for such purposes raises an implied warranty that the trees are sound, healthy, and vigorous. *Kitchin v. Oregon Nursery Co.* (1913) 65 Or. 20, 130 Pac. 408.

It has also been held that a sale of seed to be sowed or planted raises an implied warranty that it is in good condition for that purpose. *Shaw v. Smith* (1891) 45 Kan. 334, 11 L.R.A. 231, 25 Pac. 886.

In *Ward v. Valker* (1920) — N. D. —, 176 N. W. 129, it is held that under the Sales of Goods Act of that state a sale by an importer of bulbs to a grower raises an implied warranty that the bulbs shall be of merchantable quality, and fit for the use intended.

In *Frith v. Hollan* (1901) 133 Ala. 583, 91 Am. St. Rep. 54, 36 So. 494, the court said that, on the sale by description of onion sets to a merchant, there is an implied warranty that the sets delivered shall not only answer to the description, but that they shall be salable or merchantable.

An implied warranty that seed sold to a planter to sow for a crop is suitable for that purpose is raised by the transaction. *Moore v. Koger* (1905) 113 Mo. App. 423, 87 S. W. 602; *Kitchin v. Oregon Nursery Co.* (1913) 65 Or. 20, 130 Pac. 408, modified on rehearing in (1913) 65 Or. 27, 130 Pac. 1133, petition recalled and mandate denied in (1913) 65 Or. 28, 132 Pac. 956. The foregoing decisions evidently regarded suitability as being synonymous with the possession of germinative powers or quality, and not as relating to the question as to whether or not the seed was suitable for the land in which the purchaser proposed to sow or plant it. Where the term "suitable" has been used in this sense, it has been held that no implied warranty of suitability is raised by a sale of seed, and that in this regard the purchaser exercises his own judgment and acts at his own risk. *Gachet v. Warren* (1882) 72 Ala. 288; *Gardner v. Winter* (1904) 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143; *Yandell v. Anderson* (1915) 163 Ky. 702, 174 S. W. 481.

In the *Gachet Case* (Ala.) *supra*, the court said, where there was a sale of oats known in the market as "rust-proof oats:" "Though the sellers were dealers in oats, and knew the purpose to which the buyer intended to apply them, there cannot be said to be any express stipulation by them that the oats were suitable for that particular use; nor any implied warranty that for it they were reasonably fit. The kind of oats suitable for his

use, the purchaser selects; he does not rely on the judgment or skill of the seller to select for him. The judgment or skill of the seller is trusted only to providing oats of a designated species. When oats of that species were furnished, not unsalable, unmerchantable, the contract was performed by the sellers. And if there was a warranty or representation by them that the oats were of that species, the warranty or representation was not broken. The oats may not have produced as the buyer expected; his expectations were capable of disappointment, though the sellers kept the contract, made no false representations, and no warranty which was broken."

But under the Sales of Goods Act, which provides that there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract of sale, except where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), no warranty of fitness is implied on the sale of flax for seed, where nothing was said, either by the buyer or by the seller, intimating to the latter that the buyer relied upon his skill and judgment to provide flax suitable for seed, and it appeared that at the time the contract was entered into, the seller agreed to sell to the buyer all the flax he could spare out of the quantity then in his granary, and as to another quantity of flax it was agreed that the buyer was to take it if, after examination, it suited him, and it was delivered to him, and he examined it and said it suited him and that he would take it. Under these circumstances, the court said, there was nothing in the transaction which could be held as indicating that the buyer was relying in the slightest degree upon the skill or judgment of the

seller. *Ordway v. Olson* (1911) 4 Sask. L. Rep. 343.

4. *Variety.*

By the great weight of authority, the sale of seed as of a certain kind—in other words, a sale by description—constitutes a warranty that the seed is of the variety described, and this is especially true where the sale is by the grower. (The undertaking on the part of the seller is in some jurisdictions regarded as an express warranty, in others as an implied warranty, while in others it is regarded as a condition rather than a warranty. The breach of the condition, however, gives rise to an action in the nature of a breach of warranty, and, so far as regards many of the questions raised in this annotation, the distinction is immaterial, as hereafter seen (IV. c); it may, however, be of importance as bearing upon the application of a disclaimer of warranty clause.)

Alabama. — *Gachet v. Warren* (1882) 72 Ala. 288; *Frith v. Hallan* (1901) 133 Ala. 583, 91 Am. St. Rep. 54, 32 So. 494; *Amzi Godden Seed Co. v. Smith* (1913) 185 Ala. 296, 64 So. 100; *Winter-Loeb Grocery Co. v. Boykin* (1919) 208 Ala. 187, 82 So. 437.

Arkansas. — *Kefauver v. Price* (1918) 136 Ark. 342, 206 S. W. 664.

California. — *Rauth v. Southwest Warehouse Co.* (1910) 158 Cal. 54, 109 Pac. 839; *Moody v. Peirano* (1906) 4 Cal. App. 411, 88 Pac. 380.

Florida. — *Vaughan's Seed Store v. Stringfellow* (1904) 56 Fla. 708, 48 So. 410.

Georgia. — *American Grocery Co. v. Brackett* (1904) 119 Ga. 489, 46 S. E. 657.

Illinois. — *Phillips v. Vermillion* (1900) 91 Ill. App. 133.

Kentucky. — *Gardner v. Winter* (1904) 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143.

Massachusetts. — *Edgar v. Joseph Breck & Sons Corp.* (1899) 172 Mass. 581, 52 N. E. 1083.

Minnesota. — *Shatto v. Abernethy* (1886) 35 Minn. 538, 29 N. W. 325; *Barthelemy v. Foley Elevator Co.*

(1919) 141 Minn. 423, 170 N. W. 513; *JOHNSON v. FOLEY MILL. & ELEVATOR Co.* (reported herewith) ante, 856.

Mississippi. — *Grafton Stamps Drug Co. v. Williams* (1913) 105 Miss. 296, 62 So. 273.

Missouri. — *Cline v. Mock* (1910) 150 Mo. App. 431, 131 S. W. 710.

New Jersey. — *Wolcott v. Mount* (1873) 36 N. J. L. 262, 13 Am. Rep. 438, affirmed in (1875) 38 N. J. L. 496, 20 Am. Rep. 425.

New York. — *Passinger v. Thorburn* (1866) 34 N. Y. 634, 90 Am. Dec. 753; *Van Wyck v. Allen* (1877) 69 N. Y. 61, 25 Am. Rep. 136; *White v. Miller* (1877) 71 N. Y. 118, 27 Am. Rep. 13; *Gubner v. Vick* (1886) 42 Hun, 657, 6 N. Y. S. R. 4.

Texas. — *American Warehouse Co. v. Ray* (1912) — Tex. Civ. App. —, 150 S. W. 763.

Washington. — *Kelly v. Lum* (1913) 75 Wash. 135, 49 L.R.A.(N.S.) 1151, 134 Pac. 819.

Wisconsin. — *Ross v. Northrup, K. & Co.* (1914) 156 Wis. 327, 144 N. W. 1124.

England. — *Allan v. Lake* (1852) 18 Q. B. 560, 118 Eng. Reprint, 212; *Wieler v. Schillizzi* (1856) 17 C. B. 619, 139 Eng. Reprint, 1219, 25 L. J. C. P. N. S. 89; *Lovegrove v. Fisher* (1860) 2 Fost. & F. 128.

In *Longino v. Thompson* (1919) — Tex. Civ. App. —, 209 S. W. 202, it is apparently assumed that a sale of seed for a certain variety raises an implied warranty that the seed shall be true to name. A recovery, however, was denied in this case, on the ground that, while the buyer showed that he suffered a loss, yet the evidence offered by him afforded no basis for the computation of such loss.

In *Ross v. Northrup, K. & Co.* (1914) 156 Wis. 327, 144 N. W. 1124, the court said that, leaving any question of usage or custom out of consideration, where a certain variety is called for, and seed is furnished in response to such call, there is a warranty that it is true to description unless the seller advises the purchaser that the sale is made without warranty.

So, in *Gubner v. Vick* (1886) 42

Hun, 657, 6 N. Y. S. R. 4, the court said that the law merely assumed a contract, from the order for a particular kind and quality of seed, that it was as ordered, and would produce the vegetable named.

In *Stewart v. Sculthorp* (1894) 25 Ont. Rep. 544, the court remarked that, if the transaction in question had been a sale of peas for seed, it would have been a condition of the transaction that the seed delivered should have been of the variety represented, and if it was not, the plaintiff would have been at liberty to reject it. If, however, instead of rejecting, the buyer had accepted it, the condition would have become an implied warranty for the breach of which he would have been entitled to compensation.

In *Edgar v. Joseph Breck & Sons Corp.* (1899) 172 Mass. 581, 52 N. E. 1083, in holding it to be a question for the jury whether an implied warranty was raised by a sale of lily bulbs, with the statement by the buyer that he wanted the lilies to be true to name, and the reply of the seller that he would supply him with those true to name, the court said: "When an executory contract is made for the sale of a described article, the correspondence between which and the description cannot be ascertained until after acceptance, words which before are words of description may be found to operate as a warranty after the goods are accepted and the sale is complete. It would work injustice to treat an essential term of the contract as performed or waived at a time when the purchaser still is unable to tell whether it has been performed or not."

In *Wolcott v. Mount* (1875) 38 N. J. L. 496, 20. Am. Rep. 425, it is held that, where the seller asserted, in filling an order for early strap-leaf purple-top turnip seed, that the seed furnished was of a species which the buyer was in search of, and no inspection of the seed would indicate its character, this constituted a warranty. The court said: "The seller in this case asserted, at the time of the sale, that the seed was of a species which

the vendee was in search of. When he made this express assertion, he was aware that the vendee could have no opinion for himself on the subject, for the case states that the seed could not be distinguished by sight or touch. The vendee also knew that the vendor could not be stating the result of his own observation. The facts do not admit of the imperative inference that the assertion of the vendor was mere commendation of his goods, or even that it was the utterance of his view as an expert. If the seller had stated the exact truth, he would have said that he had bought the seed as seed of the specified kind, but that he did not know whether it was so or not. Instead of doing this, he made the positive assertion in question. From such an assertion, under the circumstances in evidence, I think the court, although it was not bound so to do, had the right to infer that there was a warranty."

In *Hoffman v. Dixon* (1900) 105 Wis. 315, 76 Am. St. Rep. 916, 81 N. W. 491, a warranty that the seed sold was rapeseed was held to arise from a sale of seed produced upon the inquiry of the buyer for rapeseed, and weighed out in his presence, neither the buyer nor the defendant being able to distinguish rapeseed from wild mustard seed, and it subsequently appearing, after the seed was sowed, that it was wild mustard seed. The court said: "Neither Hoffman, the clerk, the defendant, nor plaintiff, knew rapeseed from wild mustard seed, and each was wholly unaware of the ignorance of the others. Hoffman purchased the seed relying upon the fact that it was produced by the clerk, and sold to him as what he called for. The seed was delivered at plaintiff's farm, and was there, either by him or by his authority, sowed upon his land. He did not examine the seed, and would not have been wiser if he had, as he was entirely unacquainted with the appearance of rapeseed, as before indicated. He used the seed, relying upon the fact that it was sold as rapeseed. The seed was in fact wild mustard seed. It befouled plaintiff's land to his injury." Under

these circumstances the court said that the question was: "What was the contract between the parties? Upon what did their minds meet? The answer must be that the defendant would sell to the plaintiff rapeseed, and that the seed delivered was of that kind. Opportunity on the part of the plaintiff to inspect does not militate against his right to insist upon the condition of the contract as to the identity of the article delivered being made good, since he relied wholly on his contract, not knowing whether the article he received answered such condition or not, and not being chargeable with negligence because he did not know."

Where oats for seed were sold by description, the description raises an implied warranty that the oats delivered will be true to name, although, at the time of the sale, a sample of the oats was given to the buyer. *Amzi Godden Seed Co. v. Smith* (1913) 185 Ala. 296, 64 So. 100.

In *Hurley v. Buchi* (1882) 10 Lea (Tenn.) 346, it was held that a seedsman who sold to a market gardener a variety of potatoes different from that which was ordered by him was liable in damages to the latter, but it does not appear upon what theory he was held liable.

In reaching the opposite conclusion as to a sale of squash seed, in *Calhoun v. Brinker* (1907) 17 Ohio Dec. 705, the court said: "In this case a special variety of squash seed is asked for. We all know that varieties are not permanently fixed qualities; that under different conditions of soil and climate they quickly change, if not carefully protected against that. We know, for instance, that if a seed be planted in one lot, and in a near-by lot there be a different variety of the same species, the insects will fly from one to the other and carry the pollen from one to the other; and while one variety is planted, a different variety is produced. Take the ordinary sweet corn that is used for the table, and plant it near a field of common yellow corn, and the first season the sweet corn will deteriorate by the transmission of the pollen, by in-

sects or by the wind, from the other field. Considering the nature of this man's business, considering the nature of the subject-matter with which he was dealing, it seems clear that if all that had been done were what I have thus far enumerated, this court is of opinion there would be no warranty that the product would be 'mammoth golden yellow-bush squash.'" In this case the court said: "The law may be different in the case of a seedsman in a large city [as in the instant case] selling and delivering seeds, from what it is where the seeds are bought from a farmer or a gardener who sells what he has grown. Without evidence on the subject, a court must not be blind to the ordinary facts of life, and the fact about the business of a seedsman in a large city is that he handles chiefly goods which he gets from others; some of them from foreign countries. . . ." [As to a farmer, it is pointed out the rule may be different.] "If one go to a farmer and ask him for certain seeds, the natural inference, the one which the producer has a right to draw, is that the seeds furnished are those which the farmer himself has taken from the squash."

In *Rauth v. Southwest Warehouse Co.* (1910) 158 Cal. 54, 109 Pac. 839, it is held that where a grower merely asked for seed barley, and the barley was sold to him under the representation that it had been purchased for use as seed, no implied warranty arose that the barley was of the bearded variety, although that variety of barley was mostly used in the locality where the barley in question was sold. The court said: "If the buyer in terms asks for the particular kind, and the seller purports to comply with his request, he would probably be held to warrant the article as being of that kind, although he may not have made any declaration in words to that effect. In other words, the circumstances may be such as to make the acts of the vendor constitute such a representation. But in this case, we have seen, there was no demand, in terms, for bearded barley. The demand of the buyers was simply for

seed barley, and they were given good seed barley of a kind not shown to be in any way different in quality from the common bearded variety theretofore grown in that locality. There is nothing in the evidence heretofore referred to, upon which to found the conclusion of a representation or warranty that the barley was of the bearded kind, unless we can hold that the jury was warranted in concluding that there was a custom or usage in Orange county, known to defendant, or so notorious that one engaged in the grain business must be presumed to know it, . . . to the effect that, where the word 'barley' was used without qualification, it meant only bearded barley, and did not include beardless barley."

The doctrine of implied warranty of variety is denied in *Lord v. Grow* (1861) 39 Pa. 88, 88 Am. Dec. 504, where the seller replied in the affirmative to the query by the buyer as to whether or not he had good spring wheat for sale. The court said: "We have here the bald question whether, in sales of personal property on inspection, without express warranty, the law presumes an engagement on the part of the vendor that the article sold is of the species contemplated by the parties. . . . The tendency of the modern cases has also been to the doctrine that, in sales of articles in regard to which the seller is presumed to have superior knowledge, there is a warranty that the thing sold shall be in kind what it is represented to be. Illustrations of this are found in sales of wine by wine merchants, of jewels by a jeweler, and of medicines by a druggist. In this class of cases the buyer and seller do not deal on equal terms. . . . The case before us is not one of this character. The wheat was not sold by sample, and neither the contract of sale nor the identity of the article was defined by a bill of parcels, nor was the subject of the contract a manufactured article, ordered and supplied for a particular purpose. True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed

that they are not the same in species. Still, the case is one of a purchase on inspection of an article of which the vendor's means of knowledge were no greater than those of the vendee. . . . To the purchaser of goods on inspection the language of the law is 'caveat emptor.' There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them."

So, in *Kircher v. Conrad* (1890) 9 Mont. 191, 7 L.R.A. 471, 18 Am. St. Rep. 731, 23 Pac. 74, neither an express nor an implied warranty was held to arise from the sale of wheat to a grower as of a certain variety of spring wheat, where it appeared that, prior to the delivery of the wheat, the buyer asked the seller as to whether or not the wheat was winter wheat or spring wheat, and said that he would buy some for seed if he was sure it was spring wheat, whereupon the seller replied that he would write and find out which it was, and at a later date, upon being asked in that regard by the buyer, he replied that he had been informed that it was spring wheat. The court cites and relies upon *Lord v. Grow* (1861) 39 Pa. 88, 80 Am. Dec. 504, as authority for its holding. While the rule is stated in this case that the authorities hold that it is the duty of the buyer to make an inspection of goods, and the consequence of any omission to do so must be suffered by him, yet the statement of facts shows that no inspection of the wheat would enable the parties to determine whether it was spring wheat or winter wheat.

However, the authority of the foregoing as a precedent is considerably shaken by the decision of the same court in *Keeler v. Green* (1915) 51 Mont. 42, 149 Pac. 286, wherein it is held that a warranty that wheat sold was spring wheat arose from the fact of the sale of the wheat as and for spring wheat, the plaintiff not knowing that the wheat was not spring wheat and the defendant knowing, or being in a position with reasonable diligence to have ascertained, that the wheat was winter wheat. The defendant insisted in his defense that a cause

of action was not shown for two reasons: (1) That there was no allegation that the defendant had knowledge of the variety of the wheat he sold; (2) that the declaration attempted to state a cause of action based upon the total worthlessness of the wheat sold, which was negated by an allegation that there was some wheat raised upon the field where this wheat was sowed. The court in overruling these contentions said: "We see nothing in either objection. As to the first, the allegations are clearly sufficient to charge a warranty of character and quality by the seller; it was his duty to know that the goods delivered were of that character and quality, and if they were not the responsibility is his, in the absence of an acceptance with knowledge by the buyer."

5. *Freedom from noxious weed seed.*

A sale of seed to be sowed or planted also raises an implied warranty that it is free from noxious weed seed. *Moore v. Koger* (1905) 118 Mo. App. 423, 87 S. W. 602; *Bell v. Mills* (1902) 78 App. Div. 42, 80 N. Y. Supp. 34; *Carlstadt Development Co. v. Alberta Pacific Elevator Co.* (1912) 4 Alberta L. R. 366, 7 D. L. R. 200.

An implied warranty that alfalfa seed was free from such obnoxious weed seed as trefoil, where the seed of the latter plant resembled the alfalfa seed, was held to arise upon the sale of alfalfa seed to a grower, in *Depew v. Peck Hardware Co.* (1907) 121 App. Div. 28, 105 N. Y. Supp. 390, affirmed in (1909) 197 N. Y. 528, 90 N. E. 1158. The court said: "The plaintiff purchased alfalfa seed and obtained trefoil and dodder in major quantities. The cases cited by the appellant to the effect that there is no implied warranty of quality, only in exceptional cases, do not apply to the facts presented in this record. The plaintiff paid for and supposed he was purchasing a valuable seed of a certain kind and after the crop partially matured he discovered that he had obtained a worthless kind of seed and a valueless crop had resulted. He did not get what he bought. If the alfalfa seed had been defective,

not up to the standard in quality, there would have been no implied warranty. A purchaser innocently buying seed, the kind of which he cannot ascertain by reasonable inspection, may assume in ordinary circumstances that he is getting what he purchased. The plaintiff knew nothing of alfalfa seed. He was not capable of making a discriminating inspection of it. Whatever inspection he made was fruitless. The evidence shows that the trefoil closely resembles the alfalfa seed. 'They are very similar in shape and color and size, . . . remarkably like . . . in general appearance. Only an expert can distinguish them.' . . . The authorities sustain the finding of the jury that there was an implied warranty by the defendant, surviving acceptance, that the seed sold the plaintiff was alfalfa seed."

Under the Sales of Goods Ordinance, a warranty arises from the sale by sample of seed for seeding purposes which is breached by the intermixture of noxious weed seed so that it is not reasonably fit for seeding, and, in this regard, does not correspond with the sample. *Carlstadt Development Co. v. Alberta Pacific Elevator Co.* (Alberta) *supra*.

6. *Miscellaneous.*

Where a grower contracts to raise and furnish seed of a prescribed kind, to be of good growing stock, the transaction amounts to a warranty that seed of good growing stock shall be sown, and that everything shall be done in regard to sowing and caring for the seed that can reasonably be required in the ordinary course of raising seed. No implied warranty is raised, however, that the seed, when raised, shall be good. *Pinder v. Button* (1862) 7 L. T. N. S. (Eng.) 269, 11 Week. Rep. 25.

Aside from the warranty raised by the description of the article, there is also a warranty implied by law that the seed sold is free from any latent defect arising from the mode of cultivation, where the sale is by the grower. *White v. Miller* (1877) 71 N. Y. 118, 27 Am. Rep. 13.

In *Landreth v. Wyckoff* (1901) 67 App. Div. 145, 73 N. Y. Supp. 388, it is said that, upon the sale of seed by a grower to a farmer, there is an implied warranty that it is free from any defects arising from improper and negligent cultivation. The defect in the instant case was due to cross-fertilization.

It has been held that, where the seller agreed that the onions he was selling the buyer were to be in good merchantable condition at time of shipment, and to be screened through a certain sieve, if the defective condition of the onions at the time of their arrival at place of destination was due to defects imputable to the manner in which the onions were grown that season, or to the failure to screen the same, then the seller was responsible therefor; but he was not responsible if it was due to negligence in transportation. *L. J. Upton & Co. v. Reeve* (1918) 123 Va. 241, 96 S. E. 277.

Where fruit trees are delivered late for fall planting, there is no reason or principle which will prevent the seller from taking upon himself the risks and dangers resulting from the late transportation of the trees, and, if he does so, he will be held responsible for damages arising from the unfavorable state of the weather. *Congar v. Chamberlain* (1861) 14 Wis. 258.

The question whether seed furnished was unfit for the purpose contemplated, or failed to fulfil the requirements of the contract where the evidence is conflicting, is for the jury. *Shatto v. Abernethy* (1886) 35 Minn. 538, 29 N. W. 325.

III. Express warranties.

a. In general.

As heretofore suggested, statements by the seller descriptive of seed, bulbs, plants, or nursery stock, or relative to the quality thereof, have been construed in some jurisdictions to constitute express warranties of identity, quality, condition, etc.

For example, in *Coleman v. Simpson, H. & Co.* (1914) 162 App. Div. 335, 147 N. Y. Supp. 865, an assertion

by the seller that seed oats he was selling had been tested was held to constitute an express warranty of the germinative quality of the seed.

And in *Allan v. Lake* (1852) 18 Q. B. 560, 118 Eng. Reprint, 212, it is held that the statement as to the variety in a note for the price of seed where made a part of the contract, constituted a warranty. The court said that if the statement had been limited to an assertion that the seed was turnip seed, then it would, without doubt, be a warranty of the seed being turnip seed, and, in like manner, when defendant described the seed as Skirving's Swedes, he undertook that it should answer that description.

In *Hoffman v. Dixon* (1900) 105 Wis. 315, 76 Am. St. Rep. 916, 81 N. W. 491, it was held to constitute an express warranty where, on application by a grower for rapeseed, the seller informed him that he had rapeseed for sale, and produced and delivered seed which he claimed to be rapeseed. Upon this point the court said: "What was the contract between the parties? Upon what did their minds meet? The answer must be that the defendant would sell to the plaintiff rapeseed, and that the seed delivered was of that kind. Opportunity on the part of the plaintiff to inspect does not militate against his right to insist upon the condition of the contract as to the identity of the article delivered being made good, since he relied wholly on his contract, not knowing whether the article he received answered such condition or not, and not being chargeable with negligence because he did not know. In such a case, the doctrine of implied warranty does not apply, but the doctrine of express warranty does. No particular form of expression or words is necessary to make an express contract of warranty. The word 'warranty' is not necessary to it. An affirmation of the fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant, but upon which he relies in purchasing such article, is as much a binding contract of warranty as a formal

agreement using the plainest and most unequivocal language on the subject."

It has been held to be a question of fact for the jury whether the transaction at the time of the sale of seed, as related by witnesses upon the stand, taken in connection with the printed notices, etc., constituted a warranty, and, if so, whether it was an express or implied warranty. *Coates v. Harvey* (1888) 17 N. Y. S. R. 389, 2 N. Y. Supp. 5. In the foregoing case the jury found that the transaction amounted to an express warranty that the seed was true to name.

In *Shatto v. Abernethy* (1886) 35 Minn. 538, 29 N. W. 325, the evidence was in dispute as to whether or not the seller warranted grain to be genuine Saskatchewan Fife wheat; the written agreement of sale, however, described the wheat as Saskatchewan Fife wheat. Under these circumstances it was held properly a question for the jury to determine whether the wheat was sold as genuine Saskatchewan Fife wheat, and whether or not it was pure, and it being claimed that there was a large per cent of impurities mixed with the wheat, and this also being in dispute, the finding of the jury in favor of the seller was sustained.

In *Brooks v. McDonnell* (1876) 41 Wis. 139, it was held that the trial court properly submitted to the jury the question as to whether or not the representation that hop roots were sound healthy roots, and would grow, was a qualified warranty, or whether it extended to any defect in the quality of the roots or their ability to produce a crop. Upon this point it is said: "The question as to the extent of the warranty is the main one to be considered. And the learned circuit court fairly submitted it to the jury, upon the evidence, to say whether the defendants only represented the hop roots to be sound and such as would grow, or whether the representations made were such as to amount to a warranty that the roots would produce hops of the ordinary quality and yield. It seems to us there was no

error in leaving it to the jury to find, from all the facts and circumstances, what the parties intended by the words, The roots are 'all right and will grow'—whether this language amounts to a warranty of the quality of the roots, their power or ability to produce hops, or whether the warranty only related to the vitality of the roots, and that they would grow. The words are sufficiently broad in their meaning to include quality; and it was for the jury, under the circumstances, in what sense they were understood and used by the parties."

But in *Horn v. Elgin Warehouse Co.* (1920) 96 Or. 403, 190 Pac. 151, where a farmer ordered a quantity of wheat to be used for seed, and the defendant claimed that he was acting as the agent of another, the court said that the transaction did not constitute an express warranty as to the variety of seed sold, and that the sale was distinguishable from the sale of goods by description, where the buyer had not inspected the goods and had no opportunity therefor, since in the present case, he had an opportunity to inspect the seed and to determine for himself the variety and quality, and it did not appear that he was unable, through want of skill or otherwise, to distinguish between "Red Chaff wheat" and other kinds, or that the defendant practised any fraud upon him on that account.

In *Phillips v. Vermillion* (1900) 91 Ill. App. 133, the doctrine is stated that, before a statement descriptive of seed can be held to amount to a warranty, the seller must have intended it, and the buyer must have accepted and acted upon it as a warranty. "The general rule, which we think is too familiar to need a citation of authority in support of it, is that, in order for representations to constitute a contract of warranty, the vendor must so intend them, and the vendee accept and act upon the face of them as such. In truth, such is the initial point in every verbal contract of sale, that the minds of the contracting parties must meet in proffering and accepting the proposition; and while this may be done in various

forms and ways, and may be proved even by circumstances, still the one element, of intention by one and acceptance by the other, is always material to be determined, and if wanting in the mind of either, there is no contract; and, without this evidence of intention, no representations as to character or quality of the thing sold will amount to a contract."

The seller's statement, on the sale of rosebushes, that they are very fine stock, does not constitute a warranty; at most, the words amount to no more than a representation. *Stumpp & W. Co. v. Lynber* (1903) 84 N. Y. Supp. 912.

Nor does the statement by the seller that the trees he was selling were good trees, and if taken care of would make good fruit trees, amount to an express warranty of the quality of the trees. *Brackett v. Martens* (1906) 4 Cal. App. 249, 87 Pac. 410.

In order to be effectual a warranty need not be made at the time of the sale, providing it is based upon a good consideration. For example, where fruit trees were delivered so late in the fall that the purchaser objected to receiving them, and the seller, in order to induce him to accept them, warranted that there was ample time for removal of the trees before cold weather or frost sufficient to injure them, and said that if they should be frozen they would come up uninjured in the spring if properly buried, the warranty is based upon a sufficient consideration. *Congar v. Chamberlain* (1861) 14 Wis. 258.

b. Scope.

In *Western Soil Bacteria Co. v. O'Brien Bros.* (1920) — Cal. App. —, 194 Pac. 72, the seller of seed to be sowed at a certain place and for a certain purpose was held to have expressly warranted that the seed would germinate and grow. The seller contended that even if this warranty was made, and even though it had formed the chief inducement to the buyer to purchase, it was not such a warranty as would be enforceable, for the reason that there are other elements entering into the problem as to whether

seed, however reinforced as to its germinative qualities and however carefully or correctly planted, will germinate and grow to its expected maturity—such as conditions of soil and location, and also the particular climatic conditions of the season of the planting and growth of the seed; which matters would always be beyond the control of the seller. In holding that this contention had no weight in the particular case, the court said: "The difficulty with this contention consists in the fact that, in so far as the matters of soil and location are concerned, the plaintiff knew, at the time said warranty was given, in just what soil and location said seed was to be planted. It was purchased by defendants for planting in growth as a cover crop within their said orchard, which facts were fully known to the plaintiff at the time of said sale. With respect to the seasonal conditions, it is true that this would be beyond the control of the plaintiff; and that, if it could be shown that the seasonal conditions of the particular place where, and time during which, said seed was to be planted and was expected to grow, were abnormal, and that whatever failure there was in said seed to germinate and grow was attributable to such abnormal conditions, this would be a good defense to the enforcement of such guaranty."

It has been held that a complaint alleging that the defendant sold potatoes to the plaintiff, representing that they were a new variety, enormous bearers, etc., did not constitute an allegation that the potatoes were warranted to be a new variety, etc., nor that the defendant agreed that they should be of a new variety, etc., or a contract to deliver potatoes of a new variety. *Fanning v. International Seed Co.* (1895) 89 Hun, 146, 35 N. Y. Supp. 10. The court said: "Suppose plaintiff had known the potatoes were not in fact a new variety, were not enormous bearers, etc., and yet had made the purchase, the allegation in the complaint might be true, but plaintiff would not have been deceived. It is true that proof upon a trial that a vendor represented goods

to be of a particular kind or quality may oftentimes enable a jury to see that the transaction was understood by the parties to be a warranty, or a contract to deliver goods of a specified kind or quality, and render a verdict accordingly. But a representation is not necessarily, perhaps not usually, a warranty. Caveat emptor is the general rule."

Under the Sales of Goods Act, representations by the seller of seed that it is clean and free from noxious weed seed constitute a warranty as to the purity of the seed, where relied upon by the purchaser. *Nargang v. Kirby* (1911) 4 Sask. L. R. 306. So, under the Sales of Goods Ordinance, a sale of grain for seeding purposes, by furnishing a sample of the grain, raises an implied warranty which is breached when the seed contains a noxious weed seed. *Carlstadt Development Co. v. Alberta Pacific Elevator Co.* (1912) 4 Alberta L. R. 366, 7 D. L. R. 200.

A warranty that onion seed sold to a grower is good, fresh, and such seed as will grow, amounts to a warranty that the seed is fresh and genuine and the product of the preceding year. *Ferris v. Comstock* (1866) 33 Conn. 513.

A warranty that hop roots are female roots, and not male roots, is in effect a warranty that the roots will be productive and are suitable for the purpose for which they were purchased. *Schutt v. Baker* (1877) 9 Hun (N. Y.) 556.

Statements or representations that hop roots sold for cultivation were sound, healthy roots, and would grow, and that they were all right, may be found by the jury to constitute a warranty, not only that the roots would grow, but that they would produce hops of ordinary quality. *Brooks v. McDonnell* (1876) 41 Wis. 139. The court said: "There was no error in leaving it to the jury to find from all the facts and circumstances what the parties intended by the words, The roots are 'all right and will grow;' whether this language amounted to a warranty of the quality of the roots, their power or ability to

produce hops, or whether the warranty only related to the vitality of the roots, and that they would grow. The words are sufficiently broad in their meaning to include quality; and it was for the jury to say, under the circumstances, in what sense they were understood and used by the parties. It is said that the growing quality was all the parties talked about, or had in mind, and that whatever was said should be construed as referring to that one thing. It seems to us the question whether or not the statement or representation made by Donohue amounted to a warranty, and, if so, what was included in it, was a proper matter for the determination of the jury."

In *Jacot v. Grossmann Seed & Supply Co.* (1913) 115 Va. 90, 78 S. E. 646, it appeared that the seller affirmed that the seed was of the crop of a certain year, and this statement was intended to influence the buyer as an affirmation of quality, and as such it was relied upon. Under these circumstances it was held that the failure of the seed to germinate was evidence of the breach of the warranty arising from the statement that the seed was fresh, this warranty being based upon the language referred to.

A warranty as to the quality of fruit trees of certain varieties constitutes, among other things, a warranty that the trees will bear fruit of the kind indicated by the name given. *Shearer v. Park Nursery Co.* (1894) 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412.

A warranty that fruit trees are in good condition refers to the quality of the trees and to their capacity to grow, and is breached where the trees furnished are without sufficient vitality to grow. *Wellington v. Frazer* (1909) 19 Ont. L. Rep. 88.

It is not necessary that a warranty relate to the quality, condition, or properties of the article at the time of the sale, but it may be prospective in its operation; as, for example, it may refer to the power or capacity of fruit trees to withstand the action of frost, or to come out of the ground

unharmful in the spring if properly buried during the winter. *Congar v. Chamberlain* (1861) 14 Wis. 258.

Where a consignment of trees, vines, and bushes purchased under a written contract were in poor condition when tendered, and the purchaser refused to receive the same, it is competent for the parties to abandon the written contract and enter into an oral agreement pursuant to which the articles are delivered and accepted, and according to which the purchaser is to pay nothing until such articles prove to be as hardy as other varieties then growing upon the premises; and this oral agreement is a defense to an action by the seller upon the written contract, commenced before it was possible to ascertain the rights of the parties under the oral agreement. *Backes v. Erickson* (1905) 19 S. D. 245, 103 N. W. 21.

IV. Effect of disclaimer of warranty clause.

a. In general.

The decisions are not in harmony as to the effect of a disclaimer of the warranty clause upon the right of the buyer to rely upon an express or implied warranty of seeds, plants, bulbs, or nursery stock. There are several decisions to the effect that a clause of this character will preclude the buyer from relying upon an implied warranty, in the absence of any showing of actual knowledge by the seller of defects in the article sold, or of fraud upon his part.

Thus, in *Kibbe v. Woodruff* (1920) 94 Conn. 443, 109 Atl. 169, the seller furnished peas upon an order for corn, made upon a printed form furnished by him, and containing the clause that he gave no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seed, etc. The peas thus delivered were returned, and the seller sent the corn originally ordered, and it was held that the corn was also received under this disclaimer of warranty clause, and that the buyer could not claim a breach of warranty as to the variety furnished.

And in *Leonard Seed Co. v. Crary*

Canning Co. (1911) 147 Wis. 166, 37 L.R.A.(N.S.) 79, 132 N. W. 902, Ann. Cas. 1912D, 1077, there was a clause in the contract for the sale of seed, to the effect that the seller did not give—that its agents and employees were forbidden to give—any warranty, express or implied, as to description, quality, productiveness, or any other matter of any seed delivered or to be delivered by it, and it was not and would not be in any way responsible for the crops. The buyer admitted that the effect of this clause was to free the seller from all liability as to the seed in question being good or bad, large or small, wrinkled or smooth, black or white, wormy or sound, vital or dead, but claimed that it did not relieve the seller from liability if the seed was not true to name; this contention, however, was overruled by the court. Upon this point it is said: "It was practically conceded on the argument that the clause quoted was intended to exempt the plaintiff from such liability as was sought to be enforced against it under the counterclaim in this action. The concession was advisedly made. The peas to be delivered under the contract were described therein as 'Advancer' peas. But the contract provided that no warranty, express or implied, was given that the peas furnished should be of the description named therein. If the dealer in seed peas can exempt itself from liability for selling bad, wormy, or dead peas to a grower, no good reason is apparent why it cannot go further, and say that it will not be responsible in the event of an intermixture of other peas with the variety agreed to be furnished. Neither of the parties here is under guardianship or incompetent to contract. There is no claim that the contract signed was not the one agreed upon, or that both parties did not fully understand what they were agreeing to. Plaintiff plainly undertook to relieve itself from liability in case of intermixture, and defendant agreed that it should be relieved. It is not claimed that the contract was void because contrary to public law or to public policy, and, if not, effect

should be given to it. The vendee might reject and refuse to receive the peas if they were not 'Advancer' peas, or it might well be that, in the event of the shipment being made in bad faith and with the purpose and intention of committing fraud upon the vendee, an action for damages for the fraud would lie; but we have no such case before us. If it be conceded that the contract is one-sided, it must also be conceded that the parties had a right to make a one-sided contract, if they saw fit."

And in *Calhoon v. Brinker* (1907) 17 Ohio Dec. 705, it is held that a warranty clause printed on the packets of different seeds bought by a grower, to the effect that the seller warranted that all seeds sold by him shall prove to be as represented to this extent: that if they prove otherwise he would replace them, or send other seed of the same value; and also a clause that he used all possible care and precaution to have his seed pure and reliable, but did not warrant or guarantee them, and if the purchaser did not accept them on these conditions, they must be returned at once—constituted the contract between the parties, and precluded a warranty as to the seed being true to name.

And it has been held that, where a nonwarranty clause was printed on a slip and placed inside the package, it was binding upon the buyer and excluded any warranty, express or implied. *Seattle Seed Co. v. Fujimori* (1914) 79 Wash. 123, 139 Pac. 866. This was held to be true in the foregoing case, even though it was not shown that the buyer read the printed matter.

But it has been held that disclaimer of warranty clauses, even though brought to the attention of the buyer, are not effectual to preclude an express warranty given by the seller to the buyer. *Moorhead v. Minneapolis Seed Co.* (1917) 139 Minn. 11, L.R.A. 1918C, 391, 165 N. W. 484, Ann. Cas. 1918E, 481. Upon this point the court said that the defendant cited and relied, on the question of disclaimers of warranty, on a line of cases of which *Ross v. Northrup, K. & Co.* (1914) 156 16 A.L.R.—56.

Wis. 327, 144 N. W. 1124; Blizzard Bros. v. Growers' Canning Co. (1911) 152 Iowa, 257, 132 N. W. 66, and *Seattle Seed Co. v. Fujimori* (Wash.) supra, may be taken as typical, and added: "Some of the cases of this character bear upon the question of an implied warranty that what is sold is true to variety or tradename. Here, there is no question of implied warranty. The cases do not go so far as to hold that, if an express warranty is made, its effect is obviated by the use of letters, or invoices, or shipping tags, on which disclaimers are printed. We would not expect such a holding. These disclaimers are evidentiary in support of the defendant's contention. That far, they should have effect. They are not conclusive. If a warranty was actually made during the negotiations, and not withdrawn or modified, it should be given effect irrespective of the printed disclaimers."

So, in *Ward v. Valker* (1920) — N. D. —, 176 N. W. 129, it is held that if the circumstances anterior to the invoices, which had a disclaimer of warranty clause printed thereon, indicated the existence of a warranty, the printed statement on the invoice did not operate to extinguish it as a matter of law.

In *Howcroft v. Laycock* (1898) 14 Times L. R. (Eng.) 460, a similar clause was held not to relieve the seller from damages for the sale of cabbage seed by name, where the seed furnished was not true to name. The court said that a rational construction must be put on the words relied upon, and the construction desired by the seller was unreasonable. This doctrine was applied in this case, although the seller had bought the seed from someone else, and there was no question of his bona fides.

And it has been held that the liability of a nursery company upon its warranty as to the variety of fruit trees furnished by it is not limited by a provision in the contract that any stock which does not prove to be true to name, as labeled, is to be replaced free, or purchase price refunded. The court said: "The defendant, if it desired to limit liability on its part by

reason of the failure to furnish and deliver to plaintiff the trees purchased by him as specified, could have provided in the contract for liquidated damages, or, by language unmistakable in terms and susceptible of comprehension by the purchaser, it might relieve itself from any liability. . . . The defendant failed either to limit or avoid liability by the terms employed in the agreement of purchase and sale. The language used by it is susceptible as an inducement to a sale of its goods or as an additional promise upon its part, but cannot be construed as a limitation of liability for a breach of contract." *Sanford v. Brown Bros. Co.* (1913) 208 N. Y. 90, 50 L.R.A. (N.S.) 778, 101 N. E. 797.

b. Effect of buyer's ignorance of clause.

It has been held that, in order for a disclaimer of warranty clause to have the effect of precluding any warranty, it is not essential that the buyer should have actual knowledge of it, it being sufficient in this regard if the clause was printed upon the package containing the articles, or upon the invoice, or in the catalogue, so that it might have come to his attention.

Thus, in *Ross v. Northrup, K. & Co.* (1914) 156 Wis. 327, 144 N. W. 1124, notwithstanding the fact that the jury found that the buyer was without knowledge of the general custom of seedsmen to refuse to warrant their seed, and the further fact that the buyer had no knowledge or information of any disclaimer printed in defendant's catalogue, or upon its invoices or packages, and that such a disclaimer was not printed upon the package in which the seed was delivered to him, it was held that he was chargeable with knowledge of the fact that the seller refused to warrant the seeds sold, since such disclaimer was printed in the catalogue from which the buyer ordered the goods through a retail dealer, and also on an invoice which it was clear that the buyer received prior to the day of the delivery of the seed. In so holding the court said: "He had the defendant's catalogue before him when he placed the order, and ordered from it. He so

testifies. The defendant knew that he ordered from the catalogue, because one of the two items called for was ordered by the catalogue number. Between the cover and the first page of the catalogue there was a blank order sheet for customers to detach and use in ordering seeds. Immediately above the blank spaces in which the order was to be written was a printed statement to the effect that defendant gave 'no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seed . . . they send out, and will not be in any way responsible for the crop.' On the first page of the catalogue proper there was printed in large type the words, 'General suggestions to customers.' There were a dozen such suggestions made, the first word or words in each instance, indicating the nature of the suggestion, being printed in large, heavy type. One of these headings consisted of the word 'Disclaimer,' so printed, and immediately following it was a statement substantially like the one quoted above. The two packages ordered from the defendant were wrapped in one bundle and shipped by express. One side of the shipping tag contained the name and address of the consignee. On the reverse side there was printed in red ink and in conspicuous type the following words, which were underscored, as indicated: '*Northrup, King, & Company do not give, and their agents are forbidden to give, any warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds, bulbs, or plants they send out, and will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned and money paid for same will be promptly refunded.*' The goods were shipped on April 8th, and were followed by an invoice two days later. There was printed near the head of the invoice a statement like that contained in the catalogue, to the effect that the goods were sold without warranty. In reference to this invoice, the respondent claims that it was not received until after the seed

had actually been delivered to the plaintiff. There is some testimony given by Morton [the retail dealer] to the effect that the invoice was not received until the day after the seed was delivered, and some testimony which would indicate that the seed had not been delivered when the invoice came. We accept the statement that there had been an actual delivery before receipt of the invoice. But what of it? It is not claimed that any use had been made of the seed in the meantime. The relation of principal and agent existed between the plaintiff and Morton. The latter could communicate with the former by telephone; at least, he testified that he telephoned plaintiff when the seed arrived. The invoice was retained without objection; so was the seed; and the seed was thereafter paid for in the usual course of business. Morton testified that he did not read or pay any attention to any of these nonwarranty provisions. If Morton had observed the conditions printed on the invoice, it would certainly have been his duty to inform his principal of them. The defendant having the right to sell without warranty, it seems clear that it did all that could in reason be required of it to advise the purchaser of the condition upon which the seed was sold. Of course, it is easy to imagine other things which it might have done which would be better calculated to give notice; but, if those things had been done, and had proved inefficacious, still other things might be suggested which would surely acquaint Morton with the conditions of sale. The business was transacted by mail. Where the book from which the order was given, the shipping tag, and the invoice all stated these conditions, it would seem to be unreasonable to hold that any blame attached to the defendant, if Morton failed to observe all of these things."

In *Blizzard Bros. v. Growers' Canning Co.* (1911) 152 Iowa, 257, 132 N. W. 66, it is held that the grower could not assert a breach of warranty against the seller, where it was established that a general custom prevailed among dealers in seeds to sell with a

disclaimer of warranty as to quality or variety, and that on all packages it was customarily printed, in effect, that while the seller exercised great care to have all seeds pure and reliable, and true to name, the seeds were sold without any warranty, express or implied, and without any responsibility in respect to the crop, and if the seeds were not accepted on those terms they must be returned at once. The court said that the evidence that a general custom of this character prevailed in the seed trade was conclusive. "The particular package had the printed matter thereon, and, though this may not have been noticed, the sale is presumed to have been negotiated with reference to the general custom of the trade. . . . This being so, a warranty that the seed is true to name could not be inferred, and the court rightfully found in favor of the [seller]."

However, it has been held to be erroneous to instruct the jury that if the buyer saw printed matter on the defendant's billhead, and read it before he purchased, and nothing was said about a warranty, he will be presumed to have contracted with reference to such printed matter, since it is merely a matter of inference whether the buyer considered the printed matter or not. *Amzi Godden Seed Co. v. Smith* (1913) 185 Ala. 296, 64 So. 100.

It has also been held to be a question for the jury whether printed notices disclaiming a warranty, which were put on the packages and billheads and which were called to the attention of the buyer, became a part of the contract of sale and relieved the seller of the effect of the general rule as to warranties. *Coates v. Harvey* (1888) 17 N. Y. S. R. 389, 2 N. Y. Supp. 5.

And the holding has been made that a disclaimer of warranty clause is of no avail to the seller, where it does not appear that the same was brought to the attention of the buyer, and that he purchased in view thereof. *Vaughan's Seed Store v. Stringfellow* (1904) 56 Fla. 708, 48 So. 410.

In order for a disclaimer of war-

ranty clause, which is printed in fine print upon cards placed upon the packages of seed sold, to be regarded as a part of the contract, it must have been assented to by the buyer, otherwise the minds of the parties did not meet; and where the buyer claims that he saw the card, but did not read the fine print, it cannot be held as a matter of law that he was bound to know or understand that it was intended as part of the contract, and hence that he must have read it or have known its contents. *Bell v. Mills* (1902) 78 App. Div. 42, 80 N. Y. Supp. 34.

In *American Warehouse Co. v. Ray* (1912) — Tex. Civ. App. —, 150 S. W. 763, the court said: "The law implied a warranty from the representation of appellant that the seed was of a certain kind, and that implication could not be set aside by testimony of a custom and usage of trade which was not known to buyers. It would present a singular proposition of law if a dealer in seeds should contract to deliver cabbage seed, and should actually deliver radish or turnip seed, and then escape liability on his implied warranty by proof that dealers in seed had adopted a rule or custom not to be bound by any implied warranty. Such a custom would be in contravention of law and justice, and would be null and void."

In *Landreth v. Wyckoff* (1901) 67 App. Div. 145, 73 N. Y. Supp. 388, it appeared that a notice was printed in small type in the upper left-hand corner of the bill which the seller rendered to the buyer, which amounted to a disclaimer of warranty. This notice the buyer claimed that he did not read, and knew nothing of until his attention was called to the same upon the trial. Under these circumstances the court said that, whatever might have been its legal effect if he had become cognizant of its existence and purport before using the seed, it cannot be deemed to have entered into or altered the contract between him and the seed grower under the circumstances.

Notice on invoices of a disclaimer of warranty cannot affect a contract which was previously made by tele-

phone for the purchase of seed. *Longino v. Thompson* (1919) — Tex. Civ. App. —, 209 S. W. 202.

Where the buyer of fruit trees agreed with the seller as to the variety of trees and the quantity, etc., orally, and the seller orally warranted the trees and then induced the buyer to sign an order for the same which the buyer was unable to read, the seller representing to him that it was merely to show to whom the trees were to be shipped, the buyer is not bound by a disclaimer of warranty clause printed in the order. *Woodward v. Rice Bros. Co.* (1920) 110 Misc. 158, 179 N. Y. Supp. 722, affirmed in 193 App. Div. 971, 184 N. Y. Supp. 958.

This case follows, in this regard, *Whipple v. Brown Bros. Co.* (1919) 225 N. Y. 237, 121 N. E. 748, which holds that where an oral contract for the purchase of nursery stock was made between the parties, and the seller then induced the buyer to sign a written order for the same under the representation that it contained nothing but a statement of the varieties and the prices at the time of delivery, the oral contract controlled, and not the written contract.

c. As affected by distinction between implied warranty and condition.

As heretofore suggested, a distinction has been made between a warranty and a condition, and it has been held that a sale by description constitutes a condition rather than a warranty, and hence that the nonwarranty, or disclaimer of warranty clause, does not cover the rights of the parties claiming a violation of the condition. This point is made in *Wallis v. Pratt* [1911] A. C. (Eng.) 394, wherein it is held that a clause that "sellers give no warranty, express or implied, as to growth, description, or any other matters," did not relieve the seller of seed sold by description for planting or sowing purposes, from liability for damages, if the seed delivered was not true to name. Upon this point *Loreburn, Ld. Ch.*, said: "When you are dealing in a commodity the inspection of which does not enable you to distinguish its exact nature,

there are risks both on the buyer and on the seller, if they think fit to sell by description. But if it is desired by a seller to throw the risk of any honest mistake onto the buyer, then he must use apt language." On the same point, Lord Alverstone, Ch. J., remarked that "it is quite impossible to suggest . . . when these parties made a contract whereby they required that the goods should be common English sainfoin, and the sellers put in a stipulation that they would not give any warranty, express or implied, it was intended that it was always to be understood that they were not making themselves liable in regard to any condition as to the goods, or for the consequences of a breach of the condition." Upon this ground it is said that the disclaimer or nonwarranty clause does not apply to the sale of seed by description, since such a sale raises a condition rather than a warranty, and renders the seller liable for breach of the condition, and the clause referred to does not cover such a liability.

V. Measure of damages.

a. In general.

It is clear that the buyer of seed, bulbs, nursery stock, etc., is entitled to recover damages for a breach of warranty as to such articles, where he receives the goods and acts in good faith in the use thereof. Of course, it is his duty to make his loss as small as possible, and hence, if before he planted the seed he knew of defects therein constituting a breach of warranty, he cannot recover damage based upon compensation for the loss of the crop. Generally, however, the measure of recovery is compensation for the loss to the buyer by the breach, if the amount can be ascertained with reasonable certainty and it may be said to have been fairly within the contemplation of the parties as a result of the breach.

Consequential damages are not recoverable by a purchaser who knew of the defective condition of the seed before sowing it. *Oliver v. Hawley* (1877) 5 Neb. 439.

The buyer is bound by the rule of

damages he seeks to have applied, although, as matter of law, he might have recovered under a rule which would have increased the amount of his recovery. *Vaughan's Seed Store v. Stringfellow* (1904) 56 Fla. 708, 48 So. 410; *Crutcher v. McManus* (1891) 13 Ky. L. Rep. 592.

Where the seed is used upon land which the buyer is cropping on shares, he is entitled to recover as damages compensation both for his loss and for the loss of the owner. *Phillips v. Vermillion* (1900) 91 Ill. App. 133. The landowner may also join with the tenant in an action to recover damages for a breach of warranty. *Fuhrman v. Interior Warehouse Co.* (1911) 64 Wash. 159, 37 L.R.A.(N.S.) 89, 116 Pac. 666.

In *Richardson v. Woodruff* (1919) 178 N. C. 46, 100 S. E. 173, it is held that where seed potatoes ordered by a dealer do not comply with the terms of the contract, and on this ground he refuses to receive them, the measure of recovery is the amount that he has paid as a deposit on the potatoes, and in addition thereto he may recover the difference between the contract and market price at the time and place of delivery.

b. Breach as to germinative quality.

It has been held that where, due to defective seed sold for sowing and planting, no crop is raised, the measure of damages for breach of warranty as to germinative condition, or variety, or whatever the defect may have been that caused the crop failure, is the value of the crop which would have been raised that season had the seed been as warranted, without any deduction for the expense of raising the crop, but not including any probable expense for harvesting the crop. *Fuhrman v. Interior Warehouse Co.* (1911) 64 Wash. 159, 37 L.R.A.(N.S.) 89, 116 Pac. 666. To the same effect is *Cline v. Work* (1910) 150 Mo. App. 431, 131 S. W. 710.

So, in *Van Wyck v. Allen* (1877) 69 N. Y. 61, 25 Am. Rep. 136, it is held that the measure of damages for breach of implied warranty that the seed was of the variety designated,

where, owing to the character of the seed, no crop of value was produced from the land, is the value of the crop which would have been raised on the land had the seed been as represented, without any deduction for the labor and expense of producing the crop. Upon this point the court said: "The rule of damages given to the jury was the fair value of the crop that could have been raised had the seed been as asserted, limited by certain inquiries, which, however, do not enter into the defendant's exceptions. We do not understand from the exceptions taken by the defendant, nor from the points presented by him in this court, that the rule of damages laid down in *Pas-singer v. Thorburn* (1866) 34 N. Y. 634, 90 Am. Dec. 753, is questioned by him; so that we are not called upon to consider that case, and to express either concurrence with it or dissent from it. It seems to have been taken at the trial by the defendant as the law of the case. . . . It is a decision, which we may not in this case question, that where seed are sold as, or warranted to be, those of a certain vegetable, and to produce that vegetable, then the vendee, the warranty failing, may recover the value of the reasonably anticipated crop, less the cost of tillage and the value of what was in fact raised. But if he may recover the value of the crop which should be, why, when naught is the product, should the vendee be held to credit the vendor with the lost labor and expenses? That he has expended in this case, and should be remunerated, if he is to have full compensation. He would have been repaid it out of the profits of the crop, had a crop been raised. He will repay it now out of the damages which stand in place of the profits of the crop, if his judgment for them remains unimpaired. If he, having paid it out in futile tillage, is not to have recompense for it, he has lost it once. And, if now he is to deduct it from the value of the crop which that tillage should have produced, he loses it twice. The crop, if raised, would have represented to him all that went into it of time, labor, money, use of land, and ma-

terials. The avails of the crop would have gone to reimburse each of those. He gets in his damages what the avails of the crop would have been, and those damages should go to reimburse each of those items. But if from the damages he deducts them, or either of them, there are no damages to reimburse them, and he loses them entirely. If there had been any part of a crop raised, the value of that, clearly, should have been deducted."

Where the lessor of a farm on shares furnished seed corn that did not possess good germinative powers, and told the lessee, when the latter objected that he was afraid that the corn would not germinate, that he would take the risk, and the crop failed, he is liable for the amount that the proof showed that the value of the crop would probably have been if the seed corn had been good. *Flick v. Wetherbee* (1866) 20 Wis. 393.

It has, however, been held that, when the seed fails to sprout and make a crop, the purchaser is entitled to recover only the actual expense of planting the seed and the rental value of the land; he cannot recover the value of the crop, had the seed been as warranted. *Vaughan's Seed Store v. Stringfellow* (1904) 56 Fla. 708, 48 So. 410. The court said: "Where the seeds bought prove to be worthless, however,—that is, where they wholly fail to germinate or grow after having been planted, and no crop results from the wrong seeds,—the evidence of the probable produce of the right seeds, in the land and the year in question, would be lacking; and the rule that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty. In such a case, therefore, the only damages recoverable are the price paid for the seed, the expenses in preparing the soil for the seed and for planting the same, together with the loss sustained from having his land lie idle for the year,

or for such time as the use of it was lost."

And it has been said that the measure of damages, where seed fails to germinate, is the value of the buyer's labor expended in preparing the ground for the reception of the seed after deducting all general benefits to the land resulting from such labor, and also the value of the labor expended in planting the seed and the sum of money paid in its purchase, together with interest on the several amounts. *Ferris v. Comstock* (1866) 33 Conn. 513.

So, in *Reiger v. Worth* (1900) 127 N. C. 230, 52 L.R.A. 362, 80 Am. St. Rep. 798, 37 S. E. 230, it is held that where no crop was raised from seed which failed to germinate, and the season was too far advanced to re-plant, the measure of damage for breach of warranty of germinative quality is the amount paid for the seed, the expense of preparing the soil and planting the seed, and the reasonable rental value of the land less any amount for which the land might have been rented for some other crop, if any.

When the failure of crop is entire because of failure of germination, the damages should be based on the value of the use, with additions and deductions suiting the conditions of the particular case, and in this regard there need be no market rental value; it is enough if the use value is determined, and this may be based upon the testimony of farmers and others qualified to testify. In other words, the true measure of damage, where there is a total loss of crop arising from failure of seeds to germinate and grow, is the amount paid for the seed, the expense of cultivating and preparing the land for planting or sowing, and a reasonable rent to compensate for the loss of the use of the land. *Moorhead v. Minneapolis Seed Co.* (1917) 139 Minn. 11, L.R.A. 1918C, 391, 165 N. W. 484, Ann. Cas. 1918E, 481. The court said: "The object of the law is to furnish a measure which will give, as near as may be, actual compensation for the breach, and which is free of uncertain, contingent, conjectural, or

speculative elements. When damages are based upon the value of the use of the land, the uncertainty of the amount because of uncertainty of the crop results is eliminated, and they may be assessed forthwith."

It has, however, been held that the measure of damages for breach of warranty as to the germination of seed is the purchase money paid, with interest, and the expenses incurred in hauling the seed, preparing the land for planting, sowing, and tilling the soil, etc., but it does not include loss of prospective planting profits where no fraud is alleged on the part of the seller. *Butler v. Moore* (1882) 68 Ga. 780, 45 Am. Rep. 508.

c. Condition.

In this regard it has been held that, in an action for breach of warranty as to the quality of fruit trees sold by him, it is proper to prove the amount the different kinds of trees added to the value of the land; and the difference between the value thus added by the trees delivered, and the value that would have been added if the trees ordered had been planted instead of those actually furnished and planted, is the measure of the purchaser's damage. *Shearer v. Hart Nursery Co.* (1894) 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412.

Where nursery stock furnished is unfit for use and worthless, the measure of damages is the price paid for the stock. *Weller v. Bectell* (1891) 2 Ind. App. 228, 28 N. E. 333.

d. Variety.

Unless the evidence affords some basis for computing the loss to the buyer due to seed not being true to name, he is not entitled to recover for breach of the implied warranty that the seed shall be true to name. *Longino v. Thompson* (1919) — Tex. Civ. App. —, 209 S. W. 202.

The cases are not entirely clear as to the proper measure of damages for breach of warranty as to the variety of seed or bulbs to be sowed or planted. In some cases, notably *Passinger v. Thorburn* (1866) 34 N. Y. 634, 90 Am. Dec. 753, it is said to be

the difference between the value of the crop which the evidence shows would have been raised had the seed or bulbs been true to name, and the value of the crop actually raised, deducting the expense of raising the crop. If by this is meant that there should be deducted the difference (if any) between the expense of raising the crop actually raised and the probable expense of raising the crop had the seed or bulbs been true to name, it would seem that the application of the rule would secure substantial justice; but it would seem that there could be no tenable ground for deducting the expense of raising the probable crop, unless there was added to the value of the crop actually raised the expense of raising it. The later cases decided by the New York court, as well as those in other jurisdictions, state the rule of damage to be the difference in value between the crop actually raised, and a crop of the variety called for by the contract, such as would ordinarily have been produced in the year in which the seed was sowed.

Arkansas. — *Kefauver v. Price* (1918) 136 Ark. 342, 206 S. W. 664.

Massachusetts. — *Edgar v. Joseph Breck & Sons Corp.* (1899) 172 Mass. 581, 52 N. E. 1083.

Minnesota. — *Moorhead v. Minneapolis Seed Co.* (1917) 139 Minn. 11, L.R.A.1918C, 391, 165 N. W. 484, Ann. Cas. 1918E, 481; *JOHNSON v. FOLEY MILL. & ELEVATOR CO.* (reported herewith) ante, 856.

Mississippi. — *Grafton-Stamps Drug Co. v. Williams* (1913) 105 Miss. 296, 62 So. 273.

New Jersey. — *Wolcott v. Mount* (1875) 38 N. J. L. 496, 20 Am. Rep. 425.

New York. — *White v. Miller* (1877) 71 N. Y. 118, 27 Am. Rep. 13; *Gubner v. Vick* (1886) 6 N. Y. S. R. 4.

Tennessee. — *Ford v. Farmers Exch.* (1916) 136 Tenn. 287, L.R.A.1917B, 1106, 189 S. W. 268.

Texas. — *American Warehouse Co. v. Ray* (1912) — Tex. Civ. App. —, 150 S. W. 763.

England. — *Randall v. Raper* (1858) El. Bl. & El. 84, 120 Eng. Reprint, 438,

4 Jur. N. S. 662, 27 L. J. Q. B. N. S. 266, 6 Week. Rep. 445.

This measure of damages proceeds on a reasonable view that the crop actually raised may rightly furnish the prima facie test of the amount of crop which would have been raised from the stipulated variety, and thus becomes neither speculative nor remote for estimation of damages. This rule, however, as above formulated, imposes the element of direct contract between the seller and the grower of the seed, not present where the sale is to a dealer for resale to growers. *Buckbee v. P. Hohenadel, Jr., Co.* (1915) L.R.A.1916C, 1001, 139 C. C. A. 478, 224 Fed. 14, Ann. Cas. 1918C, 88.

Kefauver v. Price (1918) 136 Ark. 342, 206 S. W. 664, sustained an instruction by the trial court to the jury that, if they found for the plaintiff, they should assess the damage at a sum equal to the difference in the value of the crop raised from the seed sold, and the value of the crop which would have been raised from the seed if it had been of the variety as impliedly warranted.

Where lily bulbs are sold for the understood purpose of raising lilies for a certain market, the measure of damages is the difference between the value of the crop which plaintiff raised from an inferior lily bulb, and a crop of the variety he undertook to purchase. *Edgar v. Joseph Breck & Sons Corp.* (1899) 172 Mass. 581, 52 N. E. 1083.

In *Moorhead v. Minneapolis Seed Co.* (1917) 139 Minn. 11, L.R.A.1918C, 391, 165 N. W. 484, Ann. Cas. 1918E, 481, the court said that, where there is a partial crop or a crop of a different variety than that promised by the warranty, the proper measure of damage is the difference in value between the crop raised and the crop which would have been raised had the seed responded to the warranty. The rule of damages applied in this case was followed and applied by that court in *Barthelemy v. Foley Elevator Co.* (1919) 141 Minn. 423, 170 N. W. 513, as to a breach of implied warranty of variety arising from the sale of seed wheat, the evidence showing that,

while a crop was produced, it was much less in quantity than would have been produced had the seed been of the variety warranted.

Where the seed is sold with warranties that it is true to name, the measure of damages for breach thereof, when it is actually sowed and produces a crop not harmful to the land, but of less value than would have been produced had the warranty not been broken, is the value of the crop such as the seed was warranted to produce, and would ordinarily have produced, less the value of the crop actually raised from the seed purchased. *Grafton-Stamps Drug Co. v. Williams* (1913) 105 Miss. 296, 62 So. 273.

In *Wolcott v. Mount* (1876) 38 N. J. L. 496, 20 Am. Rep. 425, in sustaining the trial court in fixing the measure of damages for breach of warranty as to the variety of seed sold as the difference between the value of the crop produced and the crop which would have been produced if the seed had been as warranted, the court said that the argument that this rule embraces profits, and that the profits are too remote and uncertain to constitute an ingredient in the recompense which the law gives on a breach of contract, comprises a latitudinarian and incorrect statement of the legal rule. "Profits sometimes are not, in a legal point of view, either remote or uncertain. Where the situation of the parties is such that, supposing their attention to have been directed to the contingencies, they must have perceived, at the time of making of the contract, that its breach would probably result in the loss of definite profits, such profits being of an ascertainable nature, the compensation which the law affords the injured party will embrace these profits. . . . The present case falls clearly within the scope of this principle. The defendant at the time of the sale was possessed of all the facts; he knew the business of the plaintiff, and the use to be made of the thing sold. He was in a situation to foresee, with entire certainty, the loss that would fall upon the plaintiff if the warranty should be broken. Nor are

the gains which have been lost subject to any uncertainty. The seed sold was planted and came to maturity; the seed stipulated for would have done the same, only the value of the product would have been, to a definite amount, greater. In such an injury there is nothing speculative or contingent."

On the question of the measure of damages the rule is thus stated in *Vaughan's Seed Store v. Stringfellow* (1904) 56 Fla. 708, 48 So. 410: "The defendant's engagement was that the seed sold was the Arlington white spine cucumber seed and would produce Arlington white spine cucumbers. The natural consequence of the breach of such a warranty would be a crop of cucumbers different in kind and quality from that guaranteed by the defendant. Where, then, the seed produces a crop not harmful to the land, but of a poorer character, or of an inferior quality, and less value than would have been produced had the warranty been fulfilled, the measure of damages is the value of the crop of the true product, such as the seed was warranted to produce and such as would ordinarily have been produced that year, less the expense of raising it."

In *Ford v. Farmers' Exch.* (1916) 136 Tenn. 287, L.R.A.1917B, 1106, 189 S. W. 368, the court said: "There have been developed two rules in respect to damages growing out of the warranting of seed that proved not true to name. The first class of cases, dealing with seeds improperly delivered under the contract that are of such quality that no crop is produced, announces the restrictive rule that there is no proper basis for the allowance of expected profits and damages. The rule in such case appears to be that the items of damages recoverable are those of actual outlay, such as the price paid for the seed, the expense of preparing the soil to receive the seed (less general benefit to the land therefrom), the expense of planting, and the loss sustained from having the land lie idle for such period of time as the use of it was lost. . . . The other and more liberal rule is applied

in cases where the defective seeds germinate and produce a crop that is inferior in quality and value to the one that would have been produced in the same circumstances had the seed been as warranted. In such case, by an almost unbroken line of authorities in England and America, there is held to be a reasonable basis on which to estimate the profit that would have been made had the seed been of contract quality. It is held that this basis is found in the certainly ascertainable value of the crop actually produced, the court having only to estimate the difference in value between that crop and the value of the crop that would ordinarily have been produced under the same circumstances if seed true to name had been supplied by the seller. The loss is held not to be conjectural, and the damages not to be speculative or beyond the contemplation of the contracting parties."

The rule is thus stated in *American Warehouse Co. v. Ray* (1912) — Tex. Civ. App. —, 150 S. W. 763: "The weight of authority seems to be that, where seeds of a certain family are sold and represented to be of a certain variety of that family which would in their natural development produce crops of greater value than would seeds of the same family which were delivered, the purchaser can recover not alone the difference between the value of the seeds delivered and those contracted, but the difference between the value of the crop produced from the seed delivered and the value of the crop that would have been produced from the seed contracted. . . . The rule would obtain whether the warranty was express or implied."

Upon this subject in *Randall v. Roper* (1858) 4 Jur. N. S. (Eng.) 662, Lord Campbell, Ch. J., said: "It has been contended that if the plaintiff had paid to the subpurchasers the full amount of the damages which they have sustained from the breach of the warranty, still he would not have been entitled to recover them. A true rule on the authorities is that the plaintiff must show that the damage which he seeks to recover naturally arose from

the breach of contract complained of. In this case the damage sustained by subpurchasers was the natural—yea, the necessary—consequence from the breach of contract by the defendant. The defendant sold the barley with the warranty that it was 'Chevalier's barley;' if it was not, it would not, when sown, produce grain of that quality, quite independently of soil or climate. The difference in value between the inferior crop grown, and that which would have been produced if the seed had been as warranted, is the natural and necessary loss from the breach of the warranty. Therefore, the defendant having warranted the barley as 'Chevalier's seed barley,' if the plaintiff had been sued by the subpurchasers he would have been obliged to pay damages to that extent, and these he would have been entitled to recover from the defendant. But the main point brought before us is whether the plaintiff can recover as damages an amount which he has not paid to the subpurchasers, and for which they have only made claims not enforced by legal proceedings. We cannot lay down a rule that a mere liability, which has not been enforced, will not give a right to recover damages. Cases of extreme hardship might occur if such were the rule, and no authority has been cited to show that a liability to pay damages is not enough to sustain a right to damages." Justice Wightman in concurring said that he had "no doubt on the principle enunciated, and that, if the claims of the subpurchasers had been paid by the plaintiff, he might have recovered them from the defendant." But he does express a doubt whether recovery is authorized for a claim of damages neither paid nor liquidated, with the remark, however, that he did not press this doubt further than to mention it.

According to the syllabus of the court in *Dunn v. Bushnell* (1902) 63 Neb. 568, 93 Am. St. Rep. 474, 83 N. W. 693, where seed is purchased on a warranty that it is of a certain kind and quality, and such seed proves to be of an inferior kind and quality, and is planted without the knowledge of

the inferior quality, the value of the crop such as should have been produced by the seed if it had conformed to the warranty, deducting the expense of raising the crop and the value of the one in fact raised, is a proper measure of damage for the breach of such warranty.

In an early New York case it was held that the seller could not complain of the rule that, for a breach of warranty as to the variety of seed sold, the measure of damages is the value of a crop of the variety represented, such as ordinarily would have been produced that season, deducting the expense of raising the crop, and also the value of the crop actually raised from the seed sold. *Passinger v. Thorburn* (1866) 34 N. Y. 634, 90 Am. Dec. 753. Upon this point the court said: "The counsel for the appellant insists that the judge at the circuit erred in refusing to charge that the contract must be the result of the minds of both parties meeting and agreeing, and, unless the defendant intended to make a contract that he would pay for the crop in case of its failure because of the bad quality of the seed, he cannot be made liable to such damages. To the refusal to charge both branches of this proposition there is a general exception. If the counsel had intended to designate the contract of warranty as that upon which the minds of the parties must have met, he was undoubtedly correct in the position; but this is evidently not what he meant. He alludes to the contract mentioned and referred to in the second branch of his proposition; that is, that unless the defendant intended to contract that he would pay for the crop in case of failure of the seed to produce the crop warranted, he cannot be made liable in damages. The authorities cited are abundant to show that the defendant must be held responsible for the natural consequences of the contract which he did make, and the legal responsibilities following therefrom, whether he intended to be so liable or not. Ignorance of the law and of the legal effect of the contract made by him cannot excuse him from

its performance. The law assumes that both parties entered into the contract with full knowledge of the legal rights and duties resulting therefrom; and whether either of them intended to be thus bound cannot be a subject of proper inquiry. The judge, therefore, justly refused to charge as requested. The supposition of defendant as to the use plaintiff intended to make of the seed was wholly immaterial. The defendant's liability is to be tested by the fact whether he made the warranty, and whether there was a breach; and the extent of that liability, if these two preliminary positions are established, was what sum was necessary to compensate the plaintiff for the loss he had sustained by the article sold not being of the quality warranted. The judge, therefore, properly refused the charge that the extent of defendant's liability, or the rule of damages to be applied, depended in any manner upon the supposition of the defendant as to the use the plaintiff intended making of the thing sold."

So, in *Landreth v. Wyckoff* (1901) 67 App. Div. 145, 73 N. Y. Supp. 388, it is held that it was error for the trial court to submit the case to the jury upon the question of damages, where he did not instruct them that, in fixing the amount of damages they should take into consideration the expense of raising a crop of the variety contracted for, and such as might have been produced by good seed.

The *Thorburn Case* is referred to in *VanWyck v. Allen* (1877) 69 N. Y. 61, 25 Am. Rep. 136, and, after pointing out that the court did not understand from the exceptions taken by the defendant, or from the points presented by him, that he questioned the rule of damages laid down in the *Thorburn Case*, and hence that it was not called upon to consider that case, or express either concurrence with it or dissent from it, it is remarked that that case did not undertake to fix the limits of the rule on all sides; that the question presented for review upon appeal was whether the rule of damage stated was unjust to the sell-

er, not whether the buyer might have complained of it.

In *White v. Miller* (1877) 71 N. Y. 118, 27 Am. Rep. 13, the Thorburn Case is also referred to as authority for the rule that the measure of damage was the difference in value between the crop raised from the defective seed and a crop such as would ordinarily have been produced that season, had the seed been true to name.

Depew v. Peck Hardware Co. (1907) 121 App. Div. 28, 105 N. Y. Supp. 390, affirmed in (1909) 197 N. Y. 528, 90 N. E. 1158, holds that the proper measure of damage where seed is defective in that it contains seeds of another kind,—in other words, for a breach of warranty as to variety,—and no crop of value is raised, is the difference between the value of the crop actually grown and the value of the crop which would have been produced had the seed been of the kind warranted. The court said: "Alfalfa is called a perennial plant. It produces for many years without reseeded or cultivation. Three crops may ordinarily be cut each year. No crop is expected the year of the seeding. The plaintiff proved by competent witnesses the probable quantity and also the value of the crop which would have been raised the second year if the seed had been as the plaintiff had the right to expect he had purchased. He then gave proof that the product which he cut was of no value. Believing that the prevalence of the trefoil and dodder would destroy the alfalfa, he plowed the land and fitted it anew, and reseeded it with alfalfa. He proved the cost of this labor and the seed. These were the two items of damages which were submitted to the jury. There can be no doubt that the primary rule of damages applicable to cases of this kind is the difference in value between the crop actually grown from the defective seed, and that which would have been produced had the seed complied with the guaranty. . . . The plaintiff gave evidence which tended to show the cutting was of no value. The defendant gave no proof upon that subject. There was, therefore,

nothing to deduct in that item from the value of the crop which would have been raised from unmixed alfalfa seed. . . . The cost for the first crop was not allowed him. The second seeding was caused by the failure of the defendant to furnish him proper seed. He was obliged to recultivate his land in order to put it in the same condition as at the first seeding. If he was entitled to recover, the measure of his recovery was the loss he sustained, providing it was the natural proximate result of the defendant's breach of the contract. If the plaintiff was justified in plowing under the promiscuous growth of trefoil, dodder, and alfalfa, the cost of so doing was properly chargeable to the defendant. It would have been provident for the plaintiff to leave the land plowed without a crop. He is to be compensated for his loss and his land restored, as nearly as practicable, to its former condition, and the expense of the refitting was one of the elements in the restoration."

In *Hurley v. Buchi* (1882) 10 Lea (Tenn.) 346, in an action to recover the purchase price of potatoes sold to a grower, the latter undertook to recoup damages because the potatoes were not true to name and the court instructed the jury, upon the measure of damages, that the buyer was entitled to recover the increased value of the potatoes he would have raised and sold if the seed delivered had been of the variety ordered, over the variety actually delivered, raised, and sold by him. Upon appeal the case was reversed upon the ground that this measure of damages was too speculative, and the real measure of damages was the difference between the value of the potatoes actually furnished and the value of the potatoes which the grower ordered.

In referring to *Hurley v. Buchi* (Tenn.) supra, in *Ford v. Farmers' Exch.* (1916) 136 Tenn. 287, L.R.A. 1917B, 1106, 189 S. W. 368, the court said: In that case "it appeared that Buchi, a market gardener, applied to Hurley to buy 'Early Rose' potatoes, informing the latter that they were desired to plant for the early market;

that that variety matured about the middle of June, and was worth on the market \$3.50 a bushel; a different kind, actually furnished and planted, did not mature until August. The court disallowed the claim of the plaintiff that he was entitled to recover as damages the increased value of the potatoes he would have raised and sold if the seed potatoes delivered had been of the 'Early Rose' variety; and this on the ground that the claim was based on the assumption that, if the variety ordered had been delivered, they would have been planted, cultivated, and matured in a given time (in June), and that therefore speculative profits would be involved. The speculative element, we conceive, was that the anticipated crop would have matured on a date that substantially differed from the date when the seed potatoes that were actually furnished would and did mature. In its particular ruling on the point of speculative damages, the case of *Hurley v. Buchi* (Tenn.) *supra*, may, and we think should, be treated as not out of harmony with the widely accepted general rule, but as announcing an exception to it, based on the fact above referred to. The uncertainty in the quantity of the crop, dependent on weather and season, under the facts of that case, was not removed by any aiding reference to the actual yield under precise, or fairly similar circumstances. The weather at or near the date of the maturing of 'Early Rose' seed potatoes might have been such as to materially affect the quantity and quality of the production, while not having identical effect upon the later maturing varieties. Broadly stated, the rule is that for the breach of an expressed warranty that seed is true to name, where the seller knows the use for which the same is bought and the purchaser sows in ignorance of the true character of the seed, the measure of recoverable damages is the value of the crop had the seed been as warranted, such as would ordinarily have been produced that year, less the value of the crop actually raised."

In *Crutcher v. McManus* (1892) 13

Ky. L. Rep. 592 (an abstract opinion) the buyer only sought to recover as damages the cost of preparing the ground and sowing the seed, and the rental value of the land, and the court said that the evidence as to damages should have been restricted to these amounts, although, had he so claimed, he would have been entitled to the value of the crop which would have been raised had the seed been of the kind represented.

In *Smeltzer v. Tippin* (1913) 109 Ark. 275, 49 L.R.A. (N.S.) 1156, 160 S. W. 221, a distinction is made between the measure of damages recoverable for breach of warranty as to the kind of an article, like strawberries, and a breach where the warranty relates to an article like fruit trees for an orchard; and it is pointed out that an orchard must be set out and cultivated for several years before the trees bear fruit, and that with proper care and cultivation it will last a great number of years; while strawberry plants become productive the second year after they are set out, and are only profitable commercially for a few years. And hence, for breach of warranty that strawberry plants are true to name, the measure of damage is the difference between the value of the crop of strawberries of the kind that was produced, in case the plants bore, and the crop that would have been produced under ordinary circumstances if the plants had been of the kind represented, together with the cost of resetting the plants, cost of recultivating, and the cost of new plants.

So, in *Heilman v. Pruyn* (1899) 122 Mich. 301, 80 Am. St. Rep. 570, 81 N. W. 97, the rule of damages, where fruit trees were not of the variety warranted, was held to be the value that would have been added to the premises if the trees had been of the variety ordered. The court said that the rule of damages is the same where fruit trees are furnished contrary to the warranty, as where good fruit trees are destroyed by the negligent act of others. The purchaser has suffered the same damages in each case. Both parties must be held to have contract-

ed with reference to the land in future years, and its value would be enhanced by the existence of fruit trees of the kind warranted. The difference between the value of the land with and without the trees is a just measure of damages.

To the same effect, see *Long v. Pruyn* (1901) 128 Mich. 57, 92 Am. St. Rep. 443, 87 N. W. 88.

The parties to the sale of fruit trees to be set out for commercial orchards will be held to have contracted with reference to the future, and to have taken into consideration the fact that the land would be enhanced in value by the existence of trees of the kind warranted. *Heilman v. Pruyn* (Mich.) supra.

In *Saibara v. Yokohama Nursery Co.* (1917) 200 Ala. 535, 76 So. 861, an action was brought upon two notes given for orange trees of different varieties, one the satsuma and the other the trifoliata. Judgment was given for the plaintiff on the note given for the satsuma, and denied on the note given for the trifoliata, and this was affirmed as against the appeal of the defendant, who claimed that he was entitled to a judgment in excess of the face of the note, he claiming consequential damages. The court said that, whether or not the special damages claimed and sustained were within the warranty, the amount of damages to be awarded for the breach of the warranty would be a question for the jury, and since the court tried the case without a jury, its finding in that regard would be followed.

The measure of damages, where seed of less value is furnished than that ordered, is the difference between the value of the goods ordered and the value of those delivered, at the time and place of delivery. The amount which the buyer is entitled to recover is not affected by the subsequent rise in the price of the seed ordered or of the seed delivered; nor is it changed by the fact that the buyer subsequently resold it at an increased price. *Americus Grocery Co. v. Brackett* (1904) 119 Ga. 489, 46 S. E. 657.

c. Presence of noxious weed seed.

The measure of damages for breach

of warranty as to purity of seed, the impurity being due to noxious weed seed, is the deterioration in the value of the land by reason of the contamination. *Carlstadt Development Co. v. Alberta Pacific Elevator Co.* (1912) 4 Alberta L. R. 366, 7 D. L. R. 200.

In *McMullen v. Free* (1887) 13 Ont. Rep. 57, where there was obnoxious weed seed in the seed furnished under an express warranty that the seed was clean, but there was no loss to the crop raised although a depreciation in the value of the land, it was held that such depreciation would be the measure of damages.

In *Fox v. Everson* (1882) 27 Hun (N. Y.) 355, the court said: The "damages for the breach of a contract are those which are incidental to and directly caused by the breach, and which may reasonably be presumed to have entered into the contemplation of the parties. Speculative profits, or accidental or consequential losses, cannot be recovered. It is the duty of a person suffering from the breach of a contract to make reasonable exertions to render the injury as light as possible. The ordinary rule in the sale of goods is that the party may recover the difference between the value of the goods if they had corresponded with the warranty, and their actual value. This rule, however, has its exceptions, as where the goods are purchased for a particular purpose, and that purpose is made known to the vendor. In such case a recovery can be had for the damages sustained by reason of the use of the articles for that purpose. . . . If, after the plaintiff had discovered that plantain was growing upon his farm, he could, by reasonable means, have rooted it out, and prevented its further growth, it was his duty to have done so. He would not be justified in lying idle and permitting the noxious weed to seed and spread over his entire farm, and thus enhance his damages. He is only entitled to recover such damages as he has actually sustained and that necessarily would be expected to follow from the sale of the impure seed. It is contended on the part of the appellant that he is not entitled to re-

cover any damages resulting to the land; that the evidence does not show that the plaintiff stated to the defendants, or either of them, at the time of making the purchase, that he wanted the seed for the purpose of sowing. Ordinarily this evidence would be necessary in order to entitle the party to recover for such damages; but was not this intended use understood by the parties at the time of the sale? Clover seed has little, if any, commercial value, except for the purpose of seeding. It is merchantable because it can be used for that purpose. We think it must have been understood by the defendants at the time of selling this seed that it was for the purpose of sowing it upon this land. This being within the contemplation of the parties, the defendants are properly charged with such damages as must of necessity follow the sowing of the impure seed. Nothing, however, was said about the intention of the plaintiff to mix the seed with timothy seed; and it cannot be contended that such act was understood by the defendants, or contemplated by them, in their contract. For this reason there could be no recovery for the timothy seed. The difference in value between the pure clover seed and the seed actually sown fully compensates the plaintiff for what he lost upon the purchase. The difference between the value of the land or farm before the sowing of the plantain seed, and the value of it after the sowing, furnishes him full compensation for the injury to the land, and in our judgment becomes the measure of damages in the case. For the purpose of determining the damages to the land it is doubtless competent to show the extent to which the noxious weed had grown upon the land from the seed sown; the expense and labor, together with the difficulty, of removing and killing it; and the extent to which it would interfere with the growing and production of crops."

Where the seed germinated but, owing to its being mixed with other seeds, the crop was worthless, the measure of the buyer's damage was the value of the crop which he would

have raised had the seed been as warranted, the evidence in this regard showing such damage to a reasonable certainty. *Cline v. Mock* (1910) 150 Mo. App. 431, 131 S. W. 710.

f. Miscellaneous.

Where unproductive hop roots were sold under a warranty as to their productiveness, the buyer, for breach of the warranty where the crop proved a failure, is entitled to recover the difference between the value of the crop actually raised and that of the crop that would have been raised had all the roots been productive. *Schutt v. Baker* (1877) 9 Hun (N. Y.) 556.

In *Burge v. Albany Nurseries* (1917) 176 Cal. 313, 168 Pac. 343, it is held that the measure of damages for a breach of express warranty that prune trees purchased of a nursery were grafted on myrobalan roots, and not on peach roots, was the difference in the value of the land after the trees had been set out, and what its value would have been had the trees been grafted on myrobalan roots. The case follows, in this regard, the decision of the same court in *Shearer v. Park Nursery Co.* (1894) 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412, which applied the same rule to a breach of warranty as to the variety of fruit trees.

In *Jacot v. Grossmann Seed & Supply Co.* (1913) 115 Va. 90, 78 S. E. 46, it is held that the measure of damages to a dealer for a breach of implied warranty in a sale of seed, the implied warranty being as to the kind and quality of the seed, was the difference in value of the seed at the time of delivery, if it had been of the kind and quality of description and sample by which it was sold, and the value of the seed actually delivered.

The fact that the buyer uses the seed on land he has leased on shares does not affect the measure of damages he is entitled to recover; under these circumstances, the warranty will inure to the benefit of the landlord as well as the lessee, and the latter may recover the full amount. *Phillips v. Vermillion* (1900) 91 Ill. App. 133.

g. Effect of negligence of buyer or failure to mitigate damage.

While it is the duty of the buyer to mitigate as much as possible the damage he suffers by reason of the failure of seed to germinate, and it is his duty in this regard, where there is a partial failure of seed corn to germinate, to replant the same where it is not too late, yet the fact that he failed to do so does not preclude him from recovering damages, although it may have the effect of reducing the amount to which he is entitled. *Casper v. Fredericks* (1920) 146 Minn. 112, 177 N. W. 936.

If the purchaser has actual notice of the nature of the seed delivered under the contract prior to growing the same, under the rule that the party damnified by the other party's breach of the contract is bound to use all reasonable means not to enhance his damages, proof of this knowledge will bar recovery of special damages sought, based upon the difference between the value of the crop raised and that which would have been raised had the seed been true to name. *Buckbee v. P. Hohenadel, Jr., Co.* (1915) L.R.A.1916C, 1001, 139 C. C. A. 478, 224 Fed. 14, Ann. Cas. 1918B, 88.

Consequential damages cannot be recovered where the grower had knowledge of the inferior character of the seed before sowing the same; in such case the party furnishing the seed is not liable for damages resulting either to the crop or the land in consequence of the use of inferior seed. *Oliver v. Harley* (1877) 5 Neb. 439.

In *Dunn v. Bushnell* (1902) 62 Neb. 568, 93 Am. St. Rep. 474, 88 N. W. 693, the court instructed the jury that if the defendant had knowledge of the character of the seed before it was sowed, but notwithstanding such knowledge retained the same and used it for the purpose for which it was purchased, he could not recover on a counterclaim for damage for breach of warranty as to the quality and condition and variety of the seed. This instruction was held to be error, the court on appeal saying that, even granting that there was evidence

tending to show that the defendant had discovered the inferior quality of the seed before planting it, yet, if the seed had been warranted as defendant claimed it was, he would still have had the right to have retained the seed, and to have recovered as damages the difference between the market price of the seed he received and the purchase price of such seed as he alleges was warranted to him.

VI. Waiver of breach.

It has been held that where the buyer, by an inspection before acceptance, might have discovered the defective condition of the seed or other articles, if he accepts and uses the goods he waives the breach.

Thus, in *Hazen v. Wilhelmie* (1903) 68 Neb. 79, 93 N. W. 920, it is held that where the buyer of fruit trees claimed that they were delivered to him in poor condition and that the roots were rotten, but admitted that nevertheless he set the same out and undertook to make them grow, his conduct in thus accepting the trees constituted a waiver of the express warranty as to quality. In this regard the court said: After the defendant had inspected the stock, "we think it was his duty to take some steps to notify plaintiff that the quality was unsatisfactory, if such were the case, and that the stock would not be received. We cannot reconcile his statement that the trees, when he first saw them, were rotten so that the roots broke off, with his further testimony that he planted them the next spring, and cared for them, apparently expecting them to grow. At any rate, having elected to keep them and to exercise acts of ownership over them, he waived any objection as to their quality."

Upon this point, in *Fox v. Ever-son* (1882) 27 Hun (N. Y.) 355, the court said: "Whilst the representations made by a vendor respecting the property sold may relieve the purchaser from the use of that care, caution, and observation that he would ordinarily be bound to exercise in the purchase of property, still it will not do to permit the vendee, having the

property before him and defects plainly visible, to shut his eyes and rely solely upon the representations. In the case under consideration, at the time of making the purchase, the plaintiff did not have an opportunity to see and examine the seed. His eyesight was defective; his glasses were left at home, and without their aid he was unable to see. He was therefore, at that time, excused from making the examination, and had a right to rely upon the representations of the vendor. This excuse, however, did not exist after he had taken the seed home, where he had the opportunity of inspecting it before spreading it over his farm. It is possible that on making such an inspection he would not have discovered the presence of plantain seed. If, however, it was plainly visible and easily distinguished from the clover seed, it is probable he would have discovered it. We think that under the circumstances of the case it was the duty of the court to have submitted to the jury the question as to whether or not the plaintiff was guilty of negligence in not making an inspection of the seed before using it."

Where, however, it is impossible to determine, at the time the purchaser receives fruit trees, whether or not they have sufficient vitality to grow, he has a right to accept them and set them out, and if their condition is such as to prevent their growth when given proper care, his acceptance does not waive the warranty, and it survives the acceptance, although the trees on their arrival at the place of delivery are found to be in bad condition. *Grisinger v. Hubbard* (1912) 21 Idaho, 469, 122 Pac. 853, Ann. Cas. 1913E, 87.

Where the purchaser of fruit trees is without previous experience in the culture of such fruit, and cannot discover for several years the varieties of the fruit, if any, that the trees will bear, he is justified in relying upon the superior knowledge of the seller that the trees selected and furnished by him are true to name. *Sanford v. Brown Bros. Co.* (1913) 208 N. Y. 90, 50 L.R.A. (N.S.) 778, 101 N. E. 797.

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In *Backes v. Cook* (1915) 97 Neb. 689, 151 N. W. 175, there was an express warranty that potatoes sold for seed would germinate and grow; it appeared that the potatoes received by the buyer were soft, and some of them rotten; nevertheless, relying upon the warranty, he planted the potatoes and a very poor crop resulted. Under these circumstances, it was held that he was justified in planting the potatoes, and his action in this regard did not constitute a waiver of the warranty.

VII. Time of breach as affecting limitation of right to maintain action.

In *Shearer v. Park Nursery Co.* (1894) 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412, the warranty of the quality of trees is held not to have been breached until such time as the breach appeared by the fact that the trees bore fruit of a different variety than they would have borne had they been as warranted, it appearing that the purchaser did not know, and had no means of ascertaining, whether or not the trees were true to name, until after he had planted and cultivated them for two years, when they first bore fruit.

But *Gregory v. Underhill* (1880) 6 Lea (Tenn.) 207, holds that representations that the trees are early harvest apple trees constitutes a warranty that the trees are of the character represented, and are of such quality that they may be relied upon to bear fruit, and the words are not sufficient to show that a future warranty is intended, to the effect that the trees will bear early harvest apples; hence the warranty is broken upon delivery of trees which do not meet the requirements thereof, and a cause of action then accrues in favor of the buyer for the breach, and the Statute of Limitations runs against this cause of action from that date.

VIII. Evidence.

a. As to warranty.

In *Moody v. Peirano* (1906) 4 Cal. App. 411, 88 Pac. 380, the question was as to whether or not the seller warranted seed wheat to be of a cer-

tain variety, and, as bearing upon this question, it was held that evidence was admissible by other purchasers of wheat at about the same time, to the effect that the seed that they purchased had been warranted to them by the seller to be the variety mentioned.

In *Phillips v. Vermillion* (1900) 91 Ill. App. 133, it was held to be reversible error for the court to permit evidence that the seller made representations or other warranties as to the variety of seed to a third person, who, however, eventually purchased his seed elsewhere. The court said that "it was not pertinent to the issue, nor was it claimed that the seed was sold to Shea for the particular kind of seed in question, for he purchased seed elsewhere; and, even if the statement were true, it would prove nothing material affecting the alleged contract of warranty with appellee. The only inference that could be drawn from such evidence by the jury would be that, having made the statement to Shea, it was probable it was also made to appellee, and herein was the misleading quality of the evidence."

Evidence is admissible of a newspaper advertisement published over the seller's name, and of its influence on the buyer, the buyer testifying that the advertisement came to his attention before he purchased the nursery stock in question, since the advertisement is in the nature of a representation of the matter stated therein to those who might thereafter deal with the company, and tended to establish an implied warranty to subsequent purchasers of the truth of such representation. *Kitchin v. Oregon Nursery Co.* (1913) 65 Or. 20, 130 Pac. 408, 1183, 132 Pac. 956.

In *Horn v. Elgin Warehouse Co.* (1920) 96 Or. 403, 190 Pac. 151, it is held that the court properly permitted evidence by other purchasers of wheat from the same lot of wheat that the plaintiff purchased from, to testify that the wheat they secured was planted by them and grew the variety of wheat it was represented to grow; while denying to the buyer the right to show by other purchasers from the

same lot of wheat that they had planted the seed and it had failed to grow wheat of the variety it was warranted to grow. The court said: "The offer made by the plaintiff in reference to the Smith seeding does not show that the conditions under which the experiment was made were the same as those affecting the planting made by the plaintiff. Necessarily the growth of seed is influenced by the nature and moisture of the soil and climatic conditions, as well as by cultivation. In the offer nothing is stated except that Smith ordered Red Chaff club wheat from the defendant, sowed it as such, and failed to produce a crop. All other ingredient conditions are omitted from the proposal. It is essential to its admissibility in evidence that the experiment relied upon be substantially similar to the one in issue. At first blush, one would say that the court did not hold the scale of justice at an even balance, refusing the plaintiff's offer of proof and at the same time allowing the defendant to show that the same kind of wheat sown by other parties produced a crop of Red Chaff wheat. It is a law of nature that men do not gather grapes of thorns or figs of thistles. Hence when it appears that planting the wheat obtained from the defendant produced Red Chaff club wheat, all conditions of soil, climate, and cultivation are merged in the ultimate result. The court was well within its discretion in allowing the result of the experiments offered in proof by the defendant and in excluding the negative experiment offered by the plaintiff. The former standard of demonstration, while the latter did not show that it was granted on the same or similar conditions, had spelled failure for the plaintiff."

It has been held that evidence of a general custom in the seed trade of making all sales subject to conditions named on the printed slips, coupled with the evidence that the printed slips were placed inside the seed, was sufficient to support the finding that the sale was made without warranty or condition, and a warranty or condition that the seed is true to name could not

be inferred, even though there was no evidence that the purchaser read the printed matter, in which it was stated that no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seed sent out will be made by the seller, which was placed in each pack of the seeds delivered. *Seattle Seed Co. v. Fujimori* (1914) 79 Wash. 123, 139 Pac. 866.

But *Kefauver v. Price* (1918) 136 Ark. 342, 206 S. W. 664, sustains the action of the trial court in refusing to permit the seller to prove that it was the custom among retail dealers not to warrant the quality or condition of seed which was sold, since the mere custom of merchants in that vicinity not to warrant seed could not change the law with reference to a contract concerning a particular sale.

In *Longino v. Thompson* (1919) — Tex. Civ. App. —, 209 S. W. 202, the court said that it may well be doubted whether any of the bills for seeds sold, upon which was printed a disclaimer of warranty clause, were admissible in evidence, in the absence of direct or circumstantial evidence tending to show that the buyer read the notice printed thereon.

It is competent to show that the seller knew that hop roots he was selling were being bought for cultivation, since such evidence tends to show the understanding of the parties, and to fix the measure of responsibility incurred by the seller under his warranty that the roots were female roots. *Shutt v. Baker* (1877) 9 Hun (N. Y.) 556.

b. To show condition of goods.

1. In general.

It is sufficient evidence that fruit trees were in poor condition when delivered, if it is shown that, out of 600 trees delivered in the fall, only about 300 budded the following spring, and only twelve of those lived, where it was also shown that of trees purchased from other nurserymen, and set out in the same soil and handled in the same manner, about 75 per cent lived. The court said this was true although the seller produced

evidence to show that when delivered the trees were healthy, thrifty, and in good condition, and the year following the fall the trees were delivered was extremely dry and hot, and many old orchard trees as well as young fruit trees died from the effects of the drought. *De Foe v. Wilmas* (1903) 99 Mo. App. 24, 72 S. W. 475.

A breach of the warranty is established by evidence that of the thousand trees purchased not one even so much as sprouted, although they were planted and cared for in the usual manner, and in the manner trees purchased from other nurseries, and planted in the same soil at the same time, were cared for, 95 per cent of which lived and grew. *Kelly v. Lum* (1913) 75 Wash. 135, 49 L.R.A. (N.S.) 1161, 134 Pac. 819.

It has been held that the fact that trees did not live through the first winter after being set out does not sufficiently show that they were delivered in poor condition, it appearing that the winter was an exceedingly hard one on fruit trees, and many died that had not been transplanted. *Bullock v. Bird* (1897) 19 Ky. L. Rep. 1247, 43 S. W. 234.

In order to reduce the damages for breach of warranty in that fruit trees were not of the varieties ordered, it is not competent for the defendant to show that, owing to a very severe winter, many of the fruit trees in question had been killed or severely injured. *Heilman v. Pruyn* (1899) 122 Mich. 301, 80 Am. St. Rep. 570, 81 N. W. 97.

As bearing upon the claim that seed corn was not of the germinative quality warranted, evidence is immaterial as to the poor grade of corn raised in that section that year. *Totten v. Stevenson* (1912) 29 S. D. 71, 135 N. W. 715. The court said: "There could be no prejudicial error based on the rejection of this testimony, because it was wholly immaterial for any purpose. That corn raised during the year 1909 was generally poor and of a low grade was wholly immaterial to the issue. The subject of the sale was the particular corn of the defendant; and what other

corn raised by some other person or in some other year was, generally, as to soundness and grade, could have no possible bearing upon the quality of defendant's corn, agreed to be sold to plaintiff."

In *Brooks v. McDonnell* (1876) 41 Wis. 139, it is held that it was competent to show the crop produced in the year following the year when the hop roots in question were purchased and used, as confirming the truth of the plaintiff's claim that the roots were of an inferior quality and were wild or male roots, although no claim whatever was made for a failure of the crop of that year, but only for the loss of the crop of the preceding year. The court pointed out that it appeared that, with the same soil and cultivation, $\frac{1}{2}$ of an acre of other roots produced a good crop in the preceding year, while $\frac{1}{2}$ acre set with the roots in question produced a much less quantity relatively, because, as the witnesses said, these latter roots were wild or male roots; it appearing that the nature or quality of the roots would affect the crop one year as well as another.

2. Tests, etc.

In *Western Soil Bacteria Co. v. O'Brien Bros.* (1920) — Cal. App. —, 194 Pac. 72, it is held that where the buyer claimed damages for breach of express warranty as to the germinative power of the seed, and proved that none of the seed germinated and grew, evidence was inadmissible in behalf of the seller that it took some of the seed sold to the buyer, and later returned to it by him, and made a certain test of it. The test in question was made by taking 100 grains of the seed, and, after placing them between moistened blotters, subjecting them to a temperature of 98 degrees for a specified length of time. When the seed was thus subjected to this form of test a large proportion of the grain germinated. The court held, however, that such a test was made under very different conditions from those surrounding the planting and growing of seed in an open orchard, and under conditions as

to soil, temperature, and location entirely different from those under which the—so to speak—laboratory test proffered by the plaintiff was made.

Where, in an action involving breach of warranty as to the germinative quality of seed, the evidence shows that the seller gave the seed the usual test to determine its germinative powers, and such test showed the seed to be good seed, and it further appears that the buyer so treated the seed after receiving it as to endanger, at least, the germinative quality of the seed, the evidence is not sufficient to make a case of breach of warranty for lack of germinative power. *Meehan v. Ingalls* (1916) 91 Wash. 86, 157 Pac. 217, Ann. Cas. 1918B, 71.

3. Manner of cultivation.

Evidence as to the cultivation and quality of the soil in which fruit trees were planted is admissible, although not given by expert witnesses, since the matter sought to be established thereby does not require scientific knowledge, or special skill or learning, but is rather a matter of common observation from the appearance and facts. *Kitchin v. Oregon Nursery Co.* (1913) 65 Or. 20, 130 Pac. 408, modified on rehearing in (1913) 65 Or. 27, 130 Pac. 1133, petition to recall mandate in (1913) 65 Or. 28, 132 Pac. 956.

Nor is testimony as to character and condition of the soil in which fruit trees are set out objectionable because reference is made therein to other trees thriving in similar soil, where a part of the defense to an action for breach of warranty as to quality of trees is that the trees died for the want of proper soil, cultivation, and care. *Ibid.*

Judicial notice cannot be taken of the fact that it is customary in good husbandry to replant missing hills of corn, and that it is the usual practice to supplement the first planting by succeeding planting, and that this course is adopted by ordinarily prudent men in the raising of corn.

Casper v. Frederick (1920) 146 Minn. 112, 177 N. W. 936.

c. To show breach as to variety.

In *White v. Miller* (1877) 71 N. Y. 118, 27 Am. Rep. 15, it was held that the evidence established a breach of warranty that the seed was true to name, although it appeared that the seed sold was actually from the plant having the name of the seed; that is, the referee found upon this point that the seed (cabbage seed) was raised from Bristol cabbage stocks, but he further found that these stocks were planted in the vicinity of stocks of other varieties of cabbage, and were fertilized with the pollen therefrom, and that, in consequence of the crossing of the varieties, the seed grown upon the Bristol cabbage stocks became impure, and were not genuine Bristol cabbage seed, but lost that quality, and that the plants raised by the buyer from the seed purchased, with a very few exceptions, in consequence of such crossing, were of no known variety of cabbage, and were of no value except as food for cattle. The evidence in this regard showed that the buyer set out 105,000 cabbage plants raised from this seed, from which 100,000 lived and grew vigorously, but only about 200 produced Bristol cabbages. The court said: "That the defendants intended to sell, and the plaintiffs to buy, seed which under proper cultivation, if it grew at all, would produce Bristol cabbages, is evident. The defendants knew that the plaintiffs were market gardeners, and desired this particular variety of seed. Bristol cabbages were regarded as a valuable variety for marketing. The defendants raised the seed, and it was not Bristol cabbage seed within the meaning of the warranty, whatever its botanical or scientific designation might be, unless it would produce Bristol cabbages. Whether the seed was Bristol cabbage seed, within the warranty, depends not upon the origin of the seed, or the stocks upon which it grew, but upon the fact whether Bristol cabbages, as known in the market, could be raised there-

from. The contention of the defendants that the warranty was not broken if technically, or in the language of botanists, the seed was Bristol cabbage seed, cannot, therefore, be sustained."

The declaration of the agent of the seller, made some eight months after the sale and not connected with any business then being transacted, in effect that the seed involved in the action for breach of warranty was defective and not genuine, and that this was due to improper cultivation, is inadmissible. *Ibid.* The court stated the doctrine that the general rule is that what one person says out of court is not admissible to charge or bind another. The exception is in cases of agency; and, in case of agency, the declarations to the agent are not competent to charge the principal, upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with, the business then depending, so that they constituted a part of the *res gestæ*. So, evidence of statements or representations made by the defendant to a third person, concerning seed sold under a warranty of quality and variety, is inadmissible. *Phillips v. Vermillion* (1900) 91 Ill. App. 133.

As bearing upon the question as to whether or not the seller sold to the buyer the variety of seed he purported to sell, evidence is admissible that a third person, to whom he sold the same variety of seed, planted the same, and that the crop grown was not of the variety which should have been grown if the seed had been of the kind warranted. *Moody v. Peirano* (1906) 7 Cal. Unrep. 247, 84 Pac. 783.

It is competent for the seller to show that he sent to the buyer the cucumbers raised from the seed which he sold the latter, in order to show that the buyer knew the character of cucumber that the seed would produce. *Buckbee v. P. Hohenadel, Jr., Co.*

(1915) L.R.A.1916C, 1001, 139 C. C. A. 478, 224 Fed. 14, Ann. Cas. 1918B, 88.

d. To show breach as to noxious weed seed.

Where the seller claims, and gives proof to substantiate his claim, that the plaintiff's damage from an obnoxious seed known as trefoil was due to the trefoil growing on the roadside abutting the plaintiff's field, and not to trefoil being mixed in the seed he sold the plaintiff, expert testimony is admissible to show the amount of trefoil in the seed. *Depew v. Peck Hardware Co.* (1907) 121 App. Div. 28, 105 N. Y. Supp. 390, affirmed in (1909) 197 N. Y. 528, 90 N. E. 1158.

e. Miscellaneous.

In *Natchez Drug Co. v. Ratekin Seed House* (1914) 165 Iowa, 641, 146 N. W. 865, an action by a dealer in seeds against a wholesale seed house to recover for breach of an implied warranty as to the condition of corn sold for seed, it being claimed that it was unfit for seed, it was held that the

subsequent agreement by the seed house that it would refund the money paid by growers for all seed found unsatisfactory to them, and which they returned to the dealer, did not obligate it to pay for or refund any money to the dealer which he had paid to the growers, where the latter did not return the corn.

In a suit by a florist against a seed dealer for a breach of warranty that lily bulbs sold by the defendant to the plaintiff would grow a certain kind of lily, evidence of the price paid for a quantity of lilies at a retail store is inadmissible on the question of market value, since it sheds no light upon the grower's prices. *Edgar v. Joseph Breck & Sons Corp.* (1899) 172 Mass. 581, 52 N. E. 1083.

In *Schutt v. Baker* (1877) 9 Hun (N. Y.) 556, it is held competent to show that the seller knew that the buyer was purchasing hop roots for cultivation, since it tended to show the understanding of the parties as to the responsibility incurred by the seller under his warranty. A. G. S.

PEOPLE OF THE STATE OF MICHIGAN

v.

GLENN TOWNSEND.

Michigan Supreme Court — June 6, 1921.

(— Mich. —, 183 N. W. 177.)

Homicide — driving automobile when intoxicated.

1. To operate an automobile upon the highway when intoxicated is gross negligence, and if, in doing so, one causes the death of another, he is guilty of manslaughter.

[See note on this question beginning on page 914.]

Office — de facto officer — collateral attack.

2. The authority of one actually occupying the office of municipal justice to bind one accused of homicide over for trial will not be inquired into at the trial as a ground for quashing the information.

[See 22 R. C. L. 603.]

Indictment — sufficiency — failure to state specific acts.

3. An information for homicide caused by driving an automobile while

intoxicated is not insufficient because it fails to state the specific act or acts which brought about the death.

Automobile — driving when intoxicated — malum in se.

4. The driving of an automobile when intoxicated is malum in se although the statute merely prohibits it under penalty.

Indictment — charging involuntary manslaughter.

5. An information for involuntary manslaughter must charge accused

(— Mich. —, 183 N. W. 177.)

with the commission of some unlawful act, or with negligently doing some act lawful in itself, or with negligent omission to perform a legal duty and that death resulted therefrom.

[See 13 R. C. L. 784.]

—charging negligent homicide.

6. In charging manslaughter through gross or culpable negligence while doing a lawful act, the duty which was neglected or improperly performed must be charged as well as the acts of accused constituting failure to perform or improper performance.

—sufficiency of information.

7. An information charging accused with operating an automobile when intoxicated, and that such operation directly contributed to the death of a guest in the machine, is sufficient to charge involuntary manslaughter.

Criminal law — former jeopardy — driving automobile when intoxicated — involuntary manslaughter.

8. A conviction for driving an automobile when intoxicated is not a bar to a prosecution for involuntary manslaughter by causing the death of a person while so doing.

[See 8 R. C. L. 147.]

Indictment—charging date of commission of manslaughter.

9. The fact that the complaint before the committing magistrate charged manslaughter to have been committed on the day of the death, while the information charged it to have been committed on the day of the inflicting of the wound, does not prevent trial

on the information, on the theory that the accused had no examination as to such date before the committing magistrate.

[See 13 R. C. L. 903.]

Homicide — effect of infliction of wound.

10. One negligently inflicting wounds upon another, which become infected and cause death, is guilty of involuntary manslaughter although the infection may have resulted from negligent treatment of the injury, unless such treatment was so grossly erroneous or unskilful as to have been the cause of the death.

[See note in 8 A.L.R. 516.]

—effect of intoxication on liability.

11. One cannot avoid liability for involuntary manslaughter in driving an automobile when intoxicated, and causing injury to another which results in death, by the fact that when he started on his trip he was so intoxicated that he did not appreciate his condition, or know and appreciate that operating the car would cause a condition of things that might make him guilty of manslaughter.

[See 8 R. C. L. 129; 13 R. C. L. 715; see note in 12 A.L.R. 888.]

Evidence—sufficiency.

12. One who has pleaded guilty to a charge of driving an automobile when intoxicated cannot object to conviction in a subsequent prosecution for involuntary manslaughter by causing death while so doing, on the ground of lack of evidence that he was driving the car.

EXCEPTIONS by defendant to rulings of the Circuit Court for Kalamazoo County (Weimer, J.) made during the trial of an information charging him with involuntary manslaughter, which resulted in his conviction. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Harry C. Howard, for defendant:

The refusal of motion to quash, and the forcing of defendant to trial, were in violation of his constitutional rights.

People v. Barnes, 182 Mich. 179, 148 N. W. 400; Whart. Homicide, p. 338.

The legislation creating the municipal court of the city of Kalamazoo was unconstitutional and void.

Atty. Gen. ex rel. Hooper v. Loomis, 141 Mich. 547, 105 N. W. 4; Crary v. Marquette Circuit Judge, 197 Mich. 452, 163 N. W. 905, 166 N. W. 954.

Defendant is entitled to know the nature and cause of accusation.

Enders v. People, 20 Mich. 240; People v. Gaige, 26 Mich. 30; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; Abrams v. State, 13 Okla. Crim. Rep. 11, 161 Pac. 331; People v. Rogulski, 181 Mich. 494, 148 N. W. 189; People v. Olmstead, 30 Mich. 431, 1 Am. Crim. Rep. 301; People v. Aikin, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821, 7 Am. Crim. Rep. 345; State v. Gesas, 49 Utah, 181, 162 Pac. 366.

Intoxication is not negligence as a

matter of law, but a fact to be taken into consideration.

Cramer v. Burlington, 42 Iowa, 315, 29 Cyc. 534.

A crime is made up of acts and intent (actual or presumed), and these must be set forth in the indictment with reasonable particulars of time, place, and circumstance.

Reeder v. United States, — C. C. A. —, 262 Fed. 36.

"Gross negligence" cannot be relied upon unless specifically pleaded.

Knickerbocker v. Detroit, G. H. & M. R. Co. 167 Mich. 596, 133 N. W. 504; *Weitzel v. Detroit United R. Co.* 186 Mich. 7, 152 N. W. 931, 153 N. W. 831, 9 N. C. C. A. 407; *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; *Jackson v. State*, — Ohio St. —, 127 N. E. 870; *Dunville v. State*, 188 Ind. 373, 123 N. E. 689.

Messrs. Stephen H. Wattles and Charles L. Dibble for the People.

Wiest, J., delivered the opinion of the court:

Defendant was convicted of the crime of involuntary manslaughter, and brings the case here upon exceptions before sentence.

The evening of November 8, 1919, at the city of Kalamazoo, defendant, when intoxicated, took Agnes Thorne in his Cadillac eight roadster, and while driving on Lovers' Lane road the automobile left the roadway and struck a tree near the fence line, caving in the side of the car, tearing off one wheel, and injuring Agnes Thorne so that she died November 20, 1919.

Defendant was not injured, and after the crash crawled from the wrecked car and produced a bottle out of which he took a drink and invited bystanders to have a drink, and he was so drunk that he apparently did not realize what had happened to his car or to his companion.

Agnes Thorne was taken from the scene of the accident to a hospital and given medical treatment, and it was found that on the inside of her left thigh there was an injury consisting of a separation of the tissues for a distance of 4 or 5 inches and a similar laceration on the right thigh, and also an injury on the front of the right thigh, and "brush

wounds" on her body, and a fracture of the right femur. The lacerations on both thighs extended through the fat and muscle tissues. The wounds had hair, excelsior, bits of clothing, and dirt in them. From these wounds sepsis, or blood poisoning, developed, causing her death. She remained in the hospital under treatment from the time of the accident until her death.

At the point where the car left the roadway there is a curve, but the evidence shows that the car went straight ahead to the tree, without skidding and with headlights on and propelled at a high rate of speed.

When arraigned in the circuit court defendant stood mute, and when brought to trial moved to quash the information on the ground that the warrant for his arrest was issued by, and his examination held before, and he was bound over for trial by, one without the jurisdiction of an examining magistrate. The examination complained of was held before the municipal justice of the city of Kalamazoo. We are not inclined to stop and examine the question of whether such magistrate had authority to hold

Office—de facto
officer—col-
lateral attack.

the office he in fact occupied and to which he had color of authority, but content ourselves with applying the rule that, if the magistrate was a de facto officer, his act in this public matter cannot be attacked in this proceeding nor his title to the office be here passed upon. Upon the high ground of public policy and to prevent a failure of public justice, we follow the salutary rule that while one is in public office, exercising the authority thereof under color of law, we cannot, except in a direct proceeding to test his right to the office, pass upon the question here raised, and besides it would avail defendant nothing because there is no difference between the acts of de facto and de jure officers, so far as the public interests are concerned. The point is ruled adversely to defendant in *Gildemeister v. Lindsay*, 212 Mich. 299, 180 N.

W. 633; *People v. Kongeal*, 212 Mich. 307, 180 N. W. 636; *Board of Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382. Even though the law creating a judicial office be declared void, the acts of an official thereunder will be upheld as the acts of a de facto officer. *Atty. Gen. ex rel. Dingeman v. Lacy*, 180 Mich. 329, 146 N. W. 871.

Defendant also moved to quash the information, claiming that it was not definite in its charges, and did not apprise him of the offense upon which he was tried, and urges that the charge of operating his automobile while intoxicated and the consequent injuries to Agnes Thorne by reason of her being thrown from the car was not well pleaded, unless it can be said that manslaughter is the natural or probable result to expect from driving a car while one is intoxicated, that the unlawful act set out in the information is *malum prohibitum* and not *malum in se*, and defendant contends that, where the unlawful act charged is a misdemeanor and merely *malum prohibitum*, the specific act or acts which brought about the death must be set out in the information. Defendant also contends that the third count of the information does not follow the complaint in charging the date of the offense, and therefore as to the date there charged he has had no examination. The right of an accused to be fully informed of the

Indictment—
sufficiency—
failure to state
specific acts.

nature of the charge
against him relates,
so far as the in-
formation is con-
cerned, solely to the charge, and not
to the evidence in support thereof.
Under our system the law affords
an opportunity for a defendant to
learn of the nature of the evidence
against him at the examination.

We have examined the information with care and find it sufficient. Counsel is in error in assuming that the act of defendant in operating his automobile upon a public highway while intoxicated was an act merely *malum prohibitum*, and not

malum in se. It is true the statute forbids it and provides a penalty, but this in no way determines whether it is only *malum prohibitum*. The purpose of the statute is to prevent accidents and preserve persons from injury, and the reason for it is that an intoxicated person has so befuddled and deranged and obscured his faculties of perception, judgment, and recognition of obligation toward his fellows, as to be a menace in guiding an instrumentality so speedy and high-powered as a modern automobile. Such a man is barred from the highway because he has committed the wrong of getting drunk and thereby has rendered himself unfit and unsafe to propel and guide a vehicle capable of the speed of an express train and requiring its operator to be in possession of his faculties.

Voluntary intoxication is an offense not only *malum prohibitum*, but *malum in se*, condemned as wrong in and of itself by very sense of common decency and good morals from the time that Noah in his drunkenness brought shame to his sons so that they backed in to cover his nakedness, and Lot's daughters employed it for incestuous purposes. Drunkenness was declared wrong in and of itself, and punishment provided by the Israelites; by the ancient Chinese in an imperial edict about the year 1120 B. C., called "The Announcement about Drunkenness;" in ancient India by the ordinances of Manu. In Rome the censors turned drunken members out of the Senate and branded them with infamy. In England 300 years ago drunkenness was pilloried as the root and foundation of many sins, such as bloodshed, stabbing, murder, swearing, and such like, by the statute, 4 Jac. I. chap. 5, and the Ecclesiastical judges and officers were granted power to censure and punish offenders, and Bacon, in his *Abridgment of the Common Law*, lists drunkenness as one of the sins of heresy. In Mas-

Automobile—
driving when
intoxicated—
malum in se.

sachusetts Bay Colony in 1633-34 one Robt Coles, for drunkenness, was disfranchised and sentenced to wear a red letter D upon a white background for a year. One of the acts passed at the first session of the General Assembly of the Northwest Territory and approved December 2, 1799, provided a penalty for being drunk in a public highway. Our statute Comp. Laws 1915, § 7774, declares drunkards to be disorderly persons, and § 15530 makes it an offense for any person to be drunk or intoxicated in any street or highway.

Voluntary drunkenness in a public place was always a misdemeanor at common law; and it was always wrong morally and legally. It is malum in se. *State v. Brown*, 38 Kan. 390, 16 Pac. 259, 8 Am. Crim. Rep. 165.

It is gross and culpable negligence for a drunken man to guide and operate an automobile upon a public highway, and one doing so and occasioning injuries to another, causing death, is guilty of manslaughter. It was unlawful for defendant to operate his automobile upon the public highway while he was intoxicated; made unlawful by statute, and wrong in and of itself, and it was criminal carelessness to do so, and he is guilty of manslaughter, provided the death of Agnes Thorne was a proximate result of his unlawful act.

**Homicide—
driving automobile when
intoxicated.**

To make the information for involuntary manslaughter good it must allege that the accused was in the commission of some unlawful act or negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty, and that death resulted therefrom. The distinction between involuntary manslaughter committed while perpetrating an unlawful act not amounting to a felony and the offense arising out of some negligence or fault in doing a lawful act in a

**Indictment—
charging
involuntary
manslaughter.**

grossly negligent manner, and from which death results, must be kept in mind upon the question of pleading. In the former case it is sufficient to allege the unlawful act with sufficient particularity to identify it, and then to charge that as a consequence the defendant caused the death of the deceased, and there is no need to aver in detail the specific acts of the accused; but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged as well as the acts of the accused constituting failure to perform or improper performance.

The information charged that defendant was engaged in the perpetration of an unlawful act at the time he injured Agnes Thorne so that she died.

The statute (Act No. 164, Public Acts 1917) forbids any intoxicated person to drive, operate, or have charge of the power or guidance of any automobile upon any public highway, and provides a penalty for violation of such law.

The information clearly shows that defendant was engaged in an unlawful and culpably negligent act, and that such act directly contributed to the death of Agnes Thorne. Such information is sufficient. *Surber v. State*, 99 Ind. 71; *State v. Radford*, 56 Kan. 591, 44 Pac. 19. Our attention is called to *State v. Gesas*, 49 Utah, 181, 162 Pac. 366, to the effect that the particular circumstances of the offense must be set forth in the information. In that case the court had under consideration a statute requiring an information for manslaughter to state the particular circumstances of the offense. In *State v. Watson*, 216 Mo. 420, 115 S. W. 1011, the sufficiency of an information charging manslaughter was before the court.

"This information charges that defendant carelessly, recklessly, and

grossly negligent manner, and from which death results, must be kept in mind upon the question of pleading. In the former case it is sufficient to allege the unlawful act with sufficient particularity to identify it, and then to charge that as a consequence the defendant caused the death of the deceased, and there is no need to aver in detail the specific acts of the accused; but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged as well as the acts of the accused constituting failure to perform or improper performance.

The information charged that defendant was engaged in the perpetration of an unlawful act at the time he injured Agnes Thorne so that she died.

"This information charges that defendant carelessly, recklessly, and

**—charging
negligent
homicide.**

**—sufficiency of
information.**

with culpable negligence operated and propelled this automobile," etc.

"It was not, in our judgment, essential that the information should undertake to set out in detail in what such carelessness, recklessness, and culpable negligence consisted."

See also *Schultz v. State*, 89 Neb. 34, 33 L.R.A. (N.S.) 403, 130 N. W. 972, Ann. Cas. 1912C, 495.

The information sufficiently charges that the unlawful act was the proximate cause of the accident, and avers a direct relation between the unlawful act of operating the automobile while intoxicated and the accident.

After the accident and before the death of Agnes Thorne, defendant was convicted in the municipal justice court of the crime of driving an automobile while intoxicated. Upon the trial defendant urged that such conviction was a bar to the prosecution for manslaughter, claiming former jeopardy. There is no merit in this point. The former transaction was for a misdemeanor, and did not and could not include the charge here laid.

A conviction in an inferior court of a misdemeanor does not constitute former jeopardy so as to bar subsequent prosecution for a felony arising out of the same transaction. The felony here charged being beyond the jurisdiction of the inferior court, and not included in any sense within the charge there laid, the defense of former jeopardy fails. 16 C. J. 271; *Diaz v. United States*, 223 U. S. 442, 56 L. ed. 500, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138; *Crowley v. State*, 94 Ohio St. 88, L.R.A. 1917A, 661, 113 N. E. 658; *Morgan v. Devine*, 237 U. S. 632, 59 L. ed. 1153, 35 Sup. Ct. Rep. 712. The transaction charged may be the same in each case, but if the offenses are different there is no second jeopardy for the same offense. *Gavieres v. United States*, 220 U. S.

338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421.

"The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either does not exempt the defendant from prosecution and punishment under the other." *Morey v. Com.* 108 Mass. 433.

See also *State v. Ingalls*, 98 Iowa, 728, 68 N. W. 445; *State v. Hooker*, 145 N. C. 581, 59 S. E. 866; *People v. Parrow*, 80 Mich. 567, 45 N. W. 514.

The point is made that defendant could not be convicted of the crime of manslaughter committed on November 8th, because he had not been so charged in the complaint and had had no examination as to such date. The complaint and the second count of the information charges the offense to have been committed on November 20th, the day Agnes Thorne died, while the third count charges the offense to have been committed November 8th, the day of the accident.

In *Vinegar v. Com.* 104 Ky. 106, 46 S. W. 510, it was urged that in a case of murder the time at which the crime is charged to have been committed is material and must be proved as laid, but the court held that "the rule was universal at common law that the allegation of time in an indictment was immaterial, except where the time of the commission of the act formed an ingredient of the offense, as in the case of Sunday offenses."

Michie on Homicide, § 133, says: "It may be stated as a general rule that time is not an essential element of the crime of homicide, and the statement in the indictment for such offense as to when the crime was committed is not material further than to show that it was committed before the finding of the indictment, and within the Statute

of Limitations. The averment of the time of the commission of the offense, not being material, need not be proved as laid."

Time was not of the essence of the offense charged, and under our statute, **Indictment—charging date of commission of manslaughter.** Comp. Laws 1915, § 15746, the point raised is without any force.

It is claimed that the injuries received by Agnes Thorne were not mortal, and that her death might have been averted had she received different medical treatment; and it is insisted that the court should have left to the jury the question of whether she died from blood poisoning, which might have been prevented by different treatment.

The trial judge instructed the jury: "Was the operation of the automobile by the respondent in an intoxicated condition the proximate cause of her death, either standing alone by itself or in conjunction and in co-operation with some other cause or causes, such as mistreatment or blood poison, or did some new and independent cause intervene to produce the death? Was the treatment she so received the usual and ordinary treatment, or was it unusual and grossly erroneous, amounting to an independent cause of death intervening after the injuries? If the respondent operated the automobile while intoxicated and, as a direct and natural result thereof, Agnes Thorne received injuries from which she afterwards died, the respondent is guilty of manslaughter, although and notwithstanding you may find that there was an absence of the most skilful treatment possible under such circumstances, and that everything was not done that the most modern and improved surgery might or would require or dictate.

"On the other hand, if the wound in its inception is not necessarily fatal or mortal, as we say, but if it is one that is reasonably calculated to produce death, and death therefore ensues, the person responsible

is not excused because of mistreatment on the part of the surgeons or others, or for any other cause that may contribute to produce death, unless such mistreatment or neglect or other causes constitute a new and independent cause of death standing by itself, unless the mistreatment, professional mistreatment, and neglect is so grossly erroneous as in effect to cause and constitute a new and independent cause intervening after the injury and before death. If the injury is of such a nature as to not necessarily be fatal or mortal, as I say, but is one that is reasonably calculated to produce death, the person responsible for it is not excused and should not be found not guilty because it may appear that the best and most approved methods were not used in treating the patient. There is no hard, fixed rule as to what treatment the patient should receive. If the patient received the usual and ordinary treatment, that is sufficient. If death follows, even though death may be due in part to the mistreatment, unless the mistreatment is so grossly erroneous as to amount to a new and independent cause of death, the person responsible for the injury, responsible for the death, is still responsible and should be found guilty."

This instruction, it is urged, confused in the minds of the jury the responsibility of the attending physician, practically saying to the jury that if they found Agnes Thorne had received the usual and ordinary treatment even though more modern practice had something better and safer, the respondent would be guilty. And it is stated: "We conceive the rule to be that if the injuries are not fatal, that is, if they are not mortal wounds, then the mere sustaining of the injuries whereby there is an opportunity for infection will not sustain a conviction of manslaughter."

The instruction given by the court clearly stated the law ap-

(— Mich. —, 183 N. W. 177.)

pllicable to the question. The rule of law is well stated in 21 Cyc. 700: "If a wound or other injury cause a disease, such as gangrene, empyema, erysipelas, pneumonia, or the like, from which deceased dies, he who inflicted the wound or other injury is responsible for the death. . . . He who inflicted the injury is liable even though the medical or surgical treatment which was the direct cause of the death was erroneous or unskilful, or although the death was due to the negligence or failure by the deceased to procure treatment or take proper care of the wound. The same is true with respect to the negligence of nurses or other attendants. This rule is sometimes stated with the qualification that the wound must have been mortal or dangerous; but it is usually held that defendant is liable, although the wound was not mortal."

Agnes Thorne died from blood poisoning arising from wounds, and the medical treatment she received was not an intervening, co-operative, or contributing cause of her death. Defendant cannot exonerate himself from criminal liability by showing that under a different or more skilful treatment the doctor might have saved the life of the deceased and thereby have avoided the natural consequences flowing from the wounds. Defendant was not entitled to go to the jury upon the theory claimed unless the medical treatment was so grossly erroneous or unskilful as to have been the cause of the death, for it is no defense to show that other or different medical treatment might or would have prevented the natural consequences flowing from the wounds.

The treatment did not cause blood poisoning; the wounds did that, and the most that can be said about the treatment is that it did not prevent blood poisoning, but might have done so had it been different. Defendant cannot be heard to urge in exculpation of his crime that the

wounds inflicted through his culpable negligence were not prevented from causing the death by the treatment of the physician.

It is contended that the court should have instructed the jury to find defendant not guilty if he started out that night too intoxicated to appreciate his condition, and to know and appreciate that operating the car in his condition would cause a condition of things which would quite possibly make him guilty of manslaughter. We do not conceive such to be the law of involuntary manslaughter. The trial judge left to the jury the question of whether defendant knowingly and consciously operated his automobile while intoxicated. But it is said that under the evidence defendant was too drunk to appreciate what he was doing, and the court should not have left any such issue to the jury. There was evidence that, when defendant started out that night with Agnes Thorne, he was not so intoxicated as to be unaware of what he was doing, but at the time of the accident he was apparently incapable of appreciating what he had done.

It was not necessary for the people to show that defendant was able, while intoxicated, to reason and feel that in his intoxicated condition in operating the car he would quite possibly do something to make himself guilty of manslaughter.

The instruction complained of was more favorable to defendant than he was entitled to. It is not the law that one who commits the crime of manslaughter while under voluntary intoxication, and because of such intoxication, must be sober enough to fully realize that in his intoxicated condition he might do something to kill another. No intent is involved in involuntary manslaughter, and defendant's intoxication was the gravamen of his offense, and the greater the degree thereof the more aggravated his offense.

Defendant was convicted in the

municipal court, on his plea of guilty, of a misdemeanor in driving his car on the occasion in question while intoxicated, and, as before stated, urged such conviction in bar of this prosecution. Under such circumstances we can discover no merit in the point that there was no evidence to show he was driving the car.

**Evidence—
sufficiency.**

We have examined the exceptions urged by defendant and feel that what we have said covers the points presented. References made by defendant to the case of *People v. Barnes*, 182 Mich. 179, 148 N. W. 400, have been duly considered, but

are not applicable to the charge or facts in this case, for here the unlawful act causing the death was *malum in se*.

We find no reversible error, and the conviction is affirmed, and the Circuit Court advised to proceed to judgment.

NOTE.

The subject of criminal responsibility in connection with the use of an automobile in violation of law, or for an unlawful purpose, is considered in the annotation following *PEOPLE v. HARRIS*, post, 914.

PEOPLE OF THE STATE OF MICHIGAN

v.

LOUIS HARRIS, Plff. in Err.

Michigan Supreme Court — May 5, 1921.

(— Mich. —, 182 N. W. 673.)

Homicide — manslaughter — negligent operation of automobile — illegal possession of liquor.

Upon the question of the gross negligence of the driver of an automobile which killed a pedestrian on the highway, so as to render him guilty of manslaughter, evidence is admissible that he was conveying liquor in violation of statute, causing haste which resulted in negligent management of the car.

[See note on this question beginning on page 914.]

ERROR to the Circuit Court for Monroe County (Root, J.) to review a judgment convicting defendant of manslaughter. *Affirmed*.

The facts are stated in the opinion of the court.

Mr. Edward N. Barnard for plaintiff in error.

Messrs. William F. Haas and Willis Baldwin for the People.

Steere, Ch. J., delivered the opinion of the court:

Defendant was convicted in the circuit court of Monroe county of the crime of manslaughter, committed on April 29, 1920, by running over with an automobile, and killing, a girl seventeen years of age, named Gertrude Cusino, as he was driving north through the village of Erie on

his way from Toledo to Detroit, along the thoroughfare known as the Dixie highway.

Erie is a small, unincorporated village about 10 miles south of the city of Monroe, having a few places of business and a number of residences centered around four corners where an east and west road crosses the Dixie highway. On the crossroad just east of the Dixie highway is located a Catholic school. Miss Cusino was killed not long before 9 o'clock in the morning, close to the

crossroad, at the time when pupils were going to the school. Quite a number of them saw the accident, and also several older persons who were at or near the crossing.

Testimony of the prosecution showed that an automobile (used as a "bread wagon") which carried some pupils to school from north of Erie had just stopped at the northwest corner to discharge them when Miss Cusino was seen to come out from the direction of her home onto the east side of the Dixie highway several hundred feet south of the corner and turn north, walking along the highway on its right, or east, side towards the corners, wearing a red hat, as certain witnesses seem to have particularly noticed. An automobile was also noticed at quite a distance beyond her, coming from the south at a high rate of speed. The driver of the auto which brought the pupils from the north and stood at the northwest corner of the crossing testified that the rapidly approaching automobile was at least a quarter of a mile further south when Miss Cusino came out upon the highway, and both were thereafter in plain sight with nothing between them to obstruct the driver's view until it struck her, just before she reached the crossing. The on-coming car did not sound its horn nor slacken speed, estimated by various witnesses at from 20 to 35 miles an hour, and, as it struck the girl, swept or carried her along for nearly 30 feet before she fell to the ground, and it ran over her, killing her almost instantly. The automobile was a Studebaker, with two men in it. Defendant was driving, and did not stop when he struck her, but stepped on his accelerator and hastened away. A young man just then in front of the postoffice, north of the four corners, who heard the accident and saw part of it, caught the number of the car as it went by, increasing its speed. The car cleared the village at an estimated speed of 40 miles an hour, and further north the men were seen throwing bottles from their auto-

mobile, some of which, containing whisky, were picked up by children who saw them thrown. After driving about 4 miles north of Erie, along the Dixie highway, defendant drove down a crossroad for about a half mile and stopped within sight of a farm house, where he and his companion tore the license numbers from the automobile and threw them in a ditch. The farmer and his son, near whose place they stopped, saw them do this, and then leave the car, walking back east towards the Dixie highway. Notice of the accident and the number of the car were telephoned the sheriff at Monroe, and a deputy from there on his way towards Erie met the two men walking north on the Dixie highway, stopped and talked with them, told of his mission, and asked if they had seen anything of such an automobile as he described. They denied having seen any car, and the sheriff went on. Later, he learned where the automobile was left, and other particulars which led him to return north after these men, whom he overtook and apprehended before they had reached Monroe. When examined where they left it, their automobile was without license plates. Mutilated plates found in a ditch near by were issued by the state of Ohio. A broken whisky bottle was in the car, and on shelves concealed under the running board were found seventy-two bottles of whisky.

Defendant admitted he was driving the car which struck the girl to Detroit from Toledo, where he had been employed in the liquor business, but denied ever having any whisky in that car. He testified that he did not see the girl until just as the machine hit her, and did not stop for fear he would be mobbed, that the accident occurred as he was passing a horse and buggy standing in front of a store, or shop, and a moving hay wagon, when the girl suddenly came out in front of his machine as the hay wagon passed. The other occupant of this automobile supported defendant's account.

of how the accident occurred. The testimony of witnesses for the prosecution was positive that no such vehicles were in the street at the place of the accident, or to the south of it, but that the way was clear, and the girl in plain sight of the approaching car from the time she came out upon the road until it overtook and struck her. This issue of fact was submitted to the jury under proper instructions.

Defendant's several assignments of error are all directed to the court's admitting, and permitting the jury to consider, evidence that defendant was carrying intoxicating liquor in his car at the time of the accident, in violation of state and Federal laws. Upon that proposition appeal is made to the general rule that in a prosecution for a particular offense evidence of the accused committing another and distinct offense is inadmissible, and it is urged that evidence of defendant's having whisky in the car which killed Miss Cusino has no tendency to prove that he could, and should, have seen her in time to avoid the accident, which is the crucial test of his guilt; that evidence of his being a lawbreaker in transporting or having in his possession intoxicating liquor was wholly irrelevant and prejudicially tended to inflame the minds of the jury against him.

It was the claim of the prosecution that the accidental death of Miss Cusino was caused by defendant while he was intentionally and recklessly engaged in unlawful acts in violation of statutory provisions, and such criminal intent, attached to the accidental killing under the law of homicide, making the offense either murder or manslaughter. As covering the unlawful acts which there was testimony tending to show defendant was intentionally committing, and for the perpetration of which he was using the very instrumentality which killed Miss Cusino, the following statutory provisions are referred to:

As directly relating to the instrumentality used, § 4817, Comp. Laws

1915, prohibits operating a motor vehicle upon a public highway in this state at a greater speed than is reasonable, or so as to endanger the life or limbs of any person, not in any event to exceed 25 miles an hour, and requiring that on approaching an intersecting highway the operator shall have the vehicle under control, operated at such speed as is reasonable and proper with regard to the traffic then on the highway and safety of the public. Section 4818 provides: "Upon approaching a person walking in the roadway . . . a person operating a motor vehicle shall slow down to a speed not exceeding 10 miles an hour and give reasonable warning of its approach and use every reasonable precaution to insure the safety of such person."

By § 4824, violation of these provisions is punishable as a misdemeanor.

Act 53, Pub. Acts 1919, makes it a felony to have in possession or transport intoxicating liquors in this state, with certain exceptions not applicable to the evidence offered here. Federal statutes providing punishment for offenses against interstate commerce make transportation of liquor between states in the manner indicated here a misdemeanor, with heavy penalties provided.

Defendant's objections are particularly directed against the court's permitting reference to, and admitting evidence tending to show, violation of state and Federal laws relative to transporting liquor.

The agency by which defendant was transporting liquor in violation of law was the same agency with which he killed the girl, and a connected element in the chain of cause and effect. That criminal act of so transporting liquor cannot be held, as a matter of law, entirely disconnected with his negligent act in so driving his car, which carried it, as to cause the fatal accident.

The trial court explained to the jury the different degrees of unlawful killing covered by the informa-

tion, and distinctly charged that defendant could only be convicted, if convicted at all, of involuntary manslaughter, which is quite generally defined by the authorities as the unintentional killing of a person in the commission of an unlawful act, or—

“the killing of a human being, without any intention to do so, but in the commission in an unlawful manner of an unlawful act, or of a lawful act, which probably would produce such consequences.” Wharton, *Homicide*, 3d ed. p. 8.

The fact that the act which caused death was not a misdemeanor or at common law does not relieve the killing from constituting manslaughter if the act is made a misdemeanor by statute. *People v. Abbott*, 116 Mich. 263, 74 N. W. 529, 11 Am. Crim. Rep. 4.

Under the facts in this case, as submitted to the jury, we can safely rest this inquiry on the following designation of manslaughter by Justice Stone, in *People v. Barnes*, 182 Mich. 179, 148 N. W. 400: “There seems to be no conflict in the decisions where the respondent is violating some statute, and where his manner is negligent and careless; the courts in such cases uniformly hold that he is guilty of manslaughter, if the death of some other person is the result.”

The trial court limited consideration of the proof that defendant was engaged in unlawful transportation of liquor to the question of whether or not his criminal conduct in that particular so affected his mind as to stimulate or induce wanton negligence in recklessly driving his car as claimed, thereby showing its causal connection with the killing.

On that subject the court charged the jury as follows: “I have already charged you that defendant, if found guilty, must be found guilty of gross and culpable negligence in striking and killing Miss Cusino, and that such gross and culpable negligence in driving and managing his automobile was the proximate cause of Miss Cusino’s

death. . . . Gentlemen of the jury, there has been some testimony introduced here in reference to the defendant’s automobile containing whisky. That testimony was admitted, not for the purpose of proving the guilt of the defendant on the charge here made against him, but was introduced as bearing upon the question of negligence. If the defendant knowingly had in his automobile a quantity of liquor which he was transporting from Toledo, Ohio, to Detroit, Michigan, he would be guilty of a felony under the laws of Michigan, and he would also be guilty of an offense under the laws of the United States. And while the fact, if you find it to be a fact, that he had whisky in his automobile is no evidence of his guilt, and is not to be considered in this light, yet you may consider it as bearing upon his negligence. It is the theory of the prosecution that the defendant was violating the statute referred to and transporting liquor illegally, and was hurrying through the county of Monroe with his illegal load of liquor. This theory of the prosecution must also be proven to the jury beyond a reasonable doubt before the jury can consider the carrying of the liquor as having had anything to do with the accident. In any event, and even though the defendant was knowingly carrying the liquor, he must be found to have driven his machine at the place of the accident with gross and culpable neglect, and that the accident occurred from such gross and culpable neglect.”

Under the circumstances of this case proof that defendant was engaged in perpetrating a criminal act with the very agency

by which he caused the accidental death was competent for the purpose to which the court

Homicide—manslaughter—negligent operation of automobile—illegal possession of liquor.

carefully limited it in a very plain and fair charge, fully protecting the rights of the accused.

The conviction and judgment of sentence will stand affirmed.

ANNOTATION.

Manslaughter or assault in connection with use of automobile for unlawful purpose or in violation of law.

- I. Manslaughter by unlawful act, 914.
- II. Manslaughter by negligent act, 916.
- III. Assault, 917.

I. Manslaughter by unlawful act.

In a number of cases it has been held that, under a statute providing that the killing of another in the doing of an unlawful act not amounting to a felony is manslaughter, a person who, while driving an automobile in violation of a statute or ordinance regulating speed or prescribing precautions to be observed by automobile drivers, kills another is, as a matter of law, guilty of manslaughter.

Delaware.—*State v. Long* (1919) 7 Boyce, 397, 108 Atl. 36; *State v. McIvor* (1920) — Del. —, 111 Atl. 616.

Georgia.—*Hayes v. State* (1912) 11 Ga. App. 371, 75 S. E. 523.

Indiana.—*Smith v. State* (1917) 186 Ind. 252, 115 N. E. 943.

Kentucky.—*Held v. Com.* (1919) 183 Ky. 209, 208 S. W. 772.

Michigan.—*PEOPLE v. TOWNSEND* (reported herewith) ante, 902.

New York. — *People v. Darragh* (1910) 141 App. Div. 408, 126 N. Y. Supp. 522, affirmed without opinion in (1911) 203 N. Y. 527, 96 N. E. 1129.

North Carolina. — *State v. McIver* (1917) 175 N. C. 761, 94 S. E. 682; *State v. Gray* (1920) 180 N. C. 697, 104 S. E. 647; *State v. Rountree* (1921) — N. C. —, 106 S. E. 669.

Ohio.—*Bell v. State* (1917) 7 Ohio App. 185.

South Carolina.—*State v. Hanahan* (1918) 111 S. C. 58, 96 S. E. 667.

West Virginia.—Compare *State v. Weisengoff* (1919) 85 W. Va. 271, 101 S. E. 450.

Thus, in *State v. McIver* (N. C.) supra, it was held that an auto truck driver who, in violation of a statute and of a city ordinance, drove his machine, when approaching the intersection of a city street, at a rate of 30 miles an hour without slowing down or giving a signal, thereby causing the death of another, was guilty

of manslaughter. The court said: "It is . . . practically agreed . . . that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, that the person violating the statute is guilty of manslaughter at least, and, under some circumstances, of murder. See also *State v. Rountree* (N. C.) supra.

Similarly, in *Hayes v. State* (Ga.) supra, it was held that one who, while driving an automobile at a greater rate of speed than 6 miles an hour when approaching the intersection of two streets, in violation of a law prohibiting such act, ran over and killed another, was guilty of manslaughter, the court laying down the rule that the unlawful operation of a motor vehicle, whereby death ensues, is a sufficient ground on which to predicate a criminal responsibility for the act on the part of the driver.

So, the violation of a statute forbidding a speed in excess of a definite rate has been held to render the operator of an automobile guilty of manslaughter if it is clearly shown that such unlawful speed was the cause of death. *State v. Long* (Del.) supra.

See to the same effect, *Held v. Com.* (1919) 183 Ky. 209, 208 S. W. 772; *People v. Darragh* (1910) 141 App. Div. 408, 126 N. Y. Supp. 522; *State v. Gray* (1920) 180 N. C. 697, 104 S. E. 647; *Bell v. State* (1917) 7 Ohio App. 185; *State v. Hanahan* (1918) 111 S. C. 58, 96 S. E. 667.

And in *State v. McIvor* (1920) — Del. —, 111 Atl. 616, it was held that the commission of an unlawful act in the operation of an automobile in violation of a statute, whereby death results, will render the driver guilty of manslaughter, the court saying: "Anyone who, while driving his automobile in violation of the statute, kills another by striking him with his car, is prima facie guilty of negligence, and such act will make the

driver criminally liable and guilty of manslaughter, if it is clearly shown by the evidence that such unlawful speed was the cause of the death."

In *PEOPLE v. TOWNSEND* (reported herewith) ante, 902, it was held that the driving of an automobile while intoxicated, in violation of a statute, was "an unlawful and culpably negligent act," and a conviction of manslaughter was sustained on proof that the death of a person riding in the automobile as a passenger resulted proximately therefrom.

Where, in a prosecution for manslaughter, the defendant is charged with two separate unlawful acts in the operation of an automobile, proof of either one, proximately causing the injury in question, will sustain a conviction. *Smith v. State* (1917) 186 Ind. 252, 115 N. E. 943.

But in *State v. Weisengoff* (1919) 85 W. Va. 271, 101 S. E. 450, wherein it appeared that the defendant, while operating an automobile, in endeavoring to escape the service of a warrant in the hands of a sheriff who had intercepted him as he was passing through a town and had mounted the running board of his machine, violated the law by resisting arrest, and thereby caused the sheriff's death in a collision with a bridge, it was held that, although the defendant was acting unlawfully, the rapid driving was not an act so inherently dangerous as to be likely to cause the death of the officer, and if the jury believed that the collision with the bridge was accidental, they were bound by the law to acquit the defendant.

And it has been held that the unlawful driving relied on as the basis for a manslaughter action must be the proximate cause of death, and if death occurs from any cause other than the unlawful act, there is no criminal liability. *State v. Schaeffer* (1917) 96 Ohio St. 215, L.R.A.1918B, 945, 117 N. E. 220, Ann. Cas. 1918E, 1137, wherein the court said: "The safer and sounder doctrines seems to be recognized in most of the states, that the unlawful act must be a proximate cause of the killing."

So, in *Jackson v. State* (1920) —

Ohio St. —, 127 N. E. 870, wherein it appeared that the killing was occasioned by the violation of a statute forbidding an excessive rate of speed in the operation of a motor vehicle, the court, in holding that the disobedience of the statute must have been the proximate cause of death, said: "The square question is raised here as to whether an accidental, unintentional killing of a person by another engaged in an unlawful act makes that person guilty of manslaughter under the statute, irrespective of any connection between the unlawful act and the unintentional killing, and it seems to this court that an analysis of the illogical and absurd results which would necessarily follow the recognition of such a rule will answer the query. For instance, if it be the law, as charged by the trial court in this case, that, if the jury find the accused unintentionally struck and killed the decedent, while engaged in an unlawful act, to wit, operating his car at a greater rate of speed than 15 miles per hour, they must find him guilty of manslaughter without reference to causation, then it must follow that if the accused had been violating any other valid statute, however unconnected with the death at the time of the unintentional killing, he would be guilty of manslaughter. For instance, it is a violation of a valid statute to operate a motor vehicle without having first registered same with the secretary of state, . . . yet, . . . should the driver of an automobile, while driving his car without first having registered it with the secretary of state . . . be so unfortunate as to unintentionally run over and kill a person who inadvertently or purposely projected himself in front of the car, he would be guilty of manslaughter; for clearly it would be an unintentional killing by a person operating a car in the violation of a valid statute. And yet there would be no relationship between the violation of the statute and the death. The accident would have occurred just as surely had the motor vehicle been registered. . . . The proximate cause would have been the

same in each case although the result to the driver of the car would have been the appalling difference between criminal guilt and legal innocence."

Likewise, in *People v. Barnes* (1914) 182 Mich. 179, 148 N. W. 400, a conviction of manslaughter for the killing of a pedestrian as the result of a collision, while operating an automobile on a public highway at an excessive rate of speed in violation of the statute relating to the operation of motor vehicles, was reversed on the ground that it did not appear that the homicide was the direct and natural result of the unlawful act, or that death resulted from the violation of the statute, the court saying, in recognition of the general rule: "There seems to be no conflict in the decisions where the respondent is violating some statute, and where his manner is negligent and careless; the courts in such cases uniformly hold that he is guilty of manslaughter, if the death of some other person is the result."

In *People v. Schwaz* (1921) — Mich. —, 183 N. W. 723, the court held that the rule laid down in the *Barnes* Case, just cited, was not infringed by the charge which, *inter alia*, instructed the jury that the mere fact that the defendant was exceeding the speed limit prescribed by statute would not justify his conviction of manslaughter, unless, in addition to that, his conduct was utterly careless and abandoned, and in utter disregard of the rights of other people or pedestrians upon the highway.

II. Manslaughter by negligent act.

Where a charge of manslaughter by the operation of an automobile is based on a statute providing that the killing of another by a reckless or grossly negligent act shall constitute manslaughter, the fact that the automobile was operated in violation of a statute or ordinance regulating speed or prescribing precautions to be observed is not conclusive of guilt, but is a circumstance bearing on the question whether the operation of the automobile was in fact criminally negligent.

Arkansas. — *Madding v. State* (1915) 118 Ark. 506, 177 S. W. 410.

Connecticut. — *State v. Campbell* (1910) 82 Conn. 671, 135 Am. St. Rep. 293, 74 Atl. 927, 18 Ann. Cas. 236; *State v. Goetz* (1910) 83 Conn. 437, 30 L.R.A.(N.S.) 458, 76 Atl. 1000.

Illinois. — *People v. Falkovitch* (1917) 280 Ill. 321, 117 N. E. 398, Ann. Cas. 1918B, 1077; *People v. Camberis* (1921) 297 Ill. 455, 130 N. E. 712.

Michigan. — *PEOPLE v. HARRIS* (reported herewith) ante, 910.

Minnesota. — *State v. Goldstone* (1920) 144 Minn. 405, 175 N. W. 892.

Nebraska. — *Schultz v. State* (1911) 89 Neb. 34, 33 L.R.A.(N.S.) 403, 130 N. W. 972, Ann. Cas. 1912C, 495.

New Jersey. — *State v. Dugan* (1913) 84 N. J. L. 603, 89 Atl. 691, affirmed on opinion below in (1913) 85 N. J. L. 730, 89 Atl. 1135.

Tennessee. — *Lauterbach v. State* (1915) 132 Tenn. 603, 179 S. W. 130.

Thus, in *State v. Campbell* (Conn.) supra, the court held that the fact that the accused drove his automobile at a rate of speed greater than that prescribed by statute, did not necessarily establish the degree of negligence required to convict, but that gross negligence must be proved, as well as the fact that the death of another was the direct result of the negligent act. See also *State v. Goetz* (Conn.) supra.

Likewise, it has been held that the fact that the defendant, at the time and place of the accident, was driving his automobile at a rate of speed greater than that allowed by law, was not, of itself, sufficient to justify a finding that the defendant was guilty of manslaughter, where the statute provided that rates of speed greater than those mentioned were *prima facie* evidence of negligence, since it was necessary that the defendant should be shown to be actually guilty of criminal negligence. *People v. Falkovitch* (Ill.) supra. See to the same effect, *People v. Camberis* (Ill.) supra.

In *Lauterbach v. State* (Tenn.) supra, it was held that one who drove his automobile along a public

thoroughfare at a rate of speed in excess of that prescribed by statute, thereby causing the death of a pedestrian, was guilty of manslaughter, the court saying: "His [the defendant's] violation of the statute by running in excess of the speed limit there prescribed was negligence. One who kills another in the act of committing such negligence is guilty of felonious homicide."

It is held in the reported case (*PEOPLE v. HARRIS*, ante, 910), that one who violates a statute prohibiting the operation of a motor vehicle on a public highway at a greater rate of speed than is reasonable, or so as to endanger the life or limbs of any person, not in any event to exceed 25 miles an hour, is guilty of manslaughter if a person is killed by his negligent operation of the car. It is further held that the fact that the defendant was engaged in the commission of an unlawful act in transporting liquor at the time of the homicide was an element in the chain of cause and effect so as to permit the introduction of evidence thereof, as bearing on the question of negligence and tending to prove a reason for the excessive speed.

In *State v. Dugan* (1913) 84 N. J. L. 603, 89 Atl. 691, the court sustained a conviction of manslaughter based on a death occasioned by the grossly negligent act of the defendant in operating an automobile on the public highway while in an intoxicated condition, in violation of statute.

In *Madding v. State* (1915) 118 Ark. 506, 177 S. W. 410, a prosecution for manslaughter based on negligence in the operation of an automobile, the court referred to the violation of a city ordinance and also to the fact that the car was being operated at the time of the happening of the accident at a high and unlawful rate of speed, as bearing on the question of criminal liability.

III. Assault.

In cases of assault caused by the unlawful operation of a motor vehicle, the rule seems to be that the fact that a statute was violated in the opera-

tion of the vehicle is a circumstance to be considered in passing on the guilt of the driver. Thus, in *State v. Schutte* (1916) 88 N. J. L. 396, 96 Atl. 659, affirming (1915) 87 N. J. L. 15, 93 Atl. 112, it was held that a criminal assault may be committed by driving an automobile along a public street at an excessive rate of speed, endangering the safety of other persons and actually resulting in an injury, and that the driving of an automobile at an excessive rate of speed, in violation of the statute, is a wilful act, likely to cause injury, from which the malice and intention to inflict injury, which are the essentials of a criminal assault, may, if warranted by the circumstances, be implied. The court said: "The fact that the automobile was exceeding the speed limit prescribed by the Motor Vehicle Act is not the controlling factor, but is only a circumstance to be considered in deciding whether or not the defendant was running his automobile at a rate of speed which, under the existing conditions, was obviously dangerous to pedestrians or others using the highway. A man who deliberately drives his car into a mass of people standing in the street, looking at a baseball score board, is guilty of assault and battery for running over some of them, although his automobile is traveling far below the speed limit, whereas one driving on a lonely country road, with no pedestrians on it in sight, might be entirely guiltless of the crime of assault and battery for running over a child which suddenly darted from a concealed position by the highway, although the automobile at the time was exceeding the speed limit."

So in *Com. v. Gayton* (1918) 69 Pa. Super. Ct. 513, a prosecution for assault, it was held not to be error for the court to call the attention of the jury to an act fixing the rate of speed at which an automobile should be operated on a public highway, although such violation may not of itself prove recklessness on the part of the driver.

Similarly, in *People v. Hopper* (1917) — Colo. —, 169 Pac. 152, one driving an automobile at a rate of

speed in violation of law was held not to be criminally liable on that ground alone, the court saying: "The mere fact, however, that the defendant was driving at a speed whereby he violated the speed ordinance would not make him guilty of assault in this case."

In harmony with the foregoing cases is the decision in *State v. Richardson* (1917) 179 Iowa, 770, L.R.A. 1917D, 944, 162 N. W. 28, holding that one who drives in the nighttime an automobile which is not in good running order and without lights, along a public highway, in excess of the statutory speed limit, thereby striking and injuring another, cannot, under the theory that one intends the natural consequences of his act, be convicted of assault if he does not know of the presence of the injured person, or have any intent to injure him.

So it has been held that whether the driver of an automobile was exceeding the speed limit at the time he ran into a bicycle, injuring its rider, was immaterial in a prosecution for an

assault and battery, where the accident was not caused by the rate of speed at which the automobile was traveling. *Luther v. State* (1912) 177 Ind. 619, 98 N. E. 649.

But it was held in *Fishwick v. State* (1911) 33 Ohio C. C. 63, that one who, while intentionally violating a statute prohibiting the driver of an automobile beyond a certain rate of speed on a city street, runs into and injures a person rightfully passing across the street, is guilty of assault and battery. In that case it appeared that the person injured, a boy, ran from behind a wagon being driven on the street just in time to get in front of the passing automobile.

And in *Bleweiss v. State* (1919) 188 Ind. 186, 122 N. E. 577 (denying rehearing (1918) 188 Ind. 184, 119 N. E. 375), a conviction of assault and battery was affirmed on evidence showing that the defendant was operating his automobile in violation of the statute, and caused an injury thereby. L. F. C.

T. E. COX

v.

W. A. PERKINS.

Georgia Supreme Court — June 18, 1921.

(— Ga. —, 107 S. E. 863.)

Arrest — warrant — sufficiency of affidavit.

A criminal warrant consists both of the affidavit upon which it is based and the precept of the officer. The taking of the affidavit imposes duties in their nature judicial.

(a) The powers conferred upon the clerk of the municipal court of Atlanta, under § 23 of the act approved August 20, 1913 (Acts 1913, pp. 145, 155), are not judicial in character.

(b) An affidavit taken before a deputy clerk of the municipal court of Atlanta, not in the presence of a judge of that court, will not furnish a sufficient foundation for the issuance by a judge of the municipal court of Atlanta of a warrant to arrest an accused person.

[See note on this question beginning on page 923.]

Headnote by GEORGE, J.

CERTIFICATION by the Court of Appeals for determination by the Su-

preme Court of questions arising upon demurrer to the declaration in an action brought to recover damages for alleged malicious prosecution.

Questions answered in part.

The facts are stated in the opinion of the court.

Messrs. McCallum & Sims, for defendant:

The alleged warrant upon which the action is based was void and insufficient in law to support the suit, because the affidavit upon which the arrest was made was sworn to before a clerk of the municipal court, and not before a judge thereof, or any other judicial officer.

Ormond v. Ball, 120 Ga. 916, 48 S. E. 383; Jones v. Hill, 17 Ga. App. 151, 87 S. E. 755; Carhart v. Mackle, 22 Ga. App. 520, 96 S. E. 591; Gilbert v. State, 17 Ga. App. 143, 86 S. E. 415; Scroggins v. State, 55 Ga. 380; Thorpe v. Wray, 68 Ga. 359; Gray v. Joiner, 127 Ga. 544, 56 S. E. 752; Berger v. Saul, 113 Ga. 869, 39 S. E. 326; Lloyd v. State, 70 Ala. 32; People v. Colleton, 59 Mich. 573, 26 N. W. 771.

The warrant was void because it charged no offense against the penal laws of this state.

Alexander v. West, 6 Ga. App. 73, 64 S. E. 288; Satilla Mfg. Co. v. Cason, 98 Ga. 14, 58 Am. St. Rep. 287, 25 S. E. 909; Collum v. Turner, 102 Ga. 534, 27 S. E. 680; Pye v. Gillis, 9 Ga. App. 397, 71 S. E. 594.

The petition does not sufficiently show the criminal prosecution to have terminated before the damage suit was filed.

Hartshorn v. Smith, 104 Ga. 235, 30 S. E. 666; Page v. Citizens Bkg. Co. 111 Ga. 74, 51 L.R.A. 463, 78 Am. St. Rep. 144, 36 S. E. 418; Pickard v. Bridges, 7 Ga. App. 463, 67 S. E. 117; Garrett v. Foy & A. Co. 21 Ga. App. 613, 94 S. E. 822; Woodruff v. Woodruff, 22 Ga. 237; Horn v. Sims, 92 Ga. 421, 17 S. E. 670; Thornton v. Story, 24 Ga. App. 503, 101 S. E. 309.

Mr. George P. Whitman, for plaintiff:

The affidavit and warrant were not illegal and void because the affidavit was made before a deputy clerk of the municipal court of Atlanta.

Mitchell v. State, 126 Ga. 84, 54 S. E. 931; Wright v. Davis, 120 Ga. 670, 48 S. E. 170; Pennaman v. State, 58 Ga. 336; Ormond v. Ball, 120 Ga. 920, 48 S. E. 383; Scroggins v. State, 55 Ga. 380; Thorpe v. Ray, 68 Ga. 359.

The affidavit and warrant sufficiently charged a penal offense.

Pye v. Gillis, 9 Ga. App. 397, 71 S. E. 594.

It appeared that the prosecution had ended and the suit was not prematurely brought.

Clark v. Douglas, 6 Ga. App. 489, 65 S. E. 304; Baker v. Langley, 3 Ga. App. 751, 60 S. E. 371; Josey v. Cochran, 9 Ga. App. 656, 72 S. E. 42.

Mr. Joseph A. Morris also for plaintiff.

George, J., delivered the opinion of the court:

The court of appeals certified to the supreme court the following questions:

"(1) Is a criminal warrant issued by a judge of the municipal court of Atlanta invalid for the reason that the affidavit upon which it was based was made before a deputy clerk of the court, not in the presence of the judge? In other words, has a deputy clerk of the municipal court of Atlanta authority to take an affidavit which is to be the basis of a criminal warrant, or is such authority confined to a judge of the court?"

"(2) Does an affidavit and warrant which charges a person with 'conversion of proceeds of sale under § 190 of the Criminal Code of Georgia' set out any offense under the laws of Georgia?"

"(3) The petition in paragraph 7 alleges that 'said defendant has not persisted in his said complaint, but has deserted and abandoned the same, and said prosecution is now fully determined and ended.' The petition further shows that the warrant was issued on October 1st, that the plaintiff was tried on October 3d, and that the present suit for damages was filed on October 14th. The petition fails to show that the plaintiff has not been indicted by the grand jury of the county, or that a grand jury has been in session without the return of an indictment against the plaintiff, or that a reasonable time has elapsed since Octo-

ber 3d within which prosecution could have been carried on by the defendant. Was the petition subject to a demurrer which averred 'that it appears, as a matter of law, that said alleged prosecution has not been fully determined and ended, as alleged in paragraph 7 of said declaration, and that it likewise appears from said declaration that this action has been prematurely brought, and no cause of action is set forth'?

"(4) No special damages were sued for, but suit was brought for \$10,000 general damages. Paragraph 8 of the petition is as follows: 'By reason of which said several premises the plaintiff has been and is greatly injured in his reputation, and brought into public scandal, infamy, and disgrace among all of his neighbors and other good and worthy citizens of the state; and divers of the said citizens and neighbors, to whom his innocence in the premises was and is unknown, have by reason of the premises suspected and believed, and do suspect and believe, that the said plaintiff has been and is guilty of felony.' Was this paragraph subject to the following demurrers: 'This defendant demurs specially to the allegations of paragraph 8 of said declaration, and says that said allegations setting up alleged damages are mere conclusions of the pleader, and are not allegations of fact, and said alleged damages are too remote, speculative, and uncertain to be the basis of a demand for damages therefor; and said allegations are immaterial and irrelevant as to any issue in this case?'"

Section 35(a) of the act approved August 20, 1913 (Acts 1913, pp. 145, 161), establishing the municipal court of Atlanta, provides that "any judge of said court shall have power to issue a warrant for the arrest of any offender against the penal laws, based either on his own knowledge or on the information of others given to him under oath."

Section 23 of the act (page 155) enumerates the powers and duties of the clerk of the municipal court,

and in part declares that "all purely ministerial duties which, under the laws of this state, are performable by a justice of the peace or a notary public ex-officio justice of the peace, and any such duties prescribed by the rules of said court, shall be performable by the clerk, or his deputies. The clerk and deputy clerks of said court may administer oaths and take affidavits, but shall not have the power to attest deeds and similar instruments."

Penal Code, § 789, declares that justices of the peace "have criminal jurisdiction in the following instances: . . . In issuing warrants for the apprehension of any person charged on oath with a violation of any portion of the Penal Code, or who is so known to them officially. . . ."

Penal Code, § 903, provides that "any judge of a superior, city, or county court, or justice, or any corporation officer clothed by law with the powers of a justice, may issue his warrant for the arrest of any offender against the penal laws, based either on his own knowledge or the information of others given to him under oath."

It thus appears that the judges of the municipal court of Atlanta have the power and jurisdiction of justice of the peace in the matter of issuing criminal warrants. The material portion of § 35(a) of the act establishing the municipal court of Atlanta is identical with the Code provision on the subject. The clerk of the municipal court of Atlanta has no power to issue a criminal warrant. He has the power to administer oaths and take affidavits.

In *Wright v. Davis*, 120 Ga. 670 (5), 48 S. E. 170, it was held that "an affidavit upon which an accusation in the city court of Wrightsville is based is not void because made before and attested by the clerk of such court."

In *Shuler v. State*, 125 Ga. 778, 54 S. E. 689, it was held that an accusation in the city court of Bainbridge may be framed by an affidavit attested by a commercial notary pub-

lic, by virtue of the authority to administer oaths conferred upon such officers by the Political Code. In the course of the opinion Evans, J., said: "Inasmuch as there is nothing, either in the general law or the local act, prohibiting a commercial notary public from attesting the affidavit, we see no reason why the remainder of the pleadings, to wit, the accusation, cannot be based on such affidavit, although it may not furnish the basis for issuing a warrant for the apprehension of the defendant."

In *Mitchell v. State*, 126 Ga. 84, 54 S. E. 931, it was held that an affidavit made before a commercial notary public is sufficient as a basis for framing an accusation in the city court of Atlanta, but "whether such an affidavit would furnish a sufficient foundation for the issuance, by the judge of the criminal court, of a warrant to arrest the accused person, *quære*." This court has recognized that "the issuing of a criminal warrant by a justice of the peace is a judicial act, performed by a judicial officer, and is the beginning of a judicial proceeding, but it is not the act of a court." *Ormond v. Ball*, 120 Ga. 916 (4), 921, 48 S. E. 383.

See also *Herring v. State*, 119 Ga. 709, 715, 46 S. E. 876.

In *Ormond v. Ball*, *supra*, Cobb, J., speaking for the court, said: "It so happens that under our law the only officers who are authorized to issue warrants are judicial officers, but there is no reason why this authority should not be, by the general assembly, vested in officers whose other duties are purely ministerial, such as clerks, sheriffs, and the like."

It is unquestionably true that the issuance of a criminal warrant is judicial in its nature. In *ex parte Bollman*, 4 Cranch. 75, 2 L. ed. 554 (opinion by Chief Justice Marshall), it was held that a person may be committed for a crime by one magistrate upon an affidavit made before another. In *State v. Freeman*, 59 Vt. 661, 10 Atl. 752, it was held:

"It is not necessary that oath be made by a private prosecutor before the magistrate issuing the warrant; if made before any officer authorized to administer oaths, before the warrant is issued, it is sufficient. But the magistrate must determine as to its sufficiency before he can issue the warrant."

In the report of that case the facts are not given, and it is not clear whether the oath was taken before another magistrate or before an officer authorized by statute to administer oaths merely. In the opinion, by Veazey, J., it is said: "As to the first point, it appears that an oath was taken, but it was by an officer authorized by statute to administer oaths, . . . other than the magistrate who issued the warrant. The Constitution (chap. 1, art. 11), forbids the issuing of any warrant without oath or affirmation first made. *State Treasurer v. Rice*, 11 Vt. 339. Must such oath be taken before the magistrate issuing the warrant, or may it be taken before another magistrate? The statutes are silent on the point. The substantial thing required in the Constitution is that the complaint be on oath. There is nothing in the form of the oath upon which the magistrate issuing the warrant is called upon to pass. Any form from which the idea can be collected is sufficient as 'taken and sworn before me.' 1 Bishop, *Crim. Proc.* § 231; *Com. v. Bennett*, 7 Allen, 533; *Com. v. Wallace*, 14 Gray, 382. The complaint must adequately charge an offense. Bishop, *Crim. Proc.* § 230, and cases there cited. Therefore the magistrate must see the complaint, in order to determine whether it furnishes sufficient foundation for a warrant. It stands like a *capias* in civil process issued upon affidavit. The right to the *capias* depends on compliance in the affidavit with the statutory requirements; therefore the magistrate must see it, in order to pass on its sufficiency, as held in *Muzzy v. Howard*, 42 Vt. 23; but the oath to it may be before another officer au-

thorized to administer oaths. So we think it may be as to a complaint."

In 16 C. J. 289, § 496, it is said: "In the absence of a statute requiring that the oath to an information be taken before the judge or the court issuing the warrant, it may be taken before any officer authorized to administer such an oath. When the matter is regulated by statute, and a particular officer is named before whom the information or affidavit must be sworn to, the statute must be followed. Generally the complaint or affidavit must be made and verified before a magistrate or judge; it cannot be made and verified before a clerk of the court or before a notary public, unless the statute permits the oath to be administered by a clerk or a notary."

In *People v. Nowak*, 52 Hun, 613, 7 N. Y. Crim. Rep. 69, 5 N. Y. Supp. 239, it was held that an affidavit made before a notary public was insufficient as the foundation of a criminal warrant, in view of the Code of Criminal Procedure, which provided in substance that when an information is laid before a magistrate he must examine the informant and his witness on oath. While in *State ex rel. Bryant v. Lauver*, 26 Neb. 757, 42 N. W. 762, it was held that an affidavit made before the clerk of the district court would furnish sufficient foundation for the issuance of a criminal warrant, in view of the Criminal Code, which in substance declared it to be the duty of the magistrate to issue a warrant whenever a complaint in writing and upon oath shall be filed with him. In *Lloyd v. State*, 70 Ala. 32, it was held that the clerk of the county court of Madison county could not administer an affidavit on which a criminal warrant may issue, in view of the Code and of the statute increasing the jurisdiction of that court in Madison county. In the opinion it was said that "the taking of an affidavit, and the issue of a warrant of arrest, imposed duties in their nature judicial."

In *People v. Colleton*, 59 Mich.

573, 26 N. W. 771, the question was whether the clerk of the police court of the city of Grand Rapids had power to take the complaint and issue the warrant upon which the defendant was arrested. It was held that, in so far as the act of the legislature then under consideration authorized the exercise of such judicial powers by the clerk, the act was unconstitutional. The Michigan statute provided that the complaint should be made to a justice of the peace or a police justice, and that it must be made to appear from the examination of the witness that the offense had been committed before he should issue his warrant for the arrest of the defendant. In the opinion, by Sherwood, J., it was said: "The taking of the complaint, and the examination of witnesses, and the determination therefrom whether or not the offense has been committed preliminary to issuing the warrant, involve judicial action, which can only be taken by a court, and which cannot be performed by a clerk; neither can the power to perform it be conferred upon that officer," under § 1 of article 6 of the Constitution.

Cases from other jurisdictions might be cited, but those referred to are sufficient to show that the question here presented is generally controlled by statute.

Penal Code, § 789, ¶ 2, merely defines the jurisdiction of justices of the peace in criminal matters. It does not undertake to prescribe the form of the affidavit or warrant, nor does it designate the officer before whom the affidavit (the foundation of the warrant) is to be made or taken. Penal Code, § 903, in express terms declares that "any judge of a superior court, city, or county court, or justice [of the peace], or any corporation officer clothed by law with the powers of a justice [of the peace], may issue his warrant for the arrest of any offender against the penal laws."

The warrant may be based either on the officer's own knowledge "or the information of others given to

him under oath." Sections 905 and 906 prescribe the form, respectively, of the affidavit and warrant, and the form of the affidavit and warrant indicate that the oath of the prosecutor is to be made before the officer issuing the warrant. Section 908 expressly provides that the officer issuing the warrant may, "upon any sufficient ground of suspicion, . . . require the applicant for the warrant to file a bond, with sufficient sureties to prosecute the suit in the event of a committal." While our Code does not expressly declare that the oath is to be made before the magistrate or officer issuing the warrant, the sections quoted above clearly contemplate that the affidavit is to be made before the magistrate, or at least before an officer clothed with judicial power.

Arrest—warrant
—sufficiency of
affidavit.

The taking of the affidavit involves the examination of the complaining witness (generally called the prosecutor) and the determination therefrom whether an offense has been committed, and this action cannot be performed by a mere ministerial officer. The substantial thing required by both our Constitution and Code is that prob-

able cause for the arrest must exist, and that the complaint (the basis of the warrant) must be made on oath (unless the warrant is based on the magistrate's own knowledge). We are of the opinion that an affidavit taken before a deputy clerk of the municipal court of Atlanta, not in the presence of a judge of the court, will not furnish a sufficient foundation for the issuance, by a judge of that court, of a warrant to arrest an accused person. Nothing here ruled is in conflict with the ruling in *Barnard v. Du Pree*, 149 Ga. 796 (2), 102 S. E. 422, where it was held that the powers given to the clerk of the municipal court of Atlanta, under the 28th section of the act of the general assembly establishing the court, to issue attachments and summons of garnishment, were not judicial in character.

In view of the foregoing, it is unnecessary to answer the second question propounded by the court of appeals. Questions Nos. 3 and 4 are not such questions as this court is required to answer, under the ruling in *English v. Rosenkrantz*, 150 Ga. 817, 105 S. E. 613.

All the Justices concur.

ANNOTATION.

Who may take affidavit as basis for warrant of arrest.

Magistrate.

A magistrate authorized to issue warrants has undoubted power to take the affidavit on which a warrant is to be issued.

Thus, in *People v. Le Roy* (1884) 65 Cal. 613, 4 Pac. 649, it was held that a justice of the peace was authorized by virtue of the statute (Penal Code, §§ 806, 1426; Code Civ. Proc. §§ 177, 179) to administer and certify to the oath of the complainant in a criminal proceeding. See also *United States v. Smith* (1883) 17 Fed. 510; *Lloyd v. State* (1881) 70 Ala. 32.

In *Lauzaza v. State* (1911) 1 Ala. App. 205, 55 So. 444, it was held that, under the statute (Code 1907, §§ 7519-7585), a justice of the peace is a mag-

istrate before whom a complaint or affidavit charging a criminal offense may be made. See also *Red v. State* (1910) 167 Ala. 96, 52 So. 885.

It has been held not to be necessary that the affidavit made as the foundation of a warrant of commitment should be taken before the magistrate issuing the warrant; it may be taken before another magistrate. *Ex parte Bollman* (1807) 4 Cranch (U. S.) 75, 2 L. ed. 554; *United States v. Baumert* (1910) 179 Fed. 735.

But under the Massachusetts statute (Pub. Stat. chap. 212, § 15) one magistrate cannot commit on an affidavit taken before another magistrate. *United States v. Smith* (Fed.) supra.

Clerk of court.

It is held in the reported case (*Cox v. PERKINS*, ante, 918), that, since the taking of an affidavit in a criminal proceeding imposes a duty of a judicial nature, and there is no power conferred on the clerk of the municipal court of Atlanta, under a statute (Acts 1913, § 23, pp. 145-155) establishing that court and enumerating the powers and duties of the clerk thereof, to perform duties of such a nature, an affidavit taken before the deputy clerk, without the presence of a judge thereof, is not sufficient as a basis for the issuance of a warrant of arrest.

So, in *Lloyd v. State* (Ala.) supra, it was held that, as the taking of an affidavit imposes a duty in its nature judicial, the clerk of the county court has no power to administer the oath to an affidavit on which a warrant of arrest may issue, under a statute enlarging the jurisdiction of the county court.

And in *People v. Colleton* (1886) 59 Mich. 573, 26 N. W. 771, it was held that the clerk of the police court of Grand Rapids had no power to take a complaint to be used as the basis of a warrant of arrest, and an act of the legislature authorizing the exercise of such judicial power by the clerk was unconstitutional in so far as it delegated the power to the officer in question.

In *Dillard v. State* (1902) 137 Ala. 106, 34 So. 851, the clerk of the circuit court of Coffee county was held to be expressly authorized by the terms of a statute (Acts 1900-1901, p. 864) to take the affidavit used as the foundation for a warrant in a criminal proceeding.

So, in *Roland v. State* (1906) 147 Ala. 149, 41 So. 963, the clerk of the county court of Shelby county was held to be authorized under the provisions of a statute (Acts 1896-1897, § 3, p. 124) to take an affidavit as the foundation for a warrant of arrest.

But in the case of *Re Sing* (1910) 13 Cal. App. 736, 110 Pac. 693, wherein it appeared that a superior judge, assuming the duties of a magistrate of a police court, had called in the depu-

ty clerk of that court to administer the oath to a complaint, it was held that, as the superior judge sat as a creature of the statute, with such powers only as were conferred on justices of the peace or police judges, and as depositions in justice court were required to be taken by the justice, a complaint verified before the deputy clerk of court would not authorize the issue of a warrant of arrest.

Under a statute of California (Code Civ. Proc. § 2093) the clerk of the police court of the city of Los Angeles was held, in *People v. Vasalo* (1898) 120 Cal. 168, 52 Pac. 305, to be empowered to administer the oath to a complaint charging a criminal offense. See to the same effect, *People v. Burns* (1898) 121 Cal. 529, 53 Pac. 1096.

In *State ex rel. Bryant v. Lauver* (1889) 26 Neb. 757, 42 N. W. 762, a complaint sworn to before the clerk of the district court was held to be sufficient, under a statute (Comp. Stat. chap. 62, § 1), to authorize and require a justice of the peace, in whose office such complaint was filed, to issue a warrant thereon.

Notary public.

A notary public has ordinarily no power to take an affidavit to be used as the basis of a warrant of arrest. *People v. Nowak* (1889) 1 Silv. Sup. Ct. 411, 5 N. Y. Supp. 239, 7 N. Y. Crim. Rep. 69. In that case, under a statute (Code Crim. Proc. § 145), defining an information as the allegation made to a magistrate that a person is guilty of a designated crime; declaring (§ 147) who are magistrates; and providing (§ 148) that when an information is laid before a magistrate he must examine on oath the informant, etc., it was held that an affidavit not made before a justice, but before a notary public, was insufficient to authorize the issuance of a warrant of arrest.

Under a Missouri statute (now Rev. Stat. 1909, § 10,178) a notary public is given the power to take affidavits, and administer oaths and affirmations, in like manner as justices of the peace. In *State v. Muller* (1873) 52 Mo. 430, wherein the point was raised that a justice of the peace had no jurisdic-

tion to issue a warrant on an affidavit made before a notary public, the court said: "The only object of the information was to authorize the justice to issue his warrant. If he is satisfied that such information has been duly sworn to before a proper officer, that is sufficient to authorize him to bring the defendant before him for trial."

In *People v. Bitzkus* (1911) 166 Ill. App. 396, it was contended that, as the affidavit in question was subscribed before a notary public, it did not confer jurisdiction on the justice of the peace, before whom it was returnable, to issue a warrant of arrest. The court held this contention to be untenable, saying: "Article 18, chapter 79, Hurd's Revised Statutes 1909, is as follows: 'In all cases of offenses of which a justice of the peace has jurisdiction, he may, upon affidavit of any competent person, issue his warrant. . . . And § 2 of chapter 101, on Oaths and Affirmations, provides that 'notaries public shall have power . . . to administer all oaths of office and all other oaths authorized or required of any officer or other person, and to take affidavits concerning any matter or thing, process or proceeding, com-

menced or to be commenced, or pending before any justice of the peace.'"

In *People v. Mullalley* (1911) 16 Cal. App. 44, 116 Pac. 88, it was held that a complaint may be verified and attested by any officer authorized to administer an oath, and that since a notary public has power to take oaths, and is in this respect on the same footing as a clerk of court, a complaint verified before him is valid.

In *Hamilton v. State* (1907) 153 Ala. 63, 44 So. 968, an affidavit made to obtain a warrant and verified before a notary public, which was objected to on the ground that it was not verified in "open court," was held to be good.

Chief of police.

Under a statute providing that process of a municipal court "shall be issued by either the judge of said court or by the chief of police, the same to be issued on an affidavit and returned forthwith to the court," it was held in *State v. Turner* (1915) 170 N. C. 701, 86 S. E. 1019, that the power of the chief of police to issue process inferentially confers on him the authority to administer the oath before issuing the process. L. F. C.

FRANK O. SEARS, Plff. in Err.,

v.

JOHN E. HOPLEY et al.

SAME, Plff. in Err.,

v.

E. J. SONGER et al.

Ohio Supreme Court—June 21, 1921.

(— Ohio St. —, 132 N. E. 25.)

Eminent domain — monument in highway as additional burden.

The erection in a public highway of a stone and brick monument to indicate that the highway is a part of a particular international highway system, and to serve as a memorial to an official of the highway association, is not an additional burden on the fee.

[See note on this question beginning on page 927.]

ERROR to the Court of Appeals for Crawford County to review a judgment affirming judgments of the Court of Common Pleas in favor of complainants in separate actions, heard together, brought to restrain the destruction of a monument erected in a public highway. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. L. C. Feighner for plaintiff in error.

Messrs. O. W. Kennedy and Benjamin Meck for defendants in error.

Per Curiam:

The two cases involve similar questions, and were heard together. Hopley and Songer filed an action in the court of common pleas of Crawford county, Ohio, seeking to restrain Sears from destroying a monument, or marker, erected within the limits of what is known as the Lincoln Highway. The court of common pleas granted a perpetual injunction, and the case was taken on error to the court of appeals, and there affirmed, whereupon error was prosecuted to this court.

There was no finding of facts in the common pleas court, and the disputed issues arising on the record were found by the trial court in favor of plaintiffs. It therefore appears that the trial court found that this monument or marker was erected within the limits of the highway, and that it was of such character as to mark and advise the traveling public that such was the Lincoln Highway.

The action was brought by Hopley and Songer, as residents and taxpayers of Bucyrus township, Crawford county. The facts relative to the legal question are brief. The Lincoln Highway, at the point where this monument or marker was erected, was 60 feet wide, and in the center thereof there had been constructed a brick road 14 feet in width. From the center of the brick road to the monument was about 22 feet, with an intervening ditch, and the monument was from 4 to 6 feet distant from the fenced lands of the defendant. Hopley and Songer were acting, respectively, as state and county consuls of an association known as the Lincoln Highway Association, and had solicited pri-

vate funds and obtained the consent of the county commissioners for the erection of this monument marker. This monument had been constructed at a point about $\frac{1}{4}$ mile from the nearest intersecting crossroad; was 6 or more feet in height, about 28 inches in width, and about 15 inches in depth. It was constructed of stone, brick, and cement. Upon the side facing the public highway it contained two mortised slabs. In the upper tablet, containing the colors of the Highway Association in red, white and blue, was the letter "L," intended to designate the Lincoln Highway, and upon the lower mortised tablet was the following inscription: "This Marker dedicated to Henry C. Osterman, National Field Sec. Lincoln Highway Ass'n., Nov. 28, 1917."

The plaintiff in error's entire argument is based upon the constitutional provision which prevents the taking of private property for public use without compensation; that the monument or marker is inconsistent with the public use for which the highway was originally intended, and imposes an additional burden upon his property. His claim that ingress and egress to his adjoining premises were disturbed by the erection of the monument is squarely disputed in the testimony, as is any inference that the same was constructed upon lands not dedicated for highway purposes.

The sole case turns upon the question whether the erection of the monument or marker was consistent with the use for which the public highway was taken, and was not a diversion from the natural and probable use contemplated in the original dedication. When the highway was originally dedicated, compensation was then presumed to have been paid for all purposes consistent with the right to travel and

the improvement of the road. If such purposes are not exceeded by the authorities in charge, the abutting landowner is presumed to have received compensation therefor when his land was appropriated or dedicated. *Lawrence R. Co. v. Williams*, 35 Ohio St. 168, 171, and *Schaaf v. Cleveland, M. & S. R. Co.* 66 Ohio St. 215, 229, 64 N. E. 145.

The scope of the testimony of the plaintiffs below tended to establish that, while this marker was not erected at an intersecting road, its purpose was to advise the traveling public that the road was a part of an international road, known as the Lincoln Highway. Were it not for the inscription of dedication to Mr. Osterman upon an additional tablet, it must be conceded that this monument or marker would be erected for public information only. Such

being the case we are unable to comprehend why the additional superscription to Osterman could possibly cause an additional burden to the plaintiff in error as an abutting landowner. The control of the public highways of this state has been placed in the hands of the county commissioners and the state highway department.

Eminent domain
—monument in
highway as
additional
burden.

The monument was erected by private subscription, with the consent of the public authorities, and, if Sears's private property has not been taken within the constitutional provision, those authorities assume entire control. The Ohio penal statute made the act of the defendant below unlawful. Section 13421-4, General Code, provides: "Whoever unlawfully . . . destroys any marker or monument placed along, upon or near a public highway, by the proper authorities, to mark the boundaries thereof, or for any other purpose, shall be fined," etc.

The question determined by the lower court was one both of law and fact, and if, as found by the trial court, the monument or marker was not a diversion from the natural and probable use of a public highway, and such fact was determined by that court in favor of the plaintiff, it necessarily follows that the judgments of the lower courts should be affirmed.

Marshall, Ch. J., and Johnson, Wanamaker, Robinson, Jones, and Matthias, JJ., concur.

Hough, J., took no part in the consideration or decision of the case.

ANNOTATION.

Right to place monument or marker in highway.

In addition to the reported case (*SEARS v. HOPLEY*, ante, 925), there appears to be but one case dealing with the right to place a monument or marker in a public highway. In that case, *Tompkins v. Hodgson* (1874) 2 Hun (N. Y.) 146, it appeared that a monument, in commemoration of the soldiers of a certain town, had been erected in a highway of the town, on space not needed for public travel, and not used for that purpose, and that the monument was well designed and an ornament to the place where it was erected. It was held that a property owner whose premises were opposite the monument could not com-

pel the removal thereof on the grounds that it constituted a use of the highway foreign to the right of the public therein and was a nuisance or a trespass to the property owner's premises and residence. The court said: "When it is considered that the highways are public for other purposes than traveling, for shade trees and sidewalks, by legislative enactment, and for sewers, lamps, gas and water pipes, public wells and cisterns, and that these uses are in harmony with the uses of a public highway when they do not obstruct travel, the further conclusion will readily be reached that the law will sanction the

erection of a work of art, such as an ornamental statute, without thereby trespassing in any respect on the rights of the owner of the soil, who holds strictly subordinate to public use."

In the reported case (*SEARS v. HOPLEY*), wherein it appeared that a monument erected in a highway by authority of the town highway officers was designed to advise the traveling

public that the highway was a part of a "Lincoln Highway," it is held that the fact that there was inscribed thereon a dedication to a secretary of the Lincoln Highway Association did not render the monument an additional burden on the property of an adjoining landowner, or create a use of the highway inconsistent with that for which it was originally intended.
L. F. C.

WILFORD L. EDMUNDS, Respt.,

v.

SALT LAKE & LOS ANGELES RAILWAY COMPANY, Appt.

Utah Supreme Court — April 1, 1921.

(— Utah, —, 196 Pac. 1019.)

Railroad — duty to fence road on public street.

1. That a railroad franchise permits it to lay its tracks along a street does not absolve it from the duty of complying with a statute requiring it to fence its tracks where they pass through lands owned and improved by private owners, unless the fencing of the road at that place is shown to be unreasonable and improper.

[See note on this question beginning on page 933.]

Evidence — burden of proof — existence of street.

2. A railroad which seeks to avoid liability for injuring animals on an unfenced track, on the ground that the locus in quo was a public street, has the burden of showing that the tracks were in a street.

Railroad — tracks along unplatted street.

3. A railroad running through a community of farms, gardens, orchards, and pasture lands, is not absolved from the duty of fencing its tracks, although they are within the city limits and laid along a projected street not platted, laid out, or dedicated to public use.

APPEAL by defendant from a judgment of the District Court for Salt Lake County (Brown, J.) in favor of plaintiff in an action brought to recover damages for injury to plaintiff's horses, alleged to have been caused by defendant's negligent failure to build and maintain fences on either side of its railroad. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Bagley, Fabian, Clendenin, & Judd, for appellant:

A franchise to lay a track and operate a road in a public street is merely an easement, and in the nature of things does not confer the right to or impose the duty of fencing such street.

Rippe v. Chicago, M. & St. P. R. Co. 42 Minn. 34, 5 L.R.A. 864, 43 N. W.

652; Meyer v. North Missouri R. Co. 35 Mo. 352; Elliott v. Hannibal & St. J. R. Co. 66 Mo. 683; Rhea v. St. Louis & S. F. R. Co. 84 Mo. 345; Hurd v. Chappell, 91 Mo. App. 317; Acord v. St. Louis Southwestern R. Co. 113 Mo. App. 84, 87 S. W. 537; Lee v. Brooklyn Heights R. Co. 97 App. Div. 111, 89 N. Y. Supp. 652; Ryan v. Northern P. R. Co. 19 Wash. 533, 53 Pac. 824;

(— *Utah*, —, 186 Pac. 1019.)

Long v. Central Iowa R. Co. 64 Iowa, 657, 21 N. W. 122; Lathrop v. Central Iowa R. Co. 69 Iowa, 105, 28 N. W. 465; Louisville, N. A. & C. R. Co. v. Francis, 58 Ind. 389; Indianapolis, C. & L. R. Co. v. Warner, 35 Ind. 515; Giltz v. St. Louis S. W. R. Co. 65 Mo. App. 445.

There is no duty on a railroad company to fence its tracks within the limits of a city, not even restricting their holding to tracks laid on or along a street.

Rogers v. Chicago & N. W. R. Co. 26 Iowa, 558; International & G. N. R. Co. v. Cocke, 64 Tex. 151; Blanford v. Minneapolis & St. L. R. Co. 71 Iowa, 310, 60 Am. Rep. 795, 32 N. W. 357.

Plaintiff cannot recover on the ground of negligence on the part of defendant in the operation of its train.

Richards v. Oregon Short Line R. Co. 41 Utah, 99, 123 Pac. 935; Knight v. Southern P. Co. 52 Utah, 42, 172 Pac. 689; Houston & T. C. R. Co. v. Nichols, — Tex. Civ. App. —, 39 S. W. 954, 2 Am. Neg. Rep. 466.

The total absence of any evidence of private ownership of this easement points most strongly to ownership in the city.

Southern R. Co. v. Caplinger, 151 Ky. 749, 49 L.R.A. (N.S.) 660, 152 S. W. 947; Conner v. Nevada, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256; Yates v. West Grafton, 33 W. Va. 507, 11 S. E. 8; Kimball v. Chicago, 253 Ill. 105, 97 N. E. 257; Baker v. Chicago, R. I. & P. R. Co. 154 Iowa, 228, 134 N. W. 587; Bloomfield v. Allen, 146 Ky. 34, 7 A.L.R. 122, 141 S. W. 400; McQuillin, Mun. Corp. p. 3279.

Mr. Ray Van Cott, for respondent:

It was the duty of defendant to erect and maintain the character of fence described within the statute, wherever its railroad passed "through lands owned and improved by private owners."

Stimpson v. Union P. R. Co. 9 Utah, 123, 33 Pac. 369; St. Louis & S. F. R. Co. v. Steele, 37 Okla. 536, 133 Pac. 209; 33 Cyc. 1278.

There is no proof whatsoever of statutory dedication, and there is no proof whatsoever that the municipality has ever accepted any of this land west of Ninth West street as a public street.

13 R. C. L. § 12; Morlang v. Parkersburg, 84 W. Va. 509, 7 A.L.R. 717, 100 S. E. 394; Savannah v. Standard Fuel Supply Co. 140 Ga. 358, 48 L.R.A. 16 A.L.R.—59.

(N.S.) 469, 78 S. E. 906; Brown v. Oregon Short Line R. Co. 36 Utah, 257, 24 L.R.A. (N.S.) 86, 102 Pac. 740; Sowadzki v. Salt Lake County, 36 Utah, 127, 104 Pac. 111; Tuttle v. Sowadzki, 41 Utah, 501, 186 Pac. 959.

Thurman, J., delivered the opinion of the court:

Two of plaintiff's horses were run against and seriously injured by a railroad train operated by defendant on its railroad extending from Salt Lake City to Saltair Beach May 31, 1914. The animals were so seriously injured as to render it necessary to kill them immediately after the collision. The railroad at the place where the accident occurred runs through lands owned and occupied by private owners, and said lands were more or less cultivated and improved in the near vicinity of the accident. The lands were not fenced on either side of the road. It appears that plaintiff turned the horses out upon his own premises, from which they strayed through an open gate onto the railroad, where they were struck by the train.

This is an action by plaintiff to recover damages for the injury. The sole ground of negligence relied on is the failure of defendant to construct and maintain a fence on each side of its road. Defendant contends that at the point where the injury occurred its railroad runs upon a public street of Salt Lake City, and that defendant had no authority to fence the same. Defendant also charges plaintiff with negligence in permitting his horses to run at large within the limits of the city in violation of a city ordinance.

The question was tried to the court without a jury. Judgment was entered for plaintiff, and defendant appeals.

Utah Comp. Laws 1917, § 1253, requiring railroad companies to fence their roads, states the law as it existed when the accident occurred. As far as material here, the statute reads: "Every railroad company operating a railroad by steam, electric, gasoline, or any other mechanical motive power within this state,

or which hereafter constructs or operates any such road, is hereby required to erect, within one year, and thereafter maintain, a fence on each side of its railroad where the same passes through lands owned and improved by private owners, and connect the same, at all public road crossings, with cattle guards."

The court found that the place of the accident was not within a public street of Salt Lake City, nor was said railroad laid, maintained, or operated, at the place of the accident, on a public street in said city. This finding of the court is vigorously challenged by defendant.

The evidence offered by defendant in support of the allegation of its answer that its road is operated upon a public street is open to serious question as to its sufficiency. Defendant first introduced its franchise from the city, which describes the route in the following terms: "Commencing at a point in Fourth West street on the north line of Second South street and running thence north along said Fourth West street to South Temple street, thence west on South Temple street to the city limits."

This evidence was supplemented by the testimony of the general manager of the defendant company, who testified that the road was constructed and maintained along the route set forth in the franchise. This is all the evidence there is in the record on the part of defendant as to whether or not the railroad was constructed and maintained upon a public street.

In view of the statute above quoted, it was the duty of the defendant company to construct and maintain a fence on each side of its railroad, unless the case comes within some exception recognized either by statute or judicial interpretation.

The evident purpose of defendant, both in its pleading and in the evidence referred to, was to bring the case within the exception recognized by many authorities, to the effect that the obligation to fence does not exist where the road is con-

structed upon or across a public street within an incorporated city or town. The authorities relied on by appellant are: *Rippe v. Chicago M. & St. P. R. Co.* 42 Minn. 34, 5 L.R.A. 864, 43 N. W. 652; *Meyer v. North Missouri R. Co.* 35 Mo. 352; *Elliott v. Hannibal & St. J. R. Co.* 66 Mo. 683; *Rhea v. St. Louis, & S. F. R. Co.* 84 Mo. 345; *Hurd v. Chappell*, 91 Mo. App. 317; *Acord v. St. Louis Southwestern R. Co.* 113 Mo. App. 84, 87 S. W. 537; *Lee v. Brooklyn Heights R. Co.* 97 App. Div. 111, 89 N. Y. Supp. 652; *Ryan v. Northern P. R. Co.* 19 Wash. 533, 53 Pac. 824; *Long v. Central Iowa R. Co.* 64 Iowa, 657, 21 N. W. 122; *Lathrop v. Central Iowa R. Co.* 69 Iowa, 105, 28 N. W. 465; *Louisville, N. A. & C. R. Co. v. Francis*, 58 Ind. 389; *Indianapolis C. & L. R. Co. v. Warner*, 35 Ind. 515; *Giltz v. St. Louis Southwestern R. Co.* 65 Mo. App. 445; *Rogers v. Chicago & N. W. R. Co.* 26 Iowa, 558; *International & G. N. R. Co. v. Cocke*, 64 Tex. 151; *Blanford v. Minneapolis & St. L. R. Co.* 71 Iowa, 310, 60 Am. Rep. 795, 32 N. W. 357.

Assuming that the doctrine stated in those cases is sound, the question is: Does the evidence establish the existence of a public street within the city at the point where the accident occurred? The burden of proof as to the existence of a public street at the point mentioned was upon the defendant.

Evidence—
burden of proof
—existence of
street.

Does the mere recital in a franchise, to the effect that the defendant is authorized to construct its road upon a certain street, establish the existence of a public street? Does such testimony, supplemented by oral testimony to the effect that the road was constructed as set forth in the franchise, establish the existence of a public street? Can this court take judicial notice of the fact that South Temple street of Salt Lake City is a public street extending to the western limits of the city? If appellant's contention is correct, one

or more of these questions must be answered in the affirmative.

It does seem to the writer, in view of the fact that the trial court found against defendant's contention concerning this question, that the evidence relied on by defendant to overturn the finding is far from satisfactory. Neither in the pleading nor in the evidence is it anywhere admitted by plaintiff that South Temple street is a public street extending to the western limits of the city. Plaintiff's reply to defendant's answer denies the fact, so that it was clearly incumbent upon defendant to prove it as alleged in the answer. The street was not shown to be either platted or recorded; nor was it shown to have been dedicated or laid out as a public street at any point, much less as far west as the limits of the city. In these circumstances we feel that we could be abundantly justified in sustaining the finding of the trial court solely because of the failure of defendant's proof respecting this particular defense. We prefer, however, to rest our decision upon broader grounds.

The authorities above cited and relied on by appellant quite generally sustain the proposition that where a railroad runs upon or across a public street within an incorporated city or town the railroad company is not required to fence its track, even though the statute requiring it makes no exception. The exception, however, is made by judicial interpretation for the simple reason that a fence in such cases would interfere with public travel and practically amount to a public nuisance in violation of other statutes within the same jurisdiction. For that reason we find that, perhaps, the great weight of authority is to the effect that such statutes, although unqualified in their terms, do not apply to incorporated cities and towns where the road is laid out upon or across public streets in actual use as such by the public. Some Missouri cases even go so far as to hold that such is the law whether the street is used by the public or not. See the fol-

lowing cases hereinbefore cited: Meyer v. North Missouri R. Co. 35 Mo. 352; Elliott v. Hannibal & St. J. R. Co. 66 Mo. 683; Rhea v. St. Louis & S. F. R. Co. 84 Mo. 345. The doctrine of these cases does not appeal to the court. To say the least, they are not applicable to this jurisdiction where the custom is and has been to include in most instances vast areas of farming land, gardens, orchards, and pastures within the limits of cities and towns.

In Atchison, T. & S. F. R. Co. v. Shaft, 33 Kan. 521, 6 Pac. 908, the court, in construing a statute similar to ours in principle expressly requiring railroad companies to fence their roads held: "A railroad company is not absolved from complying with the express terms of the statute requiring it to inclose its road with a good and lawful fence, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad company, rendering it improper for the company to fence its road."

This appears to be a thoroughly well-considered case, and cites numerous cases on both sides of the question. It arrives at the conclusion that the doctrine stated in the above quotation is supported by the great weight of judicial opinion. This court recognized the rule in Reid v. San Pedro, L. A. & S. L. R. Co. 42 Utah, 431, 132 Pac. 253. That case related to the inclosure of depot grounds, and, because of the inconvenience with the free access of the public to the station, this court held that the statute requiring a fence did not apply.

In Ellis v. Pacific R. Co. 48 Mo. 231, it was held that a railroad company is not excused from fencing its right of way through a town or city merely because of its passage through such locality, without reference to the question as to whether it crosses the public highways therein.

In Iba v. Hannibal & St. J. R. Co. 45 Mo. 471, it was held that where the proof showed that the accident

occurred within the limits of a town corporation, as shown by a paper plat of the town, but in fact away from any street, the railway company would not be absolved from a duty to fence.

In *Indianapolis, P. & C. R. Co. v. Lindley*, 75 Ind. 426, the court held that where the evidence showed that the stock was killed between two streets of a city, on the tracks of defendant's unfenced railroad, which might have been fenced without interfering with any street or alley, or the customary operation of the road, the defendant was liable.

In *Toledo, W. & W. R. Co. v. Howell*, 38 Ind. 447, the syllabus reflects the opinion of the court and reads: "A railroad company is not excused from fencing through a large block of ground, not intersected with streets and alleys, simply because the same is within the limits of a city."

In the case last cited the court, at page 451, says: "There is no reason why such lands not in a city must be fenced that does not apply with equal, if not greater, force when they are within the limits of a city."

In *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471, the court, at page 472, says: "But we are not aware of any case in which it has been held that it is improper for a railroad company to fence any part of its road within the corporate limits of a city or town, or that the statute does not apply to a case simply because it occurs within such corporate limits. The exception only extends to places where it is unreasonable or improper that the road should be fenced, whether within or without the corporate limits of cities and towns."

This, we believe, states the principle by which the courts should be guided where the statute itself makes no exception. We think it is the only reasonable and consistent rule that can be adopted in this commonwealth, in view of the peculiar conditions to which reference has been made. Apply-

ing this rule to the case at bar, we have no hesitancy in arriving at the conclusion that the defendant railroad company has not justified its failure to fence its road at the point where the accident occurred.

The evidence shows that the accident occurred within the city, on defendant's road, at a considerable distance west of the Jordan river. In fact, the court found it occurred about a mile west of the Redwood road which is, itself, some distance west of the river. The evidence tends to show that there is no indication on the ground whatever of a public street along and upon which the railroad is constructed west of the Jordan river. The evidence also strongly tends to show that the railroad crosses no traveled street west of the Redwood road, or even west of the Jordan river.

There is no evidence whatever of ^{—tracks along} unplatted street.

travel along or parallel with the railroad of what appellant denominates South Temple street, or upon any cross street, anywhere in the vicinity of the accident.

Unless there is some magic in the term "incorporated city," or something else which would constitute a controlling principle of differentiation in cases of this kind, we see no reason why the section of Salt Lake City west of the Redwood road should not be subject to the provisions of the statute requiring railroad companies to fence their roads just the same as would be a similar section of territory outside the city limits. There are a few scattered houses here and there, with small farms, gardens, orchards, and pasture land, having all the indicia of a rural community. Besides all this, as hereinbefore stated, it does not appear that the street in question, or any street of the city, has ever been platted, laid out, or dedicated as a public street west of the Jordan river. There was no error in the finding complained of.

The city ordinance prohibiting animals from running at large, in part, reads as follows: "No cattle,

Railroad—duty to fence road on public street.

horses, mules, sheep, goats or swine shall be allowed to run at large, or be herded, picketed or staked out upon any street, sidewalk, or any public place within the limits of the city, and all such animals so found may be taken up and driven to the stray pound."

Upon this ordinance, and the fact that the plaintiff's horses were on defendant's railroad, defendant predicates a charge of contributory

negligence. From what has been said in the preceding pages of this opinion, it is manifest that the facts of this case do not bring it within the inhibition of the ordinance.

Other alleged errors were assigned but not argued. We find no error in the record.

The judgment of the trial court is affirmed, at appellant's cost.

Corfman, Ch. J., and Weber, Gideon, and Frick, JJ., concur.

ANNOTATION.

Duty of railroad to fence tracks within limits of municipality.

I. Introductory, 933.

II. Statute silent as to track in municipality:

a. In general, 938.

b. Track laid on or across highway, 938.

III. Statute expressly excepting track in municipality, 939.

1. Introductory.

While, in the absence of statutory requirement, a railroad company is under no obligation to fence its right of way, in most, if not all, jurisdictions statutes have been enacted imposing this duty either by direct command, or indirectly by creating a liability on the part of the railroad for injuries occurring on its tracks by reason of the failure to fence. See 11 R. C. L. 890. It is the purpose of this note to discuss the cases determining to what extent these statutes are applicable to the tracks of a railroad company lying within the limits of a municipality. Cases involving the duty to fence depot grounds are not included.

II. Statute silent as to track in municipality.

a. In general.

A statute which, without specific reference to municipalities, requires railroad companies to construct and maintain fences on both sides of their right of way, or which imposes a liability on them for injuries done to animals unless the right of way is fenced, is applicable within the limits

of a municipality, where such fences will not obstruct the streets, highways, or public grounds.

Indiana.—*Indianapolis & C. R. Co. v. Parker* (1868) 29 Ind. 471; *Jeffersonville, M. & I. R. Co. v. Parkhurst* (1870) 34 Ind. 501; *Indianapolis, C. & L. R. Co. v. Warner* (1871) 85 Ind. 515; *Toledo, W. & W. R. Co. v. Corey* (1871) 37 Ind. 172; *Toledo, W. & W. R. Co. v. Howell* (1872) 38 Ind. 447; *Toledo, W. & W. R. Co. v. Owen* (1873) 43 Ind. 405; *Indianapolis, P. & C. R. Co. v. Lindley* (1881) 75 Ind. 426; *Wabash R. Co. v. Forshee* (1881) 77 Ind. 158; *Pittsburgh, C. & St. L. R. Co. v. Laufman* (1881) 78 Ind. 319; *Toledo, St. L. & K. C. R. Co. v. Cupp* (1893) 9 Ind. App. 244, 36 N. E. 445. See also *Ohio & M. R. Co. v. Rowland* (1875) 50 Ind. 349.

Iowa.—*Coyle v. Chicago, M. & St. P. R. Co.* (1883) 62 Iowa, 518, 17 N. W. 771.

Kansas.—*Union P. R. Co. v. Dyche* (1882) 28 Kan. 200; *Atchison, T. & S. F. R. Co. v. Shaft* (1885) 33 Kan. 521, 6 Pac. 908. See also *Sola Electric R. Co. v. Jackson* (1905) 70 Kan. 791, 79 Pac. 662.

Michigan.—*Lafferty v. Chicago & W. M. R. Co.* (1888) 71 Mich. 35, 38 N. W. 660; *Flint & P. M. R. Co. v. Lull* (1874) 28 Mich. 510.

Minnesota.—*Greeley v. St. Paul, M. & M. R. Co.* (1885) 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179; *Kobe v. Northern P. R. Co.* (1887) 36 Minn. 518, 32 N. W. 783; *La Paul v. Trues-*

Gale (1890) 44 Minn. 275, 46 N. W. 863; *Nelson v. Great Northern R. Co.* (1893) 52 Minn. 276, 53 N. W. 1129; *Marengo v. Great Northern R. Co.* (1901) 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117.

○ *Missouri*.—See the *Missouri* cases cited *infra* in this subdivision.

○ *New York*.—*Brady v. Rensselaer & S. R. Co.* (1874) 1 Hun, 378; *Crawford v. New York C. & H. R. R. Co.* (1879) 18 Hun, 108, 10 Am. Neg. Rep. 166; *Rubein v. Brooklyn Heights R. Co.* (1901) 61 App. Div. 478, 70 N. Y. Supp. 577; *Bradley v. Buffalo, N. Y. & E. R. Co.* (1866) 34 N. Y. 427; *Tracy v. Troy & B. R. Co.* (1868) 38 N. Y. 433, 98 Am. Dec. 54.

○ *Ohio*.—*Cleveland & P. R. Co. v. McConnell* (1875) 26 Ohio St. 57.

○ *Tennessee*.—*Nashville, C. & St. L. R. Co. v. Hughes* (1894) 94 Tenn. 450, 29 S. W. 723.

○ *Texas*.—*International & G. N. R. Co. v. Schram* (1911) — Tex. Civ. App. —, 138 S. W. 195. See also *International & G. N. R. Co. v. Dunham* (1887) 68 Tex. 231, 2 Am. St. Rep. 484, 4 S. W. 472.

○ *Utah*.—See the reported case (*EDMUNDS v. SALT LAKE & L. A. R. Co.* ante, 928).

○ *Washington*.—Compare *Ryan v. Northern P. R. Co.* (1898) 19 Wash. 533, 53 Pac. 824.

Thus it has been said that it will be presumed that the reasons which, in the opinion of the legislature, require this security generally, are applicable within the limits of municipalities as much as elsewhere. *Atchison, T. & S. F. R. Co. v. Shaft* (1885) 33 Kan. 521, 6 Pac. 908; *Flint & P. M. R. Co. v. Lull* (Mich.) *supra*.

And the conclusion has been put on the ground that the courts will not nullify, by construction, the plain and specific requirements of such a statute. *Pittsburgh, C. & St. L. R. Co. v. Laufman* (1881) 78 Ind. 319; *Tracy v. Troy & B. R. Co.* (1868) 38 N. Y. 433, 98 Am. Dec. 54; *Bradley v. Buffalo, N. Y. & E. R. Co.* (1866) 34 N. Y. 427.

In *Pittsburgh, C. & St. L. R. Co. v. Laufman* (Ind.) *supra*, the court, holding that a railroad was liable for injuries to animals on its tracks in a

municipality, at a point between two street crossings, if it had failed properly to fence its tracks, said: "The statutory rule is, that railroad companies shall be liable for injuries done by their locomotives or cars to animals at places where their roads might be but are not fenced; and it is not the province of the courts to create exceptions to the rule, or to interfere with the legislative policy."

In *Indianapolis & C. R. Co. v. Parker* (1868) 29 Ind. 471, the court, holding that a railroad company was not relieved from the duty of fencing its tracks in that portion of a municipality not bisected with streets, but lying in comparatively vacant lands, said: "We are not aware of any case in which it has been held that it is improper for a railroad company to fence any part of its road within the corporate limits of a city or town, or that the statute does not apply to a case simply because it occurs within such corporate limits. The exception only extends to places where it is unreasonable or improper that the road should be fenced, whether within or without the corporate limits of cities and towns."

In *Atchison, T. & S. F. R. Co. v. Shaft* (1885) 33 Kan. 521, 6 Pac. 908, it was said: "Railroad companies are not absolved from complying with the express terms of the statutes requiring them to inclose their roads with good and lawful fences, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad companies, rendering it improper for them to fence their roads. . . . There are numerous cases holding that railroad companies are required to fence their roads in cities, towns, and villages, except where the railroads cross some public street, alley, or other public place, and where it would be improper to fence the roads, notwithstanding any inconvenience to the railroad companies or to others."

So, in *Toledo, St. L. & K. C. R. Co. v. Cupp* (1893) 9 Ind. App. 244, 36 N. E. 445, it was said: "The fact that appellant's railroad passed through

an addition to a city, which was laid out, platted, and divided into lots and streets and alleys, did not of itself absolve the railroad company from the duty of securely fencing in its track; for wherever a railroad company can build and maintain a fence to inclose its track without interfering with the rights of the public, or with the free use of private property, or of its own property, then it is bound to maintain the fence, whether it be in the country, in a village, in a town, or in a city."

And in *Indianapolis, P. & C. R. Co. v. Lindley* (1881) 75 Ind. 426, it was held that, under a statute imposing on a railroad company liability for injury to animals on its right of way unless the same was properly fenced, a railroad was liable where it had failed to fence its tracks between two streets in a city, where a fence might have been built without interfering with any street or alley or with the customary operation of the road.

So, in *Marengo v. Great Northern R. Co.* (1901) 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117, it was said that as to the railroad's positive obligation to fence along the tracks between the streets there seemed to be no question.

Likewise in *Wabash R. Co. v. Forsee* (1881) 77 Ind. 158, wherein it appeared that the railroad track at the point in question was on an embankment and ran parallel to a highway, but with sufficient room between them to construct a fence without interfering with the use of the highway, it was held that the company was not excused from building a fence because of the fact that its track at that point was within the limits of a municipality.

In *Toledo, W. & W. R. Co. v. Cary* (1871) 37 Ind. 172, it was held that a railroad company was required to fence its track within the limits of a municipality, where the streets and alleys ended at the track. The court said: "The fact that the streets and alleys of the town terminated at the railroad is no objection to the erection of a fence. The strip of land over which the company has a right of way

is not a public highway, and may be properly inclosed, so far as we can see, by the company. The public right to travel on the streets and alleys can extend no farther than they extend, and at their termini the railroad company, as well as any other owner, has the right to erect a fence. It would not require the fencing up or fencing across any street or alley, in order to inclose that part of the railroad where the animal was killed."

A fortiori, where the corporate limits embrace portions of the adjacent country not actually laid out as a municipality, or so laid out that no streets cross the tracks of a railroad company, the obligation to fence is as imperative as outside the corporate limits. *Toledo, W. & W. R. Co. v. Howell* (1872) 38 Ind. 447; *Toledo, W. & W. R. Co. v. Owen* (1873) 43 Ind. 405; *Coyle v. Chicago, M. & St. P. R. Co.* (1883) 62 Iowa, 518, 17 N. W. 771. See also *Iola Electric R. Co. v. Jackson* (1905) 70 Kan. 791, 79 Pac. 662; *International & G. N. R. Co. v. Dunham* (1887) 68 Tex. 231, 2 Am. St. Rep. 484, 4 S. W. 472. Thus in *Toledo, W. & W. R. Co. v. Howell* (Ind.) supra, the court, holding that the railroad company was not excused from fencing its track where it passed through a large block of land not intersected by streets or alleys, said: "The statute makes no exceptions as to the place where stock shall be killed, as to liability, if the road is not securely fenced; but this court has interpolated exceptions, such as the crossings of highways, streets, and alleys, in towns and cities, and at mills, where the public have a right and a necessity to go undisturbed; but this court has not made, and ought not to make, under the statute, an exception of large blocks of ground merely because they are situated within the limits of a city. There is no reason why such lands not in a city must be fenced, that does not apply with equal, if not greater, force when they are within the limits of a city." Likewise in *Toledo, W. & W. R. Co. v. Owen* (Ind.) supra, it was held a railroad company was required to fence its tracks within the limits of a city, where they passed through large

blocks of vacant land used for farming purposes.

The fact that a fence along the track in a city or village might inconvenience the company will not excuse it from complying with the positive requirements of the statute. *Atchison, T. & S. F. R. Co. v. Shaft* (1885) 33 Kan. 521, 6 Pac. 908; *Greeley v. St. Paul, M. & M. R. Co.* (1885) 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179; *Bradley v. Buffalo, N. Y. & E. R. Co.* (1866) 34 N. Y. 427; *Tracy v. Troy & B. R. Co.* (1868) 38 N. Y. 433, 98 Am. Dec. 54. Thus it has been held that the mere fact that it is impracticable to place cattle guards at crossings does not relieve the railroad from the duty of fencing its track where practicable. *Nelson v. Great Northern R. Co.* (1893) 52 Minn. 276, 53 N. W. 1129.

Nor will any private interest or convenience on the part of individuals, resulting from a fence, be sufficient to absolve a railroad from fencing its tracks. *Atchison, T. & S. F. R. Co. v. Shaft* (Kan.) *supra*.

The mere fact that two or more railroads occupy adjacent parallel rights of way does not relieve anyone of them from the statutory duty to fence. *Marengo v. Great Northern R. Co.* (1901) 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117, wherein it was said: "The obligation to fence is absolute. Public interests are involved in its performance, and, if the defendant company could not so arrange with the adjacent company that the entire tracks would be protected in the manner required by law, it was in duty bound to see that its own right of way was properly protected. It could not relieve itself from its own negligence in that respect by showing that another railroad company, similarly situated, had also been guilty of the same fault."

It has also been held that a railroad is not excused from fencing its tracks in a city by reason of an ordinance prohibiting animals from running at large in the city limits. *Crawford v. New York C. & H. R. R. Co.* (1879) 18 Hun (N. Y.) 108, 10 Am. Neg. Rep. 166, wherein it was said: "The ordinance of the city of Cohoes, prohibiting cat-

tle and animals from running at large within the corporate limits, did not relieve the defendants from the statutory obligation to erect and maintain fences along its road, and cattle guards at road or street crossings. The duty imposed by the statute remained, notwithstanding the city ordinance. The statute had a broader purpose than to protect cattle and animals from injury. It was intended as a protection to the traveling public as well."

A Missouri statute requiring the erection of fences along or adjoining inclosed or cultivated fields or uninclosed prairie lands has been held to be inapplicable to municipalities, the court deeming it to be evident from the phraseology that it was intended to apply only to farming lands and the open prairie. *Rhea v. St. Louis & S. F. R. Co.* (1884) 84 Mo. 345; *Edwards v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 567; *Elliott v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 683. But under another statute imposing liability for the failure to fence tracks, it has been held that while a railroad is not required by the statute to fence its road within the corporate limits of municipalities, yet it may and should do so, under penalty of having to pay damages, where the road crosses unplatted tracts of land, and such fences will not obstruct streets and alleys already opened or dedicated to public use. *Ellis v. Pacific R. Co.* (1871) 48 Mo. 231; *Gerren v. Hannibal & St. J. R. Co.* (1875) 60 Mo. 405; *Edwards v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 567; *Elliott v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 683; *Wymore v. Hannibal & St. J. R. Co.* (1883) 79 Mo. 247; *Young v. Hannibal & St. J. R. Co.* (1883) 79 Mo. 336; *Lane v. Chicago, R. I. & P. R. Co.* (1885) 18 Mo. App. 555; *Vanderworker v. Missouri P. R. Co.* (1892) 48 Mo. App. 654; *Hurd v. Chappell* (1901) 91 Mo. App. 317; *Stout v. St. Louis, I. M. & S. R. Co.* (1909) 142 Mo. App. 1, 125 S. W. 230; *Lash v. Southwest Missouri R. Co.* (1915) — Mo. App. —, 180 S. W. 11; *Collins v. St. Louis, I. M. & S. R. Co.* (1916) — Mo. App. —, 181 S. W. 591; *Dubray v. Chicago & A. R. Co.* (1916)

— Mo. App. —, 182 S. W. 1092. In *Acord v. St. Louis Southwestern R. Co.* (1905) 113 Mo. App. 84, 87 S. W. 537, the rule in Missouri was stated as follows: "While by the authorities it is settled that the railroads are required by the statute to fence only such portions of the road as pass through inclosed or cultivated or uninclosed lands outside of incorporated towns and cities, and outside of platted towns in which streets are dedicated to public use, except the crossing of public and statutory private roads, and that they are exempt from being held for the penalty under the double-damage statute for any injury to stock occurring on their roads at their necessary station and depot grounds, it is equally well settled that they may be held . . . for what is commonly termed single damages, by way of distinguishing it from the double-damage section, under § 2867, Rev. Stat. 1899, for stock killed at such point on the road as the company is not required by the statute, on the one hand, to fence, and are not required, on the other hand, by the decisions, to leave unfenced for the accommodation of the public, and therefore considered to be places which are not required to be, yet might be fenced, without discommoding the public or imperiling the lives of railroad employees. The courts have recognized that there are such situations. Such a place has been judicially determined to exist where, inside of an incorporated town, there is a piece of territory in which there is neither streets nor alleys, and which is remote from the depot, and therefore the public travel and convenience would not be interrupted by fences. [*Wymore v. Hannibal & St. J. R. Co.* (1883) 79 Mo. 247; *Young v. Hannibal & St. J. R. Co.* (1883) 79 Mo. 336.] In event of stock being killed at such point, while a recovery would be denied therefor under the double-damage section, as fencing is not required by the statute (*Edwards v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 567; *Rhea v. St. Louis & S. F. R. Co.* (1884) 84 Mo. 345), yet it is held that as such place is one at which the railroad might have fenced and failed to

do so, a recovery could be had for single damages therefor under the arbitrary rule of § 2867, Rev. Stat. 1899. That section enacts an arbitrary rule to the effect that the owner of stock killed or injured by locomotive cars or carriages of the railroad may recover the value of the animal without any proof of negligence on the part of the servants, agents, or officers of the company, but it provides it shall not apply to an accident occurring on a portion of the road which may be inclosed by a lawful fence, or in a crossing of a public highway where no fences are required under this section. It imposes no such obligation. But it is said that it was designed by this section to furnish an inducement to the roads to fence their tracks at such places as could be fenced without inconvenience to the public and danger to the employees, where it was not deemed absolutely necessary by the legislature to require them to fence, and that in event stock was killed by reason of the failure to fence at such points, where they might lawfully have done so, then in an action for the value of such stock, proof of negligence is dispensed with thereunder as the law raises the inference of negligence. The owner has only to prove the killing, and the law presumes carelessness. And that a prima facie case is made by showing ownership and the killing of the animal on the road at a point which might have been fenced without inconvenience or danger, as above indicated, yet was left unfenced."

It has been held in at least one jurisdiction that a statute making the failure of a railroad to fence against stock prima facie evidence of negligence is inapplicable to railroads within the limits of an incorporated municipality. *Ryan v. Northern P. R. Co.* (1898) 19 Wash. 533, 53 Pac. 824, wherein the court, distinguishing between the duty to fence under statutes expressly requiring it, and a statute imposing a liability for injuries to animals unless the right of way is fenced, said: "It is contended by the appellant that incorporated towns are not excepted from the provision of this

act in relation to fencing, and several cases are cited to sustain the contention. An examination of them, however, convinces us that they are not in point, but that they were adjudications in states where there was an express statute demanding the fencing by railroad companies of their tracks, and it will be observed that there are no special provisions in our statute."

b. Track laid on or across highway.

Although many of the statutes relating to the fencing of railroad tracks require generally the inclosing of the entire line of road, the courts, in construing such statutes, have interpolated certain exceptions to the general language used, and have held that wherever superior obligations forbid a fence the statute is inapplicable.

As was said in *Atchison, T. & S. F. R. Co. v. Shaft* (1885) 33 Kan. 521, 6 Pac. 908: "Whenever it appears from the general course of legislation that the public have a paramount interest in having particular portions of the railroads of the state unfenced, we shall hold that the statutes requiring railroads to be fenced have no application to such places, and that the railroad companies are not required to fence their roads at such places. This exception to the general rule requiring railroad companies to fence their roads will apply to all public highways, including streets and alleys in cities, towns, and villages."

Thus it is unquestioned that public streets furnish an exception to the duty of a railroad to fence, and a railroad company cannot be required, or even permitted, to build fences across legally laid out highways crossing its tracks. *Lafayette & I. R. Co. v. Shriner* (1854) 6 Ind. 141; *Blandford v. Minneapolis & St. L. R. Co.* (1887) 71 Iowa, 310, 60 Am. Rep. 795, 32 N. W. 357; *Gibson v. Iowa C. R. Co.* (1907) 136 Iowa, 415, 113 N. W. 927; *Stern v. Michigan C. R. Co.* (1889) 76 Mich. 591, 43 N. W. 587; *Greeley v. St. Paul, M. & M. R. Co.* (1885) 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179; *Marengo v. Great Northern R. Co.* (1901) 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117; *Nashville, C. & St. L. R. Co.*

v. Hughes (1894) 94 Tenn. 450, 29 S. W. 723; *International & G. N. R. Co. v. Leuders* (1888) 1 Tex. App. Civ. Cas. (White & W.) 133.

So, where a railroad is laid along a public street in a city or village, and such street has not been vacated by the public, the company is not required or entitled to fence its track. *Indianapolis, C. & L. R. Co. v. Warner* (1871) 35 Ind. 515; *Louisville, N. A. & C. R. Co. v. Francis* (1877) 58 Ind. 389; *Union P. R. Co. v. Dyché* (1882) 28 Kan. 200; *Rippe v. Chicago, M. & St. P. R. Co.* (1889) 42 Minn. 34, 5 L.R.A. 864, 43 N. W. 652.

In *Bridges v. Missouri, K. & T. R. Co.* (1908) 132 Mo. App. 576, 112 S. W. 37, it was said that the statutory duty to fence was subject to an implied exception permitting switches to remain unfenced when such fences would endanger the lives of employees.

And in *Ft. Worth & D. C. R. Co. v. Hodge* (1910) 58 Tex. Civ. App. 540, 125 S. W. 350, it was held that a railroad was not required to fence its track at its switch limits within a municipality.

The judicial rule exempting railroad companies from the duty of fencing their tracks between proper station limits cannot be extended to long passing tracks constructed in the process of converting a single into a double-tracked road, and not forming part of a switchyard proper. *Bridges v. Missouri, K. & T. R. Co.* (1911) 159 Mo. App. 577, 141 S. W. 440.

In *Bernardi v. Northern P. R. Co.* (1910) 18 Idaho, 76, 27 L.R.A.(N.S.) 796, 108 Pac. 542, it was held that under a statute making it the duty of railroads to fence on each side of its roads "where the same passes through, along, or adjoining inclosed or cultivated fields or inclosed lands," a railroad company was not required to fence its road where it ran through a narrow canyon, with a public-traveled road occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on one side of the track, and residences and stores occupying almost the entire space between the ends of the ties and the foot of the mountain on the

other side, there being no cultivated fields or inclosed lands at such place. In construing this statute the court said: "By the language 'inclosed or cultivated fields or inclosed lands,' as used in this section, the legislature clearly had in mind rural or country districts where the railroad runs through, along, or adjoining inclosed or cultivated fields or inclosed lands, and did not intend to make such section apply to municipalities or towns, whether incorporated or not, unless such town was so extended as to include fields or inclosed lands other than town lots, or to a railroad passing along or in front of town lots or inclosed lots used for residence purposes only. Had the language of this section been general, and specified 'that every railroad company operating any steam or electric railroad in this state shall erect and maintain lawful fences not less than 4 feet high on each side of its roadbed,' then the statute would have applied to the road where it runs through municipalities and towns, whether incorporated or not; and the question then might arise whether, by such language, it was the intention of the legislature, or whether it was in the power of the legislature, to require the railroad company to fence its road where it would be impracticable or impossible, or where it would greatly inconvenience the public, or materially interfere with the operation of such road. But these objections clearly do not apply to the provisions of the statute, if it is construed as the legislature certainly intended it to be; that is, as applicable to cultivated or inclosed lands."

A railroad company is not required to fence at the crossing of streets which have been dedicated to the public, although they are not actually in use as such. *Long v. Central Iowa R. Co.* (1884) 64 Iowa, 657, 21 N. W. 122; *Lathrop v. Central Iowa R. Co.* (1886) 69 Iowa, 105, 28 N. W. 465; *Gibson v. Iowa C. R. Co.* (1907) 136 Iowa, 415, 113 N. W. 927; *Marengo v. Great Northern R. Co.* (1901) 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117; *Meyer v. North Missouri R. Co.* (1864) 35 Mo. 352; *Elliott v. Hannibal & St.*

J. R. Co. (1877) 66 Mo. 688. Thus, in *Long v. Central R. Co.* (Iowa) supra, the court, in holding that a railroad was neither required nor entitled to fence the tracks at a street crossing, though the street had not actually been opened to public travel, said: "The only ground upon which any claim can be made that the defendant is liable is that the street in question had not been opened to public travel. It was, however, a street in an addition to the town, duly platted and recorded, and no one had the right to obstruct it with fences because it was not in use by the public. The owner of lots in the platted addition would have an undoubted right to insist that the streets should be kept open. If it were lawful for railroad companies to fence up all streets and alleys which have not been opened for public travel, it would materially affect the value of lots upon such streets, and retard the growth of our cities and towns."

And it has been held that although, within the limits of a municipality, the original proprietor or other person took possession of and used for farming purposes lands dedicated to the public use, a railroad was nevertheless relieved from the duty to fence at that point. *Elliott v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 688.

III. Statute expressly excepting track in municipality.

Of course railroad companies are not required to fence within the limits of a village or city when the statute requiring the fencing of tracks expressly so provides. *Illinois & C. R. Co. v. Williams* (1861) 27 Ill. 48; *Toledo, W. & W. R. Co. v. Chapin* (1873) 66 Ill. 504; *Toledo, W. & W. R. Co. v. Spangler* (1874) 71 Ill. 568; *Illinois C. R. Co. v. Bull* (1874) 72 Ill. 537. See also *Ewing v. Chicago & A. R. Co.* (1874) 72 Ill. 25; *Butler v. Aurora, E. & C. R. Co.* (1911) 250 Ill. 47, 95 N. E. 44, affirming (1910) 158 Ill. App. 386. *Clary v. Burlington & M. R. Co.* (1883) 14 Neb. 232, 15 N. W. 220; *Chicago, B. & Q. R. Co. v. Hogan* (1890) 30 Neb. 686, 40 N. W. 1015; *Chicago, B. & Q. R. Co. v. Sevcek* (1904) 72 Neb. 793, 101 N. W. 981, 110 N. W. 639; *Cox v. Chicago & N. W. R.*

Co. (1910) 86 Neb. 136, 126 N. W. 999; *DeGraw v. Chicago, B. & Q. R. Co.* (1917) 161 Neb. 724, 164 N. W. 706. See also *Chicago, B. & Q. R. Co. v. Hogan* (1889) 27 Neb. 801, 43 N. W. 1148.

Under a statute excepting cities, towns, and villages from the territory in which a railroad is required to fence its right of way, it has been held that, to constitute a village within the meaning of the statute, it is not necessary that there shall be a plat dedicating the streets, etc. *Illinois & C. R. Co. v. Williams* (1861) 27 Ill. 48, wherein it was said: "The court also erred in its instruction as to what constitutes a town or village, under the statute. The instruction is this: 'To constitute a town, city or village, there should be something more than simply a place or point at which people live. There must be a dedication of the streets, alleys, etc., to the public.' This was substantially telling the jury that no matter how many people lived at the place, or what business was done there, it could not be a town or village unless it was laid out and platted under our statute. Such is not the law. Any small assemblage of houses, for dwellings or business, or both, in the country, constitutes a village, whether they are situated upon regularly laid out streets and alleys or not. And the proof abundantly shows that this was a village. It was called St. Johns. There was at this point a railroad station, a mill, a blacksmith shop, a store, and a grocery. The number of dwellings is not

given, but the reasonable presumption is that they were sufficient at least to accommodate the persons doing business in the village." To the same effect *Toledo, W. & W. R. Co. v. Spangler* (1874) 71 Ill. 568.

In *Toledo, W. & W. R. Co. v. Chapin* (1873) 66 Ill. 504, it was held that, in determining the limits of a village within the meaning of a statute exempting railroad companies from the duty of fencing their tracks within cities, towns, and villages, the location of the plat was not conclusive, and a switch located adjacent to the limits of a village surrounded by warehouses and stores and used by the public as a part of the village should be considered, for the purposes of the statute, as within the village limits, where a fence was not required.

However, it was said in *Ewing v. Chicago & A. R. Co.* (1874) 72 Ill. 25: "The presumption is that the houses compose the village, and if the place where the cow was killed was beyond them, it was beyond the village. If the town extended beyond the houses, the defendant should have shown it. The evidence here is clear and uncontradicted that there are no houses or streets as far north as the section house, and there is no evidence that the adjacent territory is a part of the village, by user or otherwise. We are therefore of opinion that the place at which the cow was killed was beyond the limits of the village, and that it was defendant's duty to have erected and maintained fences there, as required by the statute." M. B.

TONY DI CAPRIO, Admr., etc., of Peter Di Caprio, Deceased, Resp.,
v.

NEW YORK CENTRAL RAILROAD COMPANY, Appt.

New York Court of Appeals — April 19, 1921.

(231 N. Y. 94, 181 N. E. 746.)

Railroads — absence of fence — injury to child — liability.

Failure of a railroad company to comply with a statute requiring it to maintain fences sufficient to prevent horses, cattle, sheep, and hogs from straying upon its road, and making the company liable for injury

to domestic animals injured through failure to comply with the statute, does not render it liable for injuries to a child straying upon its road at a point where it is not fenced.

[See note on this question beginning on page 944.]

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, reversing a nonsuit entered by a Trial Term for Montgomery County, and granting a new trial, in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion of the court.

Mr. W. J. Kernan for appellant.

Mr. Harry V. Borst, for respondent:

A violation by defendant of the provisions of § 52 of the Railroad Law was evidence of negligence for the jury.

Amberg v. Kinley, 214 N. Y. 581, L.R.A.1915E, 519, 108 N. E. 830, 9 N. C. C. A. 552; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Martin v. Herzog*, 228 N. Y. 164, 126 N. E. 814; *Kelley v. New York State R. Co.* 207 N. Y. 342, 100 N. E. 1115; *Leggett v. Rome W. & O. R. Co.* 41 Hun, 80; *Graham v. Delaware & H. Canal Co.* 46 Hun, 386; *Lee v. Brooklyn Heights R. Co.* 97 App. Div. 111, 89 N. Y. Supp. 652; *Prendegast v. New York C. & H. R. Co.* 58 N. Y. 652; *Donnegan v. Erhardt*, 119 N. Y. 468, 7 L.R.A. 527, 23 N. E. 1051; *Mendizabal v. New York C. & H. R. R. Co.* 89 App. Div. 386, 85 N. Y. Supp. 896; *Thomas v. Utica & B. River R. Co.* 97 N. Y. 245; *Marcott v. Marquette, H. & O. R. Co.* 47 Mich. 1, 10 N. W. 53; *Marcott v. Marquette, H. & O. R. Co.* 49 Mich. 99, 13 N. W. 374; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; *Blair v. Milwaukee & P. du C. R. Co.* 20 Wis. 254, 10 Am. Neg. Cas. 518; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 484; *Keyser v. Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. 311; *Schmidt v. Milwaukee & St. P. R. Co.* 23 Wis. 186, 99 Am. Dec. 158; *Devereaux v. Thornton*, 4 Ohio Dec. Reprint, 449; *Terre Haute & I. R. Co. v. Williams*, 69 Ill. App. 392, 172 Ill. 379, 50 N. E. 116; *Mattes v. Great Northern R. Co.* 100 Minn. 34, 110 N. W. 98; *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L.R.A. 768, 9 C. C. A. 14, 19 U. S. App. 596, 60 Fed. 370.

Andrews, J., delivered the opinion of the court:

Section 52 of the Railroad Law (Consol. Laws, § 49) provides that a railroad corporation shall erect and maintain fences on both sides of its right of way sufficiently high and strong to prevent horses, cattle, sheep, and hogs from going upon its road from the adjacent lands, and until this is done shall be liable for all damages caused by its agents, engines, or cars to any domestic animal thereon. The fence need not be built, however, when not necessary to prevent such animals from reaching its tracks.

Through a farm occupied by Tony Di Caprio ran the New York Central Railroad. On this portion of its road the defendant had failed to comply with the statute. As a result one of Di Caprio's cows had been killed. His house stood some 70 feet from the tracks. The space between was substantially level. On May 30, 1917, his child, two years of age, momentarily escaped from those having control of it, wandered onto the railroad, and was struck by a passing train. For his death this action is brought; the sole negligence claimed being the absence of the fence. It is said by the appellant that the legislative intent in requiring fences was not the safety of persons who might trespass upon the right of way, but was to prevent the presence thereon of domestic animals and the consequent possibility not only of loss to their owners, but of danger to passen-

passengers and employees in the operation of trains. Therefore, so far as the deceased is concerned, there was no negligence which will permit a recovery of damages for his death.

Where a statutory duty is imposed upon one for the direct benefit or protection of another, and the latter is damaged because this duty is not performed, a cause of action arises in his favor based upon the statute (*Amberg v. Kinley*, 214 N. Y. 531, L.R.A.1915E, 519, 108 N. E. 830, 9 N. C. C. A. 552), but no one not included in the class so directly to be benefited may complain because the statute is not complied with (*Lang v. New York C. R. Co.* 227 N. Y. 507, 125 N. E. 681). The rule is not dissimilar to that applicable to provisions said to be unconstitutional. *Middleton v. Texas Power & Light Co.* 249 U. S. 152, 156, 63 L. ed. 527, 531, 39 Sup. Ct. Rep. 227.

On the other hand, a statute or a city ordinance may be general in its character and may define the degree of care which one shall exercise in his calling or occupation. Failure to use such care is evidence more or less conclusive of negligence as to everyone. Again, a particular statute may have both ends in view. *Kelley v. New York State R. Co.* 207 N. Y. 342, 100 N. E. 1115. When this is so, he who is to be particularly protected has a cause of action because the statute is violated to his injury. Others, one based on negligence.

Primarily the section in question was intended to protect the owners of domestic animals against loss, and passengers and employees of the railroad against danger. This is clear not only from the language used, but from the history of the act. As to such persons, where, because of the absence of a fence an animal strayed upon the track and a collision resulted, the statute imposes responsibility. *Donnegan v. Ehrhardt*, 119 N. Y. 468, 7 L.R.A. 527, 23 N. E. 1051. Was there, however, the farther intent to safe-

guard any individual who might unconsciously trespass upon the right of way? We find no sign of such a

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purpose. The fence is to be sufficient to prevent animals going upon the railroad from adjacent lands. Until built, the company is liable for all damages done to such animals. No fence is required if not necessary to prevent such a trespass. Because of the peculiar use made by the railroad of its land and the excessive peril caused not only to the animal straying upon it, but to the road itself, it seemed wise to abolish in this instance the ancient rule, and to require the corporation to furnish the necessary protection. This is what the legislature had in mind. No hint is given that it also considered the possibility of an involuntary trespass by an adult or a child; that for this object also fences were commanded. Certainly, in view of subdivision 4 of § 1990 of the Penal Law (Consol. Law, chap. 40), it had no thought of a voluntary trespass.

There seems to be no decision in this state which controls our action. Elsewhere under somewhat similar statutes the results conflict. In Massachusetts (*Menut v. Boston & M. R. Co.* 207 Mass. 12, 30 L.R.A. (N.S.) 1196, 92 N. E. 1032, 20 Ann. Cas. 1213), Maine (*Kapernaros v. Boston & M. R. Co.* 115 Me. 467, 99 Atl. 441), New Hampshire (*Casista v. Boston & M. R. Co.* 69 N. H. 649, 45 Atl. 712), Ohio (*Lake Shore & M. S. R. Co. v. Lüdtkke*, 69 Ohio St. 384, 69 N. E. 653, 15 Am. Neg. Rep. 652), Illinois (*Bischof v. Illinois S. R. Co.* 232 Ill. 446, 83 N. E. 948, 13 Ann. Cas. 185), Indiana (*Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388), and Iowa (*Cohoon v. Chicago, B. & Q. R. Co.* 90 Iowa, 169, 57 N. W. 727), it is said that the object of the legislature is solely to prevent the straying of cattle. The contrary, at least so far as children non sui juris is concerned, is the rule in Wisconsin (*Schmidt v. Missouri & St. P. R. Co.* 23 Wis. 186,

99 Am. Dec. 158), Missouri (Isabel v. Hannibal & St. J. R. Co. 60 Mo. 484), Minnesota (Schreiner v. Great Northern R. Co. 86 Minn. 245, 247, 58 L.R.A. 75, 90 N. W. 400), Nebraska (Chicago, B. & Q. R. Co. v. Grablin, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522), and Michigan (Keyser v. Chicago & G. T. R. Co. 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. 311).

Twice similar questions have been discussed in the Supreme Court of the United States. A Colorado statute provided that, where miners piled up slack coal in quantities likely to produce spontaneous combustion, they should so fence the ground as to prevent access by loose horses and cattle. A failure to do so was made a misdemeanor. At such a place a child was injured under circumstances that would have made the defendant liable at common law, but the trial judge instructed the jury that the failure of the owner to fence the slack as required by statute was negligence, of which the plaintiff could complain. The Supreme Court says that primarily this statute was intended to protect horses and cattle, "but it was not, for that reason, wholly inapplicable to the present case upon the issue as to negligence. . . .

The nonperformance by the railroad company of the duty imposed by statute, of putting a fence around its slack pit, was a breach of its duty to the public, and therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty." Union P. R. Co. v. McDonald, 152 U. S. 262, 283, 38 L. ed. 434, 443, 14 Sup. Ct. Rep. 619, 627.

In Hayes v. Michigan C. R. Co. 111 U. S. 228, 240, 28 L. ed. 410, 415, 4 Sup. Ct. Rep. 369, 374, the court again says in reference to a fencing statute for protection of animals, that "although in the case of injury

to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence."

This statement, however, is purely obiter, for in the case before the court the ordinance in question expressly provided for fences to prevent animals straying on the tracks "and to secure persons and property from injury." It should be noticed that the McDonald Case is referred to in Amberg v. Kinley, 214 N. Y. 531, L.R.A.1915E, 519, 108 N. E. 830, 9 N. C. C. A. 552, but only with reference to another question then before the court.

Had the language of the Colorado statute and that of the Railroad Law been substantially identical, our respect for the decisions of the Supreme Court should require us to reach the same result, but the language of the former may be so interpreted as to require a fence in any event, and the reference to horses and cattle simply as fixing the nature of the fence which is to be built. With us, on the other hand, the object for which the fence is ordered is clearly defined. So we do not think Judge Harlan's opinion should control us. Giving effect, therefore, to the intent of the legislature, we should hold that the absence of the fence, under the circumstances, was neither a breach of a statutory duty owing to the deceased, nor was it the basis for any claim of negligence.

The judgment of the Appellate Division should be reversed, and that of the trial court affirmed, with costs in this court and in the Appellate Division.

Hiscock, Ch. J., and Chase, Hogan, Cardozo, Pound, and Crane, JJ., concur.

ANNOTATION.

Duty of railroad to fence track as against children.

- I. Introductory, 944.
- II. Statute imposing absolute duty to fence, 944.
- III. Statute imposing liability for all damages sustained, 945.
- IV. Statute requiring fence for exclusion of stock, 946.
- V. Applicability of statute to railroad yard, 948.
- VI. Failure to fence as proximate cause of injury, 948.

I. Introductory.

Under the common law a railroad company was not required to fence its tracks. See 11 R. C. L. 890. The common-law rule was applied in *Western & A. R. Co. v. Rogers* (1898) 104 Ga. 224, 30 S. E. 804, 4 Am. Neg. Rep. 606, wherein it was held that a railroad company could not be held guilty of negligence in failing to fence its tracks so as to prevent children from coming there; in the absence of a statute making it the duty of the railroad company to do so.

The matter of the fencing of tracks is governed almost wholly by statute, and whether the duty of a railroad company to fence its tracks includes the duty to fence against children depends largely on the language of the controlling statute. Whenever the language of the statute is capable of such a construction the courts seem disposed to extend the protection of the statute to children *non sui juris*.

II. Statute imposing absolute duty to fence.

Where there is an absolute duty imposed by statute to maintain a fence, a railroad company is bound to fence against children. *Hayes v. Michigan C. R. Co.* (1884) 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Heiting v. Chicago, R. I. & P. R. Co.* (1911) 252 Ill. 466, 96 N. E. 842, Ann. Cas. 1912D, 415; *Carlin v. Chicago & W. I. R. Co.* (1921) 297 Ill. 184, 130 N. E. 371; *Tabb v. Grand Trunk R. Co.* (1904) 8 Ont. L. Rep. 203. See also *Baltimore & P. R. Co. v. Cumberland* (1898) 12 App. D. C. 598, affirmed in (1900) 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. Rep. 380; *Potvin v. Canadian P. R. Co.* (1904) 4 Can. Ry. Cas. 8. Compare *Kapernaros v. Boston & M.*

R. Co. (1916) 115 Me. 467, 99 Atl. 441; *Palyo v. Northern P. R. Co.* (1920) 144 Minn. 398, 175 N. W. 687; *Morrissey v. Providence & W. R. Co.* (1886) 15 R. I. 271, 3 Atl. 10.

Thus, in *Hayes v. Michigan C. R. Co.* (U. S.) *supra*, it appeared that the plaintiff, a boy eight or nine years old, entered on the tracks of the defendant at a place where there was no fence, and was injured by one of the defendant's trains. It was held that the defendant was liable for the injuries, under a statute requiring the defendant to erect a proper fence to prevent animals from straying on the tracks, and to secure persons and property from danger, the court saying: "The duty is due not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery."

So, in *Tabb v. Grand Trunk R. Co.* (1904) 8 Ont. L. Rep. 203, the statute involved provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of the city, town, or village at a speed greater than 6 miles an hour unless the track is properly fenced." The defendant maintained a fence, but allowed an opening 4 or 5 feet to remain therein, which was used at times by persons who desired to cross the tracks. A child who had gone on the track through this opening was killed by a train which ran through the city at the rate of 40 miles per hour. The court held that, in permitting its tracks to be unfenced and in running its trains at such a high rate of speed, the defendant was guilty of a statu-

tory breach of duty, and a verdict for the child's father was sustained.

But in *Palyo v. Northern P. R. Co.* (1920) 144 Minn. 398, 175 N. W. 687, it appeared that a boy was injured by one of the defendant's trains which was being operated on tracks laid along a public street in a municipality. The defendant was sought to be held liable under a statute, requiring railroad rights of way to be fenced. It was held that since the defendant company had only a mere license from the municipality to maintain its tracts and operate its trains in the street, and the right to the use of the street for travel had been retained by the public, the statute requiring the defendant company to fence its right of way was not applicable.

So, in *Kapernaros v. Boston & M. R. Co.* (1916) 115 Me. 467, 99 Atl. 441, an action to recover for the death of a child caused by its being struck by one of the defendant's locomotives, it was held that the defendant could not be held liable under a statute, which provided that "where a railroad passes through inclosed or improved land, or wood lots belonging to a farm, legal and sufficient fences shall be made on each side of the land taken therefor, . . . and such fences shall be maintained and kept in good repair by the corporation," the court held that the statute was enacted primarily for the purpose of preventing the entry of domestic animals on the track, and was not applicable to persons.

Likewise, in *Morrissey v. Providence & W. R. Co.* (1886) 15 R. I. 271, 3 Atl. 10, it appeared that a child about four years old strayed across the unfenced track in front of his home, and fell into a trench filled with water, located on the adjoining land. The court held that the obligation of the railroad company in reference to guarding its tracks by fences was to protect persons and cattle from injury on its own premises, and that the company was not bound to guard its roads so that children or cattle could not get across it to the land of other persons.

16 A.L.R.—60.

III. Statute imposing liability for all damages sustained.

It has been held that a railroad company is bound to fence against children of tender years, under a statute providing that a railroad company which fails to fence its right of way shall be liable for all damages sustained by any person in consequence of such neglect.

United States.—See *Union P. R. Co. v. McDonald* (1894) 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *New York C. & H. R. Co. v. Price* (1908) 16 L.R.A. (N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330.

Minnesota.—*Rosse v. St. Paul & D. R. Co.* (1897) 68 Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20, 2 Am. Neg. Rep. 730, overruling *Fitzgerald v. St. Paul, M. & M. R. Co.* (1882) 29 Minn. 336, 43 Am. St. Rep. 212, 13 N. W. 168; *Nickolson v. Northern P. R. Co.* (1900) 80 Minn. 508, 83 N. W. 454, 8 Am. Neg. Rep. 450; *Marengo v. Great Northern R. Co.* (1901) 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117; *Schreiner v. Great Northern R. Co.* (1902) 86 Minn. 245, 58 L.R.A. 75, 90 N. W. 400; *Mattes v. Great Northern R. Co.* (1905) 95 Minn. 386, 104 N. W. 234, on second appeal in (1907) 100 Minn. 34, 110 N. W. 98. Compare *Fezler v. Willmar & S. F. R. Co.* (1902) 85 Minn. 252, 88 N. W. 746.

Utah.—See *Corbett v. Oregon Short Line R. Co.* (1908) 25 Utah, 449, 71 Pac. 1065.

Wisconsin.—*Schmidt v. Milwaukee & St. P. R. Co.* (1868) 23 Wis. 186, 99 Am. Dec. 158; *Schwind v. Chicago, M. & St. P. R. Co.* (1909) 140 Wis. 1, 133 Am. St. Rep. 1055, 121 N. W. 639. See also *Schrier v. Milwaukee, L. S. & W. R. Co.* (1886) 65 Wis. 457, 27 N. W. 167; *Stuettgen v. Wisconsin C. R. Co.* (1891) 80 Wis. 498, 50 N. W. 407.

England.—*Williams v. Great Western R. Co.* (1874) L. R. 9 Exch. 157, 43 L. J. Exch. N. S. 105, 31 L. T. N. S. 124, 22 Week. Rep. 531.

Thus, in *Schwind v. Chicago, M. & St. P. R. Co.* (1909) 140 Wis. 1, 133 Am. St. Rep. 1055, 121 N. W. 639, it appeared that a boy went on the defendant's right of way, which was not

inclosed by a fence, and was injured by an engine coming up behind him. It was held that a recovery could be had for the injuries under a statute (Stat. 1898, § 1810) requiring railroads to fence their tracks, and providing that a railroad should be liable for all damages sustained "to persons thereon," occasioned in any manner, in whole or in part, by the want of a fence.

So, in *Rosse v. St. Paul & D. R. Co.* (1897) 68 Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20, 2 Am. Neg. Rep. 730, it was held that a railroad company was liable for an injury to a young child who strayed on its tracks and was injured as a consequence of the failure to erect a fence along the tracks, under a statute providing that if a railroad company should fail or neglect to erect and maintain fences along its road it should be liable for all damages sustained by any person in consequence of such failure or neglect.

Likewise in *Nickolson v. Northern P. R. Co.* (1900) 80 Minn. 508, 83 N. W. 454, 8 Am. Neg. Rep. 450, the statute under consideration provided that a railroad failing or neglecting to fence its tracks should be liable for all damages sustained by any person in consequence of that failure or neglect. A child was injured by reason of the failure to fence. It was held that there was an absolute legal duty to fence, and that the failure of the defendant to discharge this duty was evidence of negligence.

But in the case of *Fezler v. Willmar & S. F. R. Co.* (1902) 85 Minn. 252, 88 N. W. 746, it was held that a boy ten years old was guilty of contributory negligence in going on railroad premises and running along the end of the ties beside a moving train, and was not entitled to the protection of the statute.

IV. Statute requiring fence for exclusion of stock.

It has been held under statutes requiring the maintenance of fences intended primarily to exclude from the track stock in adjoining fields, that railroad companies are not bound to maintain fences which will

prevent children of tender years from trespassing on the tracks.

United States.—*New York C. & H. R. R. Co. v. Price* (1908) 16 L.R.A. (N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330 (decided under the Massachusetts statute); *McCarthy v. New York, N. H. & H. R. Co.* (1917) 153 C. C. A. 406, 240 Fed. 602.

Illinois.—*Bischof v. Illinois S. R. Co.* (1908) 232 Ill. 446, 83 N. E. 948, 13 Ann. Cas. 185; *Colby v. Chicago Junction R. Co.* (1919) 216 Ill. App. 315.

Indiana.—*Baltimore & O. S. W. R. Co. v. Bradford* (1898) 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388.

Maine.—See *Kapernaros v. Boston & M. R. Co.* (1916) 115 Me. 467, 99 Atl. 441 (set out *supra* II.).

Massachusetts.—*Byrnes v. Boston & M. R. Co.* (1902) 181 Mass. 322, 63 N. E. 897.

New Hampshire.—*Casista v. Boston & M. R. Co.* (1899) 69 N. H. 649, 45 Atl. 712.

New York.—*Prendegast v. New York C. & H. R. R. Co.* (1874) 58 N. Y. 652; *Robertson v. New York* (1894) 7 Misc. 645, 28 N. Y. Supp. 13, affirmed in (1896) 149 N. Y. 609, 44 N. E. 1123. And see the reported case (*DI CAPRIO v. NEW YORK C. R. Co.* ante, 940). See also *Ditchett v. Spuyten Duyvil & P. M. R. Co.* (1876) 67 N. Y. 425, reversing (1875) 5 Hun, 165.

Ohio.—*Lake Shore & M. S. R. Co. v. Lüdtke* (1904) 69 Ohio St. 384, 69 N. E. 653, 15 Am. Neg. Rep. 652.

But see *Devereaux v. Thornton* (1879) 4 Ohio Dec. Reprint, 449, affirmed in (1883) 10 Ohio L. J. 266.

Canada.—See *Newell v. Canadian P. R. Co.* (1906) 12 Ont. L. Rep. 21.

Thus, in *McCarthy v. New York, N. H. & H. R. Co.* (1917) 153 C. C. A. 406, 240 Fed. 602, an action to recover for the death of the plaintiff's son while on the defendant's tracks, it was held that the defendant company owed no duty to the plaintiff's son to fence its tracks under a statute (Laws 1892, chap. 676, § 32), providing in substance that no railroad need be fenced except when necessary to prevent domestic animals from adjoining lands from going on the tracks.

So, in *Bischof v. Illinois S. R. Co.* (1908) 232 Ill. 446, 83 N. E. 948, 18 Ann. Cas. 185, it was held that the defendant was not liable for the death of a child who was killed by one of the defendant's locomotives, under a statute requiring every railroad company to erect and maintain fences on both sides of its tracks suitable and sufficient to keep stock off the track, since the statute did not require the defendant to erect and maintain fences sufficient to prevent persons of any age or degree of intelligence from going on the track.

In *Colby v. Chicago Junction R. Co.* (1919) 216 Ill. App. 315, the court, without reference to an existing statute requiring a railroad company to fence its tracks against cattle, held that a railroad was not required to fence its tracks to prevent children from trespassing thereon, and could not be held liable for the death of a child caused by injuries received while playing in one of the defendant's cars. The court said: "We know of no rule which requires a railroad company to fence and guard its yards and tracks so securely as to prevent entrance by children. In many decisions the courts have recognized the physical impossibility of doing this, and have held that the company is under no duty to provide protection to children playing about its cars greater than its duty to ordinary trespassers."

A statute providing that a railroad company failing to maintain fences shall be liable for all damages resulting from the injuring or killing of stock on its right of way has been held not to require a fencing against children. *Walkenhauer v. Chicago, B. & Q. R. Co.* (1882) 3 McCrary, 553, 17 Fed. 136; *Nixon v. Montana, W. & S. R. Co.* (1914) 50 Mont. 95, 145 Pac. 8, Ann. Cas. 1916B, 299. See also *Baltimore & O. S. W. R. Co. v. Bradford* (1898) 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388.

Thus, in *Nixon v. Montana, W. & S. R. Co.* (1914) 50 Mont. 95, 145 Pac. 8, Ann. Cas. 1916B, 299, it appeared that a child entered on the unfenced tracks of the defendant and was

killed by a train. It was sought to impose a liability under a statute requiring every railroad to erect a fence on both sides of its track and to maintain cattle guards at crossings, and making railroads liable for all domestic animals killed by reason of a failure to erect and maintain such fence and guards. It was held that the statute was not applicable to children.

But statutes intended primarily for the protection of stock have, in some decisions, been so construed as to bring within their scope children of tender years straying on the right of way of the railroad company, at least to the extent of holding that the failure of the railroad company to fence its track is evidence of negligence. *Keyser v. Chicago & G. T. R. Co.* (1887) 66 Mich. 390, 83 N. W. 867; *Isabel v. Hannibal & St. J. R. Co.* (1875) 60 Mo. 475; *Chicago, B. & Q. R. Co. v. Grablin* (1893) 38 Neb. 90, 56 N. W. 796, 57 N. W. 522. See also *Marcott v. Marquette, H. & O. R. Co.* (1881) 47 Mich. 9, 10 N. W. 53, later appeal in (1882) 49 Mich. 99, 13 N. W. 374. Compare *Barney v. Hannibal & St. J. R. Co.* (1895) 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069.

Thus, in *Chicago, B. & Q. R. Co. v. Grablin* (1893) 38 Neb. 90, 56 N. W. 796, 57 N. W. 522, the court said: "By the statutes of this state, railroad companies are required to fence their tracks, and while the main objects of this law are to protect stock running at large and increase the safety of passengers on railway trains, yet the fencing of their tracks by railroad companies is a positive duty enjoined upon them by law. It is in the nature of a police regulation, and their failure to obey the statute is negligence."

So, in *Isabel v. Hannibal & St. J. R. Co.* (1875) 60 Mo. 475, wherein it appeared that a child, while straying on the tracks of a railroad company, was killed by being struck by a locomotive, it was held that although the statute requiring the railroad company to fence its tracks was intended primarily for the protection of stock, the failure to maintain the fence could be shown by the plaintiff as an element

of negligence on the part of the railroad company.

V. Applicability of statute to railroad yards.

It has been held that a statute requiring railroads to fence their tracks does not require them to fence railroad yards, and that railroad companies are not liable for injuries to children who stray into such a yard. *Burtram v. Michigan C. R. Co.* (1907) 148 Mich. 166, 111 N. W. 749. See also *McCarthy v. Fitchburg R. Co.* (1891) 154 Mass. 17, 27 N. E. 773.

But compare *Mattes v. Great Northern R. Co.* (1907) 100 Minn. 34, 110 N. W. 98, wherein it was held that statutes imposing on railroad companies the obligation to fence their tracks apply to repair shops and yards whenever it is practicable to fence such shops and yards without materially impairing their usefulness, and that a railroad company is liable for an injury to a child occasioned by its failure to fence its yards.

VI. Failure to fence as proximate cause of injury.

Under statutes which are so construed as to impose a duty to fence against children non sui juris, it has been held that there can be no recovery for injury to a child unless the failure to fence is the proximate cause of the injury. *Fezler v. Willmar & S. F. R. Co.* (1902) 85 Minn. 252, 88 N. W. 746; *Ellington v. Great Northern R. Co.* (1905) 96 Minn. 176, 104 N. W. 827, 19 Am. Neg. Rep. 342; *Paquin v. Wisconsin C. R. Co.* (1906) 99 Minn. 170, 108 N. W. 822, 20 Am. Neg. Rep. 607; *Newell v. Canadian P. R. Co.* (1906) 12 Ont. L. Rep. 21. See also *Singleton v. Eastern Counties R. Co.* (1859) 7 C. B. N. S. 287, 141 Eng. Reprint, 827; *Heiting v. Chicago, R. I. & P. R. Co.* (1911) 252 Ill. 466, 96 N. E. 842, Ann. Cas. 1912D, 451; *Carlin v. Chicago & W. I. R. Co.* (1921) 297 Ill. 184, 130 N. E. 371; *Rosse v. St. Paul & D. R. Co.* (1897) 68 Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20; *Mattes v. Great Northern R. Co.* (1907) 100 Minn. 34, 110 N. W. 98; *Wickham v. Chicago & N. W. R.*

Co. (1897) 95 Wis. 23, 69 N. W. 982, 1 Am. Neg. Rep. 198.

See also *supra*, III.

In *Fezler v. Willmar & S. F. R. Co.* (Minn.) *supra*, the court stated that, in determining whether the absence of a fence was the proximate cause of the injury, the test was: Had the statutory fence existed would it probably have prevented the child from getting on the defendant's track?

Likewise, in *Heiting v. Chicago, R. I. & P. R. Co.* (1911) 252 Ill. 466, 96 N. E. 842, Ann. Cas. 1912D, 451, it appeared that the plaintiff, a boy, entered the right of way of the defendant at a place where a fence which had been erected as required by a city ordinance had been torn down. The plaintiff ran along the end of the ties until he lost his footing, fell, and was injured by an approaching train. It was held that since the violation of a city ordinance requiring the defendant to erect fences at certain designated places, and to provide protection against injury to persons and property, was the proximate cause of the injury, the defendant could be held liable. And see *Carlin v. Chicago & W. I. R. Co.* (1921) 297 Ill. 184, 130 N. E. 371, wherein, under a similar state of facts, a like construction was placed on the same ordinance.

In *Mattes v. Great Northern R. Co.* (1907) 100 Minn. 34, 110 N. W. 98, it was held that it could not be said as a matter of law that the failure to maintain cattle guards was not the proximate cause of an injury to a child. The court said: "We are unable to distinguish, from the standpoint of effectiveness as a barrier to young children, between cattle guards and an ordinary right-of-way fence. Neither will absolutely obstruct or prevent entrance upon the railroad grounds. Their character and structure, so far as effectiveness is concerned, will not warrant the court in saying, as a matter of law, that either would or would not answer the purpose intended by the statute. Children may pass over or under the cattle guards without difficulty, and with equal facility climb over or

crawl under the fence, but either might have the effect of turning them away."

It was held in *Wickham v. Chicago & N. W. R. Co.* (Wis.) *supra*, that the failure of a railroad company to fence its tracks near its station within the limits of a city, if the statute re-

quired it to fence at all against persons, could not be said to be the proximate cause of the death of a child who was struck by a train some distance from a public crossing, in the absence of evidence that a fence would have prevented the accident.

L. W. B.

HORACE KEITH, Appt.,

v.

STATE OF TEXAS.

Texas Court of Criminal Appeals—April 13, 1921.

(— Tex. Crim. Rep. —, 232 S. W. 821.)

Mayhem — front teeth as members of body.

1. Front teeth are members of the body within the operation of a statute providing punishment for depriving a person of a member of his body.

[See note on this question beginning on page 955.]

Appeal — absence of sentence — effect.

2. In the absence of sentence, courts of criminal appeal have no jurisdiction of an appeal in a criminal case.

On Petition for Rehearing.

—denial of continuance — absence of error.

3. Refusal of a continuance for absent witnesses is not reversible, where their affidavits in the record deny that they would give the evidence expected of them.

Mayhem — question of simple assault.

4. The question of simple assault does not arise in a prosecution for mayhem, where accused deprived his victim of a member of his body.

Trial — instruction — intent in mayhem.

5. An instruction upon the question of intent in mayhem, that a wilful act is one done with evil intent, and that malice denotes a wrongful act intentionally done without just cause or excuse, is proper.

[See 8 R. C. L. 305.]

—refusal of instruction — absence of error.

6. An instruction in a prosecution for mayhem, to the effect that if, with no premeditated design, the parties engaged in a fight and accused knocked out his opponent's teeth during the altercation, he was not guilty of may-

hem, is properly refused where the court has instructed that if the jury had a reasonable doubt as to whether the act was wilfully and maliciously done they should acquit.

Appeal — refusal of instruction — absence of evidence.

7. Refusal of instructions upon a theory unsupported by the evidence is not error.

[See 2 R. C. L. 261; 14 R. C. L. 786.]

Evidence — of threat — proximity to assault.

8. Evidence of a threat made shortly before an assault is admissible in a prosecution of the assailant, if the circumstances of the case make it reasonably clear that the injured person was meant or included therein.

[See 2 R. C. L. 565.]

— motive for assault — testimony against assailant.

9. One assaulted by another may testify at the prosecution for the assault that he had been called as a witness against accused in another prosecution, as tending to show motive for the assault.

Appeal — failure to object to answer to question.

10. Permitting a question to be answered by irrelevant matter, without objection, raises no question for review on appeal.

[See 2 R. C. L. 77.]

—permitting witness to be asked as to indictment for felony.

11. It is not error to permit an accused to be asked if he had been indicted for felony, although he unnecessarily answers that he had been indicted for misdemeanor.

[See 28 R. C. L. 622, 627.]

—admission of immaterial evidence.

12. Permitting a witness to state that he saw one on trial for mayhem separate two other fighting persons a short time before the difficulty for which he is on trial is not reversible error.

[See 2 R. C. L. 247 et seq.]

On Second Petition for Rehearing.

—refusal of instruction on right to seek explanation.

13. Refusal of an instruction as to the right of one on trial for mayhem to seek his victim for an explanation is not error, where there is no qualification in the charge of his right to act in self-defense.

Trial — question for jury — issue supported by testimony of accused alone.

14. That an issue is supported by

the testimony of accused alone does not destroy its status as one for solution by the jury.

Criminal law — charge on threats and self-defense.

15. A charge on the law of threats in connection with self-defense should be given where there is evidence of communicated threats and of an overt act by the victim of the assault not amounting to an actual attack.

Mayhem — right to self-defense.

16. Self-defense is a defense to a charge of maiming.

[See 8 R. C. L. 306.]

Evidence — effect — ex parte affidavit.

17. The issue raised by testimony of an accused, as to a statement of an absent witness, cannot be eliminated by his ex parte affidavit that he made no such statement.

Appeal — evidence introduced after trial.

18. The appellate court cannot consider affidavits filed after the trial and which were not considered by the trial court.

APPEAL by defendant from a judgment of the District Court for Kaufman County (Bond, J.) convicting him of maiming. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Wynne & Wynne for appellant.

Messrs. C. M. Cureton, Attorney General, and E. F. Smith, Assistant Attorney General, for the State.

Lattimore, J., delivered the opinion of the court:

Appellant was convicted in the district court of Kaufman county of the offense of maiming, and his punishment fixed at confinement in the penitentiary for a period of five years.

An inspection of the record discloses the fact that same shows no sentence to have been passed upon the appellant. In this condition of the record this court would appear to be without jurisdiction, and the appeal is therefore dismissed.

A motion for rehearing having been granted, Lattimore, J., on May

4, 1921, handed down the following opinion:

This case was dismissed at a former day of this term because the record showed no sentence, but a duly certified copy of the minutes of the court below has been filed showing such sentence, and the motion to reinstate is granted, and the cause now decided on its merits.

Appellant asked for a continuance. He was indicted July 2d, arrested July 3d, and filed his application for a continuance on July 7th. The absent witnesses named were D. R. Saylor, Ray Robinson, and S. K. Harp, the residence of each of whom was stated to be Kaufman county, Texas. The state controverted appellant's motion for a new trial in so far as same relied upon the error in overruling his application for continuance, and attached to the replication of the county attorney the affidavits of said wit-

(— *Tex. Crim. Rep.* —, 333 S. W. 321.)

nesses Robinson and Harp, in which each specifically denies that he would have given the testimony stated to be expected of him. The record contains an affidavit of witness Sayler, in which he also denies that he would have given the testimony expected of him. We do not think the record in this condition discloses

any abuse by the trial judge of the discretion confided in him in overruling appellant's motion for new trial, or in refusing such continuance.

In his charge to the jury the court told them that if they found from the evidence that appellant made an assault on the injured party, and wilfully and maliciously knocked out three of his front teeth, they should convict. Appellant excepted to this as an unwarranted assumption on the part of the trial court of the fact that a front tooth was a member of the body. *Slattery v. State*, 41 Tex. 620, and *Bower v. State*, 24 Tex. App. 542, 5 Am. St. Rep. 901, 7 S. W. 247, are cited. Part of the lip in one of said cases, and part of the thumb in the other, was bitten off, and the question in each was whether or not such partial destruction of a member measured up to the requirements of our statute, which makes it maiming to cut off, or deprive a person of, a member of his body. In *High v. State*, 26 Tex. App. 545, 8 Am. St. Rep. 488, 10 S. W. 238, this court disapproved the application of the *Slattery* decision to the loss of a front tooth, and expressly held it no error for the trial court to assume

in the charge that a front tooth was a member of the body within the comprehension of the maiming statute. We agree with the doctrine of the *High* Case.

If we be correct in what we have just said, there was left no issue as to the fact that Mr. Choate, the injured party, was maimed by appellant, who knocked out three of his front teeth, and hence the

question of simple assault did not arise. The *Key* Case, 71 Tex. Crim. Rep. 642, L.R.A.1916E, 492, 161 S. W. 122, referred to by appellant, presents a case wherein a small part of the rim of the ear was bitten off in a fight admittedly brought on by the injured party, who did not appear as a witness. The accused testified without contradiction that in the fight the injured party was biting upon his neck, and that he bit back intending to bite the neck of his assailant, and did not know until they were separated that he had bitten his ear. The case thus lacking the apparent element of wilfulness and maliciousness, and raising a very serious question as to whether there was any maiming, the dissenting opinion in this court held that simple assault should have been submitted. This might be sound in that character of case, but has no application here, where there is no question as to the loss of a member of the body, and none of justification in the assault, the only question left being whether such injury was inflicted wilfully and maliciously. There was no error in refusing the special charge on simple assault.

Appellant excepted to the court's failure to charge on the question of his intent and premeditated design. In the *Davis* Case, 22 Tex. App. 50, 2 S. W. 630, and the *Key* Case, *supra*, we held that if the maiming was actually committed, and was with evil intent and without justification, same would be punishable whether or not there was any specific intent or premeditated design to maim. In the instant case the trial court defined a wilful act as one done with evil intent, and told the jury that malice denoted a wrongful act intentionally done without just cause or excuse. This we think sufficient upon the question of intent under the facts of this case. *Bowers v. State*, 24 Tex. App. 549, 5 Am. St. Rep. 901, 7 S. W. 247; *Pool v. State*, 59 Tex. Crim. Rep. 482, 129 S. W. 1135.

Mayhem—front teeth as members of body.

Trial—instruction—intent in mayhem.

—question of simple assault.

In addition to what we have just said, attention is called to the fact that the court charged on aggravated assault, and carefully instructed the jury that if they had a reasonable doubt as to whether the act of appellant was done wilfully and maliciously they should acquit him of maiming. For these reasons there was no error in refusing appellant's special charge No. 4, which is as follows: "If you should find and believe from the evidence that the defendant, Horace Keith, called W. K. Choate off for the purpose of having a difficulty with him, and that at the time the defendant had no intention or a premeditated design to maim the said W. K. Choate, by knocking his teeth out, and that a fight ensued between the defendant and W. K. Choate, and during said altercation the teeth of W. K. Choate were knocked out, then you are charged that defendant would not be guilty of maiming under the law, and you will find him not guilty of this offense."

We find nothing in the authorities cited (*Lee v. State*, 34 Tex. Crim. Rep. 519, 31 S. W. 667; *Halsell v. State*, 29 Tex. App. 22, 18 S. W. 418) which support the contention of appellant that this charge should have been given.

An exception was taken to the court's charge for its failure to submit the law applicable to an act of appellant resulting from uncontrollable rage, sudden resentment, or terror which rendered him incapable of cool reflection. No special charge on this issue appears in the record. We are unable to find anything in the evidence reasonably tending to support such theory. The court fully submitted self-defense based on both real and apparent danger, telling the jury that if appellant believed that Choate was about to assault him he would have the right to act as he did in his own self-defense and strike Choate.

It seems from the statement of

facts that appellant had gotten into trouble at some time prior to this difficulty by reason of his connection with some shipment of intoxicating liquor. He and others thought Choate was in some way to blame for their trouble. On the occasion in question he called Choate off to one side, and, according to the state's testimony, most brutally assaulted him, knocking out three of his upper front teeth and loosening a number of others, and beating his head against the cement sidewalk until Choate was reduced to a condition of insensibility. Appellant was a large man, weighing over 200 pounds, and Choate was a small man weighing about 130 pounds. While Choate was prostrate on the ground and appellant astride of him and beating him in the face, he said between blows with an oath that Choate would not pimp on him any more. According to appellant's own testimony, shortly before the occurrence one Robinson came to him and repeated a very ugly threat made by Choate, and appellant said that when he called Choate off to one side he wanted to speak to him about this threat; but the record fails to disclose, among the other things which appellant admitted he did say to Choate on said occasion, any reference to what he claims Robinson had told him. Robinson, in his affidavit attached to the state's controversy of appellant's motion for a new trial, specifically denies having repeated to appellant any threat of Choate, or that Choate had ever said anything to him concerning appellant. This might not be sufficient to entirely justify an assumption of the truth of Robinson's statement, he not having been on the witness stand confronting appellant, but it may be looked to as strengthening the supposition as to the falsity of appellant's reason, as stated by him, for calling Choate to one side, which supposition is based on the fact that in the ensuing conversation testified to by appellant he did not even claim to have mentioned such threat. Witness Choate,

—refusal of instruction—
absence of error.

Appeal—refusal
of instruction—
absence of
evidence.

corroborated by a number of apparently disinterested parties, testified that appellant called him off, and as they walked away appellant put one arm partially around Choate's shoulders or neck, and began to beat him in the face with his other hand, and, after knocking him to the sidewalk, got astride of his body, and beat his head up and down against the cement sidewalk.

It is complained that the trial court erred in allowing state witness Johnson to testify to a threat made by appellant, the objection being that same named no person, and that there was no evidence sufficient to make it reasonably apparent that Choate was meant. Johnson testified that about ten minutes before the difficulty he heard appellant and Henry Davis in conversation across the street from where this trouble took place. He only heard part of what was said. Davis said that he "would whip him," and appellant said, "No," that he would do it himself; and appellant said to Davis something about "keeping the dogs off;" also that when the two men left shortly they went in the direction of the place where the difficulty took place. Other evidence showed that Davis walked up with appellant and stood about 10 feet away while appellant was beating Choate, and that he made no effort to interfere, and for some reason was not used by the defense as a witness. In the *Briscoe Case*, 87 *Tex. Crim. Rep.* 375, 222 S. W. 249, cited by appellant as supporting his objection to

Evidence—of threat—proximity to assault.

this threat, we said that mere proximity of time would not seem to justify

evidence of a threat unless there was something in the case to make it reasonably certain that the injured party was meant or included therein. We think that the facts in the instant case differentiate it from the *Briscoe Case*, and bring it within the rule announced.

We find no error in the testimony of Choate as same appears in bill of exceptions No. 4. Said witness

testified that he was called before the Federal grand jury as a witness against appellant and one Fuller; that he saw appellant in Dallas at the time of appellant's trial. Motive for the assault was a material issue, and this testimony, connected with the statements of appellant at the time of the occurrence, shed light on appellant's motive. If we understand bill of exceptions No. 7, what we have just said is also true of it. The question, as asked and objected to therein, is stated to be, "Were you called upon by the sheriff's department to assist them there?" Such a question would seem to call for either an affirmative or negative answer, the objectionable character of which should have been made to appear in the bill. For counsel to permit an answer apparently not responsive, and now urged to relate to matters foreign to any issue, to be given without objection that it was not called for, and without request for instructions to the jury not to consider same, would hardly seem to bring the matter here for review. We apprehend that the matter of said answer was admitted as shedding light on appellant's motive, and the bill in no event contains anything showing it not pertinent to that issue.

—motive for assault—testimony against assailant.

Whether one has been indicted for a felony may be asked him when on the witness stand, and the fact that when objection thereto is overruled he answers that he was indicted for a misdemeanor does not make the question erroneous. Appellant was not compelled to make such answer, but might have replied that he had not been so indicted.

Appeal—failure to object to answer to question.

—permitting witness to be asked as to indictment for felony.

That witness Dallas stated that he saw appellant separate Henry Davis and another man, who were fighting some little time before the difficulty herein between appellant

and Choate, would not appear to be material, and in no event could same have injured the accused. Rather would proof that he was a peacemaker seem favorable to him.

We have carefully considered all the matters urged in the able brief for appellant, and, finding no reversible error, the judgment will be affirmed.

A second motion for rehearing having been granted, Morrow, P. J., on June 8, 1921, handed down the following additional opinion:

In the motion appellant stresses a phase of the case which was not made clear on the original presentation.

There was no error in refusing to instruct the jury touching appellant's right to seek Choate for an explanation. Such an instruction is required only in cases in which the court, in its charge, qualifies the right of the accused to act in self-defense.

Williford v. State, 38 Tex. Crim. Rep. 393, 42 S. W. 972; Smith v. State, 81 Tex. Crim. Rep. 368, 195 S. W. 595. The charge was assailed for its failure to embrace therein an instruction defining appellant's right under the law pertaining to communicated threats.

Appellant testified that he was informed that Choate, the injured party, threatened to cut his "guts" out; that shortly thereafter he saw Choate and accosted him; he said, "I want to speak to you;" that they walked together, and appellant asked him if they had not agreed to be friends; that Choate did not reply, but pushed appellant back with his left hand and started to put his right hand in his pocket; that the appellant then grabbed his right hand and the fight ensued; that when he spoke to Choate he had no intention to bring a fight; that he had previously had a conversation with Choate about making friends. According to appellant's statement, the reason he said, "Now, damn

you, I guess you won't pimp on anybody again," was that he had just been told by Robinson of a threat made by Choate, and that he hit him because of what he had been told, and because Choate had refused to answer his question and had made the demonstration mentioned; that at the time he struck the first blow he believed Choate was about to cut him; that during the fight he said, in substance, "If you threaten me again, I will use a pistol."

Dallas, a state's witness, said on cross-examination that the appellant had said that the reason for the trouble was that Choate had threatened him. Apparently, if appellant's testimony is true, antecedent to the conflict he had been informed of a threat against him made by the deceased, and, Choate, immediately before appellant assailed him, made a demonstration which was viewed by the appellant as indicative to an intention to execute the threat. There was thus presented an issue of fact. That it

was supported by the appellant's testimony alone did not destroy its status as an issue for the solution of the jury. The truth of his testimony was for the jury. 2 Vernon's Crim. Stat. (Tex.) p. 481; 12 Cyc. 487; Whart. Crim. Ev. p. 899.

Mr. Branch, in his Annotated Penal Code (Tex.) § 2083, says: "If there is evidence of communicated threats and of an overt act by deceased at the time of the homicide not amounting to an actual attack, the court should charge the jury affirmatively on the law of threats in connection with self-defense."

Numerous cases are cited, among them being Sims v. State, 9 Tex. App. 593.

The principle of self-defense is not limited to cases of homicide. It may be a defense to maiming. 1 Whart. Crim. Law, p. 484.

This is recognized in the instant

—admission of immaterial evidence.

—refusal of instruction on right to seek explanation.

Trial-question for jury—issue supported by testimony of accused alone.

Criminal law—charge on threats and self-defense.

Mayhem—right to self-defense.

case, and in a restricted manner it was presented to the jury. The court, however, was not warranted in refusing, in response to the appellant's exception to the charge, to embody therein the phase of the law of self-defense which arose upon evidence of communicated threats made by the injured party and followed by an overt act at the time of the assault. 1 Whart. Crim. Law, p. 984; *Green v. State*, 15 Ann. Cas. 82.

The rejection by the jury of appellant's theory of self-defense does not cure or render unimportant the error committed in ignoring the evidence of threats. Had the jury known that, under the law, an overt act, which alone would appear of little significance, might, viewed in the light of evidence of threats, become of vital weight as bearing on self-defense, their solution of that issue might have been favorable to appellant.

The issue raised from the testimony of the appellant delivered upon the trial in the presence of the jury cannot be eliminated by an *ex parte* affidavit of the witness Robinson attached to the state's pleading, controverting the

allegations of fact contained in the motion for a new trial. Affidavits attached to the motion for a new trial, while available to aid the court in solving the issues of fact presented in the motion, cannot be used as a substitute for testimony before the jury. In passing we will say that affidavits, some of which are found in the record in this case, filed after the trial and after the order overruling the motion for new trial, are but encumbrances and entitled to no place in the record and to no consideration by this court. The decision in the original hearing was rendered without reference to affidavits of this character put in the record by the state, and upon this hearing we must ignore these, as well as those which the appellant has attached to his motion for rehearing.

Appeal—evidence introduced after trial.

For the reason that the court refused appellant's request to instruct the jury upon the law of communicated threats in connection with the charge on self-defense, the rehearing is granted, the affirmance set aside, and the judgment of the trial court is now reversed, and the cause remanded.

ANNOTATION.

Mayhem as dependent on part of body injured and extent of injury.

- I. In general, 955.
- II. What constitutes a wound, 958.
- III. Permanency of injury, 959.
- IV. Injuries to particular parts of the body:
 - a. Limbs and parts thereof, 960.
 - b. Head, 962.
 - c. Eyes, 963.
 - d. Nose, 964.
 - e. Lips, 965.
 - f. Ears, 966.
 - g. Teeth, 969.
 - h. Private parts, 969.
 - i. Miscellaneous, 970.

This annotation is confined strictly to the question indicated by the title. Of course, whether a particular injury is, or is not, mayhem, often depends

upon other matters than its severity or the part of the body which is affected thereby, such as premeditation or the intent with which, or the instrumentality by which, it was inflicted. These matters, however, are not considered herein, but it is assumed as a starting point that all the other conditions necessary to constitute mayhem are present, and the inquiry is limited to the consideration of whether or not, granted these other conditions, the injury itself is such as to constitute mayhem.

I. In general.

Mayhem under the early common law was limited to injuries affecting

limbs or members of the body which were of use in fighting, either for assault or defense, the ground for treating it as a crime being, as pointed out by Blackstone, that it was an offense tending to deprive the King of the aid and assistance of his subjects (4 Bl. Com. 205), or, as stated by Lord Coke, "for the members of every subject are under the safeguard and protection of the law, to the end a man may serve his King and country when occasion shall be offered" (1 Inst. 127).

So, Pulton says: "Maiheming is when one member of the commonweale shall take from another member of the same, a naturall member of his bodie, or the use and benefit thereof, and thereby disable him to serve the commonweale by his weapons in the time of warre, or by his labour in the time of peace, and also diminisheth the strength of his bodie, and weaken him thereby to get his owne living, and by that means the commonweale is in a sort deprived of the use of one of her members." De Pace Regis 1609, fol. 15, § 58, quoted in 2 Bouvier's Law Dict. Rawle's Rev. 384.

While, according to Blackstone, "Mayhem is properly defined to be . . . the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary;" and he also states that certain specified injuries "are not held to be mayhems at common law, because they do not weaken, but only disfigure." 4 Bl. Com. 205.

So also Coke says: "Mayhem signifieth a corporal hurt, whereby a man looseth a member by reason whereof he is less able to fight." 2 Co. Litt. 288a.

While East defines mayhem at common law as "such a bodily hurt as renders a man less able, in fighting, to defend himself or annoy his adversary," and adds: "But if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem." 1 East, P. C. 393.

Glanville's definition, as quoted in *Foster v. People* (1872) 50 N. Y. 598, is along somewhat different lines. He

says: "Mayhem signifies the breaking of any bone or injuring the head by wounding or abrasion." Glanville, Blain's translation, bk. 14, chap. 1, 350.

As examples of particular injuries which constitute mayhem, Blackstone enumerates "the cutting off or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage;" and he adds that cutting off the ear or nose was not mayhem at common law. 4 Bl. Com. 205.

While in another place he says: "Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a foretooth and also some others. But the loss of one of the jaw teeth, the ear or the nose, is no mayhem at common law, as they can be of no use in fighting." 3 Bl. Com. 121.

Similarly, it is said in 1 Hawkins's Pleas of the Crown, 175: "The cutting off or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or castrating him, are said to be maims, but the cutting off his ear, or nose, etc., are not esteemed maims, because they do not weaken, but only disfigure him."

The statement in 1 East, P. C. 393, is similar, except that he adds "breaking his skull" to the list of crimes which come within the term, following in this respect Coke, who specifies "putting out his foretooth, breaking his skull, striking off his arm, hand, or finger, cutting off his leg or foot, or [a corporal hurt] whereby he looseth the use of any of his said members. 2 Co. Litt. 288 a.

At an early period, however, the common-law crime began to be extended by statute to cover other injuries. Thus Blackstone says: "First, by Statute 5 Hen. IV. chap. 5, to remedy a mischief that then prevailed of beating, wounding, or robbing a man, and then cutting out his tongue or putting out his eyes to prevent him from being an evidence against them, this offense is declared to be felony, if done of malice prepense. . . . Next in order of time is the Statute 37 Hen. VIII. chap. 6, which directs that if a man

shall maliciously and unlawfully cut off the ear of any of the King's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law as a civil satisfaction, but also £10 by way of fine to the King, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II. chap. 1, called the Coventry Act, being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in Parliament. By this statute it is enacted that if any person shall, of malice aforethought and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, with intent to maim or disfigure him, such person, his counselors, aiders, and abettors, shall be guilty of felony without benefit of clergy." 4 Bl. Com. 206.

The Coventry Act is said, in *Foster v. People* (1872) 50 N. Y. 598, to have been followed in the legislation by Congress and by many of the states, including New York.

It must be borne in mind that mayhem is now for the most part a statutory crime, and that, in determining whether a particular injury is included therein, regard must be had to the wording of the particular statute involved. It should be observed in this connection that many of the modern statutes discard the term "mayhem," in some instances replacing it with the term "maiming," and in others merely describing acts of the same general character as those usually included in statutes relating to mayhem, without giving them any distinctive name.

The modern tendency, both in England and in this country, seems to be to include within the offense all malicious disabling or disfiguring injuries to the person, without regard to the combative importance of the member or organ affected.

Thus, in *Kitchens v. State* (1888) 80 Ga. 810, 7 S. E. 209, it was said that the military or combative importance

of the organ injured or destroyed, to which the old common law had special regard, is of no significance whatever as a constituent of mayhem under the Georgia Code.

And in *Baker v. State* (1842) 4 Ark. 56, the court said: "This offense, at common law, is defined to be 'the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or to annoy his adversary.' . . . But our statute has somewhat changed the common law, and declares maiming to consist 'in unlawfully disabling a human being, by depriving him of the use of a limb or member, or rendering him lame, or defective in bodily vigor;' by which we understand that the act being unlawful in itself, evidencing a malicious intent, it is immaterial by what means, or with what instrument, the injury is effected, provided the crime is consummated by depriving the party of the use of a limb or member of his body, or that the consequences of the injury sustained render him either permanently lame, or by any means affect his bodily vigor, by decreasing his strength, activity, or the like."

While the present English statute (*Offenses against the Person Act 1861*, 24 & 25 Vict. chap. 100, § 18) makes everyone guilty of felony who, by any means whatsoever, unlawfully and maliciously wounds or causes grievous bodily harm to any person, or shoots or attempts to discharge loaded arms at any person, with intent in any of these cases to maim, disfigure, or disable, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person (9 *Laws of England* (Halsbury) 600), thus seeming to include the infliction of any sort of wound or injury, provided there was an intent to maim, disfigure, or disable.

In this respect the English statute follows closely an earlier law, under which it was decided in *Rex v. Hunt* (1825) 1 Moody, C. C. (Eng.) 93, that a conviction might be had under an indictment for assaulting and cutting another with intent to do him grievous

bodily harm, even though the wound, which in this case was a slight cut upon the right wrist, was not dangerous, since it was immaterial whether grievous bodily harm was actually done, so long as there was an intent to do it.

While it was held in *Reg. v. Ashman* (1858) 1 Fost. & F. (Eng.) 88, a prosecution for shooting with a gun loaded with powder and blood, with intent to do grievous bodily harm, in which it appeared that the person injured was struck on the temple, knocked back, and stunned, but that there was no wound, although grains of powder were embedded in the forehead, and that his eye was weak, and the effects of the blow felt for two months after, that it was not necessary that the injury should be either permanent or dangerous, it being sufficient if it was such as seriously to interfere with comfort or health.

In *Rex v. Akenhead* (1816) 1 Holt, N. P. (Eng.) 470, a doubt was expressed as to whether an injury consisting of a cut upon the shoulder about 7 inches long and 2 deep, a cut upon the lap of one ear, a slight wound on the neck, and a cut on the left arm, amounted to a grievous bodily harm as that term is used in Statute of 3 Geo. III. chap. 58, since the wound was not in a vital part; but in the reporter's note appended to that case it is stated that this statute, besides taking away the qualifications of lying in wait which were required by the Coventry Act, gives an extent to this act beyond the Coventry Act, and under the terms "grievous bodily harm," the wound need not be given either in a part which by law is a mayhem, nor in a visible part as under the term "disfigure" in the Coventry Act, nor even in a part regarded as vital, since grievous bodily harm comprehends stabbing or cutting in the thighs, legs, or any other part, subject only to the limitations that if death ensue from such act it must, under the circumstances, amount to the crime of murder, and therefore by implication that there might be a possibility of death ensuing, as by the cutting of an artery or the loss of blood, etc.

II. What constitutes a wound.

Whether or not a particular injury constitutes a wound, within the meaning of statutes relating to wounding with intent to maim, seems to depend upon whether or not there is a complete severance of the skin. *State v. Nieuhaus* (1909) 217 Mo. 332, 117 S. W. 73; *State v. Gibson* (1910) 67 W. Va. 548, 28 L.R.A. (N.S.) 965, 68 S. E. 295; *Rex v. Wood* (1830) 4 Car. & P. (Eng.) 381; *Rex v. Payne* (1831) 4 Car. & P. (Eng.) 558; *Moriarty v. Brooks* (1834) 6 Car. & P. (Eng.) 684; *Rex v. Beckett* (1836) 1 Moody & R. (Eng.) 526; *Reg. v. M'Loughlin* (1833) 8 Car. & P. (Eng.) 635.

To constitute a wound it is necessary that there should be a separation of the whole skin, and a separation of the cuticle or upper skin only is not sufficient under Statute 1 Vict. chap. 85, § 2. *Reg. v. M'Loughlin* (Eng.) *supra*.

So, in *State v. Gibson* (1910) 67 W. Va. 548, 28 L.R.A. (N.S.) 965, 68 S. E. 295, it was stated that there can be no wound within the maiming statute without a solution or fracture of the skin.

And in *Rex v. Beckett* (1836) 1 Moody & R. (Eng.) 526, in which it appeared that the prisoner had attacked the prosecutor with a butcher knife, and, in attempting to cut his throat, inflicted an injury which the prosecutor described as a slight scratch on his throat, but that the prosecutor, in warding off further attack, struck his hands against the knife and cut them, it was said that a scratch is not a wound within the statute, but there must be at least a division of the external surface of the body. It was also held in that case that, while the cuts on the hand were wounds, they could not be considered as inflicted by the prisoner with intent to murder or maim the prosecutor, since they were in fact inflicted by the prosecutor himself in the attempt to defend himself from the prisoner's attack.

While in *Rex v. Wood* (1830) 4 Car. & P. (Eng.) 381, it was held that breaking a person's collar bone and bruising him were not a wounding

within the Statute 9 Geo. IV. chapter 31, § 12, as the skin was not broken.

So, also, it was held in *Rex v. Payne* (1831) 4 Car. & P. (Eng.) 558, that "if a person strike another with a bludgeon and break the skin and draw blood, this is a sufficient wounding to be within the Statute 7 & 8 Geo. IV. chap. 31, §§ 11 & 13."

And in *State v. Nieuhaus* (1909) 217 Mo. 332, 117 S. W. 73, where the injuries were inflicted by striking with a whip and by burning with a hot stove-lid lifter, it was held that there was a wounding if the defendant struck the injured person with the whip or burned her with the lifter with such severity as to break, cut, or burn entirely through the skin upon her body and to her flesh.

To the same effect in *Moriarty v. Brooks* (1834) 6 Car. & P. (Eng.) 684, a civil action for assaulting, beating, and wounding the plaintiff, it was stated that the definition of a wound in criminal cases is an injury to the person, by which the skin is broken; if the skin is broken and there was a bleeding, there is a wound; and so it was held that proof that the plaintiff was cut under the eye, and that it bled, established the existence of a wound.

And see also, for similar statements of what constitutes a wound generally, *Com. v. Gallagher* (1842) 6 Met. (Mass.) 565, and *State v. Leonard* (1856) 22 Mo. 449.

The breaking of the skin may, however, be internal as well as external. *Reg. v. Smith* (1837) 8 Car. & P. (Eng.) 173; *Reg. v. Waltham* (1846) 3 Cox, C. C. (Eng.) 442.

Thus, in *Reg. v. Smith* (Eng.) *supra*, where it appeared that a blow was given with a hammer on the face which broke the lower jar in two places, the skin being broken internally but not externally, and there not being much blood, it was held that this was a wounding within the Statutes 7 Wm. IV. and 1 Vict. chap. 85.

And in *Reg. v. Waltham* (1849) 3 Cox, C. C. (Eng.) 442, it was held that a rupture of the lining membrane of the urethra, caused by a kick, and followed by a small flow of blood mingled with urine, constituted a wounding

within 7 Wm. IV. and 1 Vict. chap. 85, § 4, although the external skin was unbroken.

But in *Reg. v. Jones* (1848) 3 Cox, C. C. (Eng.) 441, it was held that evidence that the prisoner had come behind the prosecutrix and given her a violent kick in her private parts, and that this had been followed by an occasional discharge of blood mingled with urine, would not sustain an indictment for wounding with intent to do grievous bodily harm, where there was no proof as to the precise part from which the blood originally came; since under these facts there might have been no lesion of any of the vessels at all, the blood being discharged from natural causes.

While in *State v. Gibson* (1910) 67 W. Va. 548, 28 L.R.A.(N.S.) 965, 68 S. E. 295, evidence that one who had been struck over the kidney with an iron bar, necessitating the artificial extraction of his urine, and that the urine had been found to be bloody, was held insufficient to support a conviction under an indictment charging that the person had cut and wounded him, as it was too remote and uncertain to establish that there was a parting of any internal membrane.

III. Permanency of injury.

To come within the common-law idea of mayhem, an injury must have been permanent in its effects. 3 Bl. Com. 121; *State v. Briley* (1839) 8 Port. (Ala.) 472; *O'Brien v. State* (1908) 31 Ohio C. C. 33; *Rex v. Boyce* (1824) 1 Moody, C. C. (Eng.) 29; 43 Geo. III. chap. 58, § 1.

Thus, Blackstone speaks of mayhem as "a battery attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defense against future external injuries as he otherwise might have done." 3 Bl. Com. 121.

While in *State v. Briley* (1839) 8 Port. (Ala.) 472, it was stated that wherever the statute relating to maiming speaks of disabling a limb or member, a permanent injury is contemplated, as such was the common-law notion of the extent of the injury necessary

to constitute a mayhem, and that a temporary disabling of a finger, an arm, or an eye would not be sufficient to constitute a statutory offense.

And in *Rex v. Boyce* (1824) 1 Moody, C. C. (Eng.) 29, it was held that there could be no conviction under an indictment for feloniously cutting and maiming with intent to murder, maim, and disable, upon evidence which showed that the accused had intended only to produce a temporary disability, and not a permanent one.

Similarly, it was stated in *O'Brien v. State* (1908) 31 Ohio C. C. 33, that in order to convict of an assault with the malicious intent to maim or disfigure, the act must be shown to have been done with intent permanently to injure one of the members of the body mentioned in the statute.

But in *Slattery v. State* (1874) 41 Tex. 619, where the accused was charged with biting out a piece of the injured person's lower lip, it was stated that if the original injury was such as to come within the statute, the offense was complete, even though it appeared that the piece bitten out had been put back and made to grow, or that the injured person had in any other manner been subsequently relieved of the inconvenience of his loss.

And see *Rex v. Hunt* (1825) 1 Moody, C. C. (Eng.) 93, and *Reg. v. Ashman* (1858) 1 Fost. & F. (Eng.) 88, *supra*, I.

On the point of the effect of a subsequent healing of the wound, compare with *Slattery v. State* (Tex.) *supra*, the case of *State v. Cody* (1890) 18 Or. 506, 23 Pac. 891, 24 Pac. 895, *infra*, under IV. e.

In *Baker v. State* (1842) 4 Ark. 56, it was held that the testimony of the injured person that he was shot in the thigh, and from the consequences of it was so far disabled as to be unable to walk at the time, was sufficient evidence to support the averment in the indictment that he was thereby disabled in the sense and meaning of the statute, since, in the absence of evidence showing that the injury was temporary, the continuance of the disabling would be presumed where its existence had once been proved.

IV. *Injuries to particular parts of the body.*

a. *Limbs and parts thereof.*

Cutting off or permanently disabling an arm, hand, finger, leg, or foot unquestionably constituted mayhem at common law. 1 Co. Litt. 288a, 3 Bl. Com. 121; 4 Bl. Com. 205; 1 Hawk. P. C. 107; 1 East, P. C. 893.

And see also *Wright's Case* (1603) 1 Co. Litt. (Eng.) 127, 1 Hale, P. C. 412, in which a man who, in order to fit himself to be a successful beggar, caused his companion to strike off his left hand, was, together with the companion, indicted and punished for mayhem.

In view of the fact that modern statutes, in so far as they have changed the rules of the common law in respect to the injuries included in the offense of mayhem, have tended to broaden rather than limit them, there would seem to be no doubt that any injury to the limbs which would have constituted mayhem under the common law would do so under the statutes. There is little direct authority on this point, however, in the cases, as most of those involving injuries of this character assume, without discussion, that if the other necessary elements of the crime of mayhem are present, the injury itself comes within that offense.

As examples of such cases involving injuries to the arm, attention is called to *United States v. Scroggins* (1847) Hempst. 478, Fed. Cas. No. 16,243, a prosecution for shooting another in the right arm with intent to disable and maim, in which the principal question argued was whether the act of Congress punishing maiming, which was a literal transcript of the Coventry Act, embraced disabling the limb or member of a person by means of shooting, or applied only to cases where the maiming or disfigurement was done with some sharp instrument or edged tool, the conclusion of the court being: "If any person should purposely and maliciously disable the tongue of another by biting, or put out an eye by shooting, striking, gouging, or such like means, or

should disable any limb or member of another by cutting, shooting, or any other means, with the intent to maim or disfigure, such person would undoubtedly be liable to conviction under statute. . . . The particular mode of doing it, as by stabbing, cutting, shooting, or striking, or the particular weapon or instrument used, is not material. The real inquiry is, whether a limb or member has been disabled or disfigured purposely and maliciously, and with intent to maim or disfigure; and, if so, the offense is complete."

And *State v. Briley* (1839) 8 Port. (Ala.) 472, where the injury was the breaking of an arm by a blow with a stick, the principal question discussed being the sufficiency of the indictment.

See also *Lee v. State* (1912) 66 Tex. Crim. Rep. 567, 40 L.R.A.(N.S.) 1132, 148 S. W. 567, holding that a conviction of disfigurement was sustained by evidence that the accused threw acid on the face and arm of his victim, which brought about a disfigurement and kept the victim under the treatment of a doctor for some time, although the extent of the injury was not shown.

Similar cases involving injuries to the hand and fingers are: *Tully v. People* (1876) 67 N. Y. 15, where it appeared that the accused bit the thumb of the injured person so severely as to separate the joint and cause permanent stiffness; *State v. Evans* (1796) 2 N. C. (Hayw.) 281, a case of biting off the forefinger of the right hand; and *Neblett v. State* (1905) 47 Tex. Crim. Rep. 573, 85 S. W. 813, where the injured person's hand was blown off by means of a cannon fire-cracker.

In *Eskridge v. State* (1854) 25 Ala. 30, *Baker v. State* (1842) 4 Ark. 56, and *State v. Bidstrup* (1911) 237 Mo. 273, 140 S. W. 904, direct injuries to the leg are, at least, impliedly held or assumed to be sufficient to constitute mayhem.

While in *Ridenour v. State* (1882) 38 Ohio St. 272, it was held that evidence showing that the accused shot another person in the trunk of the body, and that a nerve was destroyed

by the bullet in its course, with the result that the injured person's right leg was permanently disabled by paralysis, was sufficient to support a conviction of shooting with intent to maim, the court saying: "Unquestionably, upon this state of the evidence, the accused might have been properly convicted under § 6819 of the Revised Statutes, of disabling the limb, or, in other words, of the offense of actually "maiming" the injured man; nor could he be heard for a moment to say that he did not intend to do the very thing he did."

In *Davis v. State* (1886) 22 Tex. App. 45, 2 S. W. 630, a conviction for maiming by shooting off the toe of another was sustained.

That a merely temporary injury to a limb is not sufficient to constitute mayhem, see the statement from *State v. Briley* (Ala.) which is set out supra, under III.

While in *Bowers v. State* (1888) 24 Tex. App. 542, 5 Am. St. Rep. 901, 7 S. W. 247, a prosecution for maiming by biting off a portion of the thumb, the court said: "Biting off a portion of a member of the body is not necessarily maiming. It should be left to the jury to determine in all such cases whether the member was so injured as to substantially deprive the injured party of it."

The Penal Code of the Philippine Islands defines and penalizes the crime of lesiones graves (serious physical injuries) as follows: "Art. 416. Any person who shall wound, beat, or assault another shall be guilty of the crime of inflicting serious physical injuries, and shall suffer: . . . (2) The penalty of prison correccional in its medium and maximum degrees, if in consequence of the physical injuries the person injured shall have lost an eye or any principal member, or shall have lost the use of such member, or shall have become incapacitated for the work in which he shall have been habitually engaged before receiving the injury. (3) The penalty of prison correccional in its minimum and medium degrees, if in consequence of the physical injuries the person injured shall have become deformed, or shall

have lost some member other than a principal member, or shall have lost the use of such member, or shall have been ill or incapacitated for the performance of the work in which he was habitually engaged, for a period of more than ninety days."

Injuries to the hand and fingers have been held to come within this act in a number of cases, those to the hand usually being considered as falling within ¶ 2, and those to the fingers only, within ¶ 3.

Thus, in *United States v. Ramos* (1903) 2 Philippine, 434, one who cut off the hand of another was held to be guilty of *lesiones graves* as defined in Penal Code, art. 462, ¶ 2.

And in *United States v. Baluyut* (1905) 5 Philippine, 129, it was held that the index finger of the right hand was not a principal member of the body so as to bring the offense of cutting it off within the provisions of article 416, ¶ 2, of the Penal Code, but that it was rather a nonprincipal member as that term is used in ¶ 3 of the same article.

While in *United States v. Punsalan* (1912) 23 Philippine, 375, it was held that a conviction under ¶ 2 could not be sustained where the information charged the defendant with inflicting injuries which rendered useless three fingers of the injured person, without charging that the use of the hand was lost, since the fingers were not principal members, although the hand would be. It was intimated that proof of loss of the use of three fingers might have been sufficient to have sustained a charge that the use of the hand was lost, if such a charge had been made.

So, also, in *United States v. Bugarin* (1910) 15 Philippine, 189, an injury to a field laborer by cutting off part of the index and middle fingers of his right hand was held to come within ¶ 3.

In *United States v. Malig* (1909) 13 Philippine, 736, wounds which caused the loss of the index finger of the right hand and other injuries to the hand, requiring more than sixty days to heal, were held to come within ¶ 2.

While in *United States v. Zabala* (1912) 23 Philippine, 117, one who bit

the fingers of another with the result of rendering them more or less useless and disabling the injured person for eight months, and in *United States v. Marasigan* (1914) 27 Philippine, 504, one who severed the extensor muscle of one finger of the left hand of another, thus rendering it useless, was held guilty of *lesiones graves*, without stating under which paragraph of the statute.

b. Head.

Under this subdivision are considered only injuries to the head itself as distinguished from its members or features, such as the eyes, nose, ears, etc.

As already seen *supra*, there is some disagreement among the early writers as to whether injuries to the head or skull can be considered as mayhem. In *Foster v. People* (1872) 50 N. Y. 598, the early authorities are reviewed at length, and the court says: "An injury to the head or skull is not specified by Hawkins or Blackstone as mayhem; and as the usual consequence of such an injury is either death or temporary disability, it does not seem to be embraced within the definition of that crime as given by these commentators;" and then, after calling attention to the fact that the definitions of mayhem given by Coke and Glanville do include such injuries, continues: "But no authority has been cited, subsequent to the time of Lord Coke, nor has any come to our notice, for the proposition that a fracture of the skull is mayhem, except that Mr. East, in his *Pleas of the Crown* (p. 393), after giving the general definition of mayhem at common law, and instances in illustration of it, concludes, 'Or, as Lord Coke adds, breaking the skull;' and then, after speaking of the enactment of the Coventry Act, and setting forth its terms, says: "Whatever may have been the law of mayhem in England antecedent to this statute, no case can be found, we think, arising since its enactment, in which an injury to the head, or any act or injury, has been regarded as mayhem, other than the acts and injuries enumerated in this statute,"

and finally reaches the conclusion that the New York statute then in force, providing "that every person who, from a premeditated design," etc., "shall, first, cut out or disable the tongue; or, second, put out an eye; or, third, slit the lip or destroy the nose; or, fourth, cut off or disable any limb or member of another on purpose, upon conviction thereof, shall be imprisoned in a state prison,"—was intended as a statutory definition of the crime of mayhem, and included all cases which could come within that designation, and hence that a blow intentionally aimed at the head with intent to fracture the skull or injure the head would not constitute an assault and battery with intent to maim.

So, also, in *Reg. v. Sullivan* (1841) 1 Car. & M. (Eng.) 209, in which it appeared that the defendant struck another person on the head with an ax, inflicting a very slight wound, it was held that, although he might be found guilty of wounding with intent either to murder or to do grievous bodily harm, he could not be found guilty of wounding with intent to maim and disable, the court saying: "There is no proof of an intent to maim and disable, as the blow is aimed at the head of the prosecutor; it would have been otherwise, if it had been aimed at his arm to prevent him being able to use it."

And in *Com. v. Somerville* (1808) 1 Va. Cas. 164, 5 Am. Dec. 514, it was held that an indictment for striking another on the head with a hickory club, thereby maiming and disabling him by fracturing his skull, was not a good count for mayhem, but that it was good as a count for an assault of an aggravated nature.

In *O'Brien v. State* (1908) 31 Ohio C. C. 33, it was stated that in order to convict of an assault with the malicious intent to maim or disfigure, the act must be done with intent permanently to injure one of the members of the body specifically set forth in the statute, and that to maim the assault must be made with the malicious intent to injure a member which may be used in the defense of the person or to annoy an adversary; but it was

held that, where an assault was committed by striking another over the head with a piece of gas pipe under circumstances which showed an intent to disable the person attacked, it might be charged as an assault with the malicious intent to maim or disfigure, although the head only was injured and consequently there was no actual maiming, the court saying: "So a blow upon the head made under the circumstances shown in this case may be presumed to have been made with intent to cause the loss of the use of some important member of the body. Indeed, it is well settled by medical authority that a violent blow upon the head not fracturing the skull frequently does cause the paralysis of an arm or leg."

And in *State v. Vaughn* (1901) 164 Mo. 536, 65 S. W. 236, 13 Am. Crim. Rep. 209, a conviction on a charge of felonious assault, whereby the injured person was "maimed, wounded, and disfigured, and received great bodily harm," was sustained on evidence showing that the injuries consisted of cuts on both ears and of several gashes 3 or 4 inches long on the head.

c. Eyes.

Removing the eye, or completely destroying its usefulness, was mayhem at common law (3 Bl. Com. 121; 4 Bl. Com. 205; 1 Hawk. P. C. 107; 1 East, P. C. 393), and injuries of this character are specifically mentioned in the Coventry Act and also in many of the statutes in force in this country. For cases in which, without any particular discussion of the point, it is impliedly held or assumed that injuries to the eyes are within the statutes relating to mayhem, see:

Alabama.—*State v. Simmons* (1842) 3 Ala. 497.

Dakota.—*United States v. Gunther* (1888) 5 Dak. 234, 38 N. W. 79.

Indiana.—*State v. Fisher* (1885) 103 Ind. 530, 3 N. E. 379.

Minnesota.—*State v. Hair* (1887) 37 Minn. 351, 34 N. W. 893, 7 Am. Crim. Rep. 369.

Mississippi.—*Clarke v. State* (1852) 23 Miss. 261.

Missouri.—*State v. Ma Foo* (1892),

110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222; *State v. Kyle* (1903) 177 Mo. 659, 76 S. W. 1014; *State v. Nerizinger* (1909) 220 Mo. 36, 119 S. W. 379.

North Carolina.—*State v. Irwin* (1794) 2 N. C. (1 Hayw.) 112.

Pennsylvania.—*Pennsylvania v. M'-Birnie* (1792) Addison, 28; *Respublica v. Langcake* (1795) 1 Yeates, 415; *Respublica v. Reiker* (1801) 3 Yeates, 282; *Com. v. Reed* (1850) 4 Clark, 459; *Com. v. Porter* (1859) 1 Pittsb. 502.

Tennessee.—*Terrell v. State* (1888) 86 Tenn. 523, 8 S. W. 212, 8 Am. Crim. Rep. 532.

Wisconsin.—*State v. Bloedow* (1878) 45 Wis. 279, 2 Am. Crim. Rep. 631.

It should be observed that in many of the foregoing cases it was held that mayhem had not been committed even though an eye had been put out, but this conclusion was reached because of the absence of some other element essential to that crime, and not because the injury itself was not of a character to constitute the offense.

Doubt as to whether an injury to the eye is mayhem, where the other elements of the crime are present, may arise, however, when the eye or its usefulness is not totally destroyed.

Thus, in *Cook v. Beal* (1698) 1 *Ld. Raym.* 176, 91 *Eng. Reprint*, 1014, a civil action for assault and battery in which the plaintiff declared that, on account of the injury to his left eye, he was unable to read or write, it was stated incidentally that this was not a maim, because the eye was not wholly out.

And in *People v. Nunes* (1920) — *Cal. App.* —, 190 *Pac.* 486, it was stated that under a statute providing that "every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem," the mere disfigurement of an eye would not amount to mayhem unless such disfigurement resulted in rendering the eye useless; but that where, as the result of a blow, an eye was rendered practically blind, the injury constituted mayhem, even though the injured person was still

able to distinguish light from darkness or to perceive the motions or movements made immediately before the eye, and although there was a bare possibility that a future operation on the eye might be beneficial.

While in *State v. Holmes* (1903) 4 *Penn. (Del.)* 196, 55 *Atl.* 343, where the injury in question was inflicted by throwing acid, a count of the indictment which alleged that the left eye of the victim was thereby permanently injured was attacked on the ground that such an injury would not constitute maiming within the common-law definition, requiring an injury impairing the power of attack or defense; since the injury of an eye would not impair one's powers of protection, although the putting out of an eye might do it; but the court sustained the count without any discussion of the point.

d. Nose.

Although injuries to the nose were not originally considered to be mayhem (3 *Bl. Com.* 121, 4 *Bl. Com.* 205; 1 *Hawk. P. C.* 107, 1 *East, P. C.* 393), the *Coventry Act* specifically included slitting or cutting off the nose, and such injuries are unquestionably covered by practically all modern statutes, in many of which they are expressly enumerated, provided they are inflicted by such means and under such circumstances as would otherwise constitute mayhem.

Thus, in *State v. Catsampas* (1911) 62 *Wash.* 70, 112 *Pac.* 1116, it was expressly held that wilfully biting off the end of the nose of another, with intent to disfigure him, is within the provisions of a statute declaring that "every person who, with intent to commit a felony or to injure, disfigure, or disable another, shall wilfully inflict upon him an injury which (1) seriously disfigures his person by any mutilation thereof; or (2) destroys or displaces any member or organ of his body; or (3) seriously diminishes his physical vigor by the injury of any member or organ; shall be guilty of maiming."

And in *Henry v. State* (1916) 125 *Ark.* 237, 188 S. W. 539, a prosecution

under a statute providing that "if any person shall wilfully and of his malice aforethought . . . cut or bite off the nose or lip of any person, he shall be adjudged guilty of maiming," it was held that evidence that the defendant went to the field where the injured party was at work, cursed and abused him, assaulted him with some sort of a weapon that cut a serious gash in his head, and then, in the continuance of the fight, bit off his nose, at the time intending to bite and knowing he was doing so, was sufficient to support a conviction.

So, in other cases such as *People v. Yuskauskas* (1915) 268 Ill. 328, 109 N. E. 319; *State v. Jones* (1886) 70 Iowa, 505, 30 N. W. 750; *State v. Akin* (1895) 94 Iowa, 50, 62 N. W. 667; *State v. Kyle* (1903) 177 Mo. 659, 76 S. W. 1014; *State v. Bunyard* (1913) 253 Mo. 347, 161 S. W. 756; *State v. Mairs* (1795) 1 N. J. L. 453, it is held, or taken for granted without discussion, that such an injury is in itself sufficient to constitute mayhem or maiming, the whole consideration being given to other questions.

In *Rex v. Carroll* (1765) 1 Leach, C. L. (Eng.) 55, it was held that the term "slit the nose" as used in the Coventry Act was not confined to a slitting of the nostrils or to cutting it in any particular direction, but that any division of the flesh or gristle of the nose, whether perpendicular or transverse, came within the denomination of a slit and was equally a disfiguring of the person.

So, also, in the case of *Rex v. Coke* (1722) 1 East, P. C. (Eng.) 396, 16 How. St. Tr. 54, a prosecution under the Coventry Act, based in part upon a cut across the nose which separated the flesh and cut it through into the nostril, the objection was raised that the nose could not be said to be slit, because the edge of it was not cut through, but this objection was overruled.

e. Lips.

Cutting off the lip was included in the injuries covered by the Coventry Act, and is also specified in many of the modern statutes.

So, it is said in the abstract report of *Swan v. Com.* (1883) 5 Ky. L. Rep. 238: "The offense of biting off the lip of another is expressly within the provision of § 1 of article 6, chapter 29, General Statutes, which imposes a punishment for maiming."

And the statute involved in *State v. Cody* (1890) 18 Or. 506, 23 Pac. 891, 24 Pac. 895, particularly specified cutting, slitting, or mutilating the lip. The decision that one who, in the course of a fight, injured his adversary by biting his lower lip, lacerating the tissue of the inner lining, and taking out a piece thereof, leaving a wound about $\frac{1}{2}$ of an inch long and $\frac{1}{4}$ an inch wide and $\frac{1}{4}$ of an inch deep, was not guilty of mayhem, is based upon the absence of evidence of deliberation and design; but the court seems to have had some doubt as to whether the injury was of a sufficiently serious character to constitute mayhem in any event, as the opinion calls attention to the fact that the wound had since healed over, and that to adjudge it mayhem in view of all the surroundings would be making a felony out of a comparatively trifling matter.

In *State v. Akin* (1895) 94 Iowa, 50, 62 N. W. 667, under a statute providing: "If any person, with intent to maim or disfigure, . . . cut, bite, slit, or mutilate the nose or lip," etc., it was stated that one who broke and mutilated the nose, mouth, and lips of another was guilty of maiming if he acted with the intent to maim.

In *People v. Demasters* (1895) 105 Cal. 669, 39 Pac. 35, however, it was held that where the statutory definition of mayhem used the word "slit," it was error for the court to instruct the jury that an unlawful and malicious attempt to bite the lip of another constituted an assault with intent to commit mayhem, since the lip may be bitten in such a manner as not to amount to mayhem, and therefore the intent to bite is not necessarily the equivalent of an intent to slit.

And in *Slattery v. State* (1874) 41 Tex. 619, where the injury involved was the biting out from the injured person's under lip of a piece of flesh

about an inch long and three quarters of an inch thick, and it appeared that the place had healed up, but was still a great inconvenience in drinking and in talking, and the statute provided that "to maim is to cut off or otherwise deprive a person of the hand, arm, finger, foot, leg, nose, or ear, to put out an eye, or in any way to deprive the person of any other member of his body,"—it was held that inasmuch as the under lip was not named in the Code as one of the members of the body, it should have been left to the jury to say whether it is or not, and that it was also a question for the jury, supposing that they had determined that the under lip was a member of the body, whether or not the under lip of the injured person was bitten off by the defendant to such an extent as to substantially deprive him of it at the time of the biting.

f. Ears.

The statements from Blackstone, Hawkins, and East which are quoted or referred to *supra*, under I., to the effect that cutting off or injuring the ear was not mayhem at common law, are confirmed by similar statements in *Burke v. People* (1875) 4 Hun (N. Y.) 481; *State v. Johnson* (1898) 58 Ohio St. 417, 65 Am. St. Rep. 769, 51 N. E. 40, 11 Am. Crim. Rep. 603, and *State v. Vowels* (1873) 4 Or. 324.

Even under some of the modern statutes the term "mayhem or maiming" is held not to include injuries to the ear.

Thus, in *State v. Johnson* (1898) 58 Ohio St. 417, 65 Am. St. Rep. 769, 51 N. E. 40, 11 Am. Crim. Rep. 603, it was held that since the word "maim" and "mayhem" are at common law equivalent, and the biting of an ear does not in law constitute a mayhem, the malicious biting of the ear of another could not be charged as done with intent to maim, even under a statute which declares that "whoever, with malicious intent to maim or disfigure, cuts, bites, or slits the nose, ear or lip, cutting or disables the tongue, puts out or destroys an eye, cuts off or disables a limb or any member of another person," is guilty of an offense

punishable by imprisonment in the penitentiary, as the court took the view that there was a distinction between an intent to disfigure and an intent to maim, and that the latter intent could apply only to injuries to members which were of use to the person in defending himself.

And in *United States v. Askins* (1830) 4 Cranch, C. C. 98, Fed. Cas. No. 14,471, it was held that biting off the ear of another with intent to disfigure him did not come within a statute making it a felony unlawfully to "cut out or disable the tongue, put out an eye, slit a nose, bite or cut off a nose, or lip, or cut off or disable any limb or member of any person whatsoever, within the commonwealth, with intent, in so doing, to maim or disfigure," Cranch, Ch. J., being of the opinion that biting could not be called cutting, that an ear cannot be "disabled" within the meaning of the statute, and that the ear is not such a member as was intended by the statute.

While in *Com. v. Newell* (1810) 7 Mass. 245, it was held that a statute providing that if any person, with set purpose and aforethought malice and with an intent to maim and disfigure, shall unlawfully cut off an ear of another, he shall be punished by solitary imprisonment and by confinement to hard labor, is not equivalent to a declaration that such an act should constitute a mayhem.

Most modern statutes, however, either expressly include injuries to the ear, or contain general provisions which the courts have construed as including them.

Thus, in *People v. Golden* (1881) 62 Cal. 542, it was held that biting off the ear of a person is mayhem within a statute defining that crime as the disabling or disfiguring of a member of the body of a human being.

And in *State v. Vowels* (1873) 4 Or. 324, it was held that although the crime of tearing off the ear of another is not embraced within the crime of mayhem as known to the common law, nevertheless, such a crime may be properly denominated mayhem in an indictment based upon a section of the

Criminal Code which provides that "if any person shall purposely and maliciously, or in the commission or attempt to commit a felony, cut or tear out or disable the tongue, or put out or destroy the eye, or cut or slit or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable the limb or member of another, such person, upon conviction thereof, shall be punished by imprisonment," etc., where, in the syllabus which was adopted by the legislature as part of the law of the state, the section quoted is referred to as describing the crime of mayhem.

In *Hayden v. State* (1838) 4 Blackf. (Ind.) 546, the court approved an instruction that the defendant was guilty of a mayhem as charged if he wilfully bit off a piece of the ear of the person injured, unless he did it in necessary self-defense or to protect himself from grievous bodily injury.

And in *State v. Clark* (1886) 69 Iowa, 196, 28 N. W. 537, it was held that one who, while engaged in a fight, intentionally bites off the ear of his adversary, is properly found guilty of assault with intent to disfigure.

In *United States v. Manual* (1905) 4 Philippine, 342, it was held that one who cut off both ears of another was guilty of *lesiones graves* as defined by § 416 of the Penal Code, which is set out *supra* under IV. a, and that where the cutting off of the ears caused deafness the punishment should be under ¶ 2 of that section.

For examples of cases in which injuries to the ear have been impliedly held or assumed to be mayhem without any particular discussion of the question, see:

Alabama.—*State v. Absence* (1837) 4 Port. 397; *Molette v. State* (1873) 49 Ala. 18.

California.—*People v. Wright* (1892) 93 Cal. 564, 29 Pac. 240.

Colorado.—*Foster v. People* (1871) 1 Colo. 293.

Illinois.—*People v. Conners* (1910) 246 Ill. 9, 92 N. E. 567.

Indiana.—*Hayden v. State* (1838) 4 Blackf. 546.

Iowa.—*State v. Clark* (1886) 69 Iowa, 196, 28 N. W. 537.

North Carolina.—*State v. Crawford* (1830) 13 N. C. (2 Dev. L.) 425; *State v. Skidmore* (1892) 87 N. C. 509.

Tennessee.—*State v. Ailey* (1870) 3 Heisk. 8.

Washington.—*State v. Conahan* (1894) 10 Wash. 268, 38 Pac. 996.

It seems to be generally agreed that the injury need not amount to the removal or destruction of the entire ear, but that it must, at least, be such as to produce a disfigurement visible to ordinary observation. *State v. Abram* (1847) 10 Ala. 928; *Green v. State* (1907) 151 Ala. 14, 125 Am. St. Rep. 17, 44 So. 194, 15 Ann. Cas. 81; *Territory v. Gallagher* (1894) 9 Haw. 587; *State v. Harrison* (1878) 30 La. Ann. 1329; *State v. Enkhous* (1916) 40 Nev. 1, 160 Pac. 23; *State v. Girgin* (1840) 23 N. C. (1 Ired. L.) 121; *High v. State* (1888) 26 Tex. App. 545, 8 Am. St. Rep. 488, 10 S. W. 238; *Pool v. State* (1910) 59 Tex. Crim. Rep. 482, 129 S. W. 1135; *Key v. State* (1913) 71 Tex. Crim. Rep. 642, L.R.A.1916E, 492, 161 S. W. 121.

Thus, in *State v. Abram* (Ala.) *supra*, the court said: "Although the statute speaks of biting or cutting off the lip, ear, or nose, it is not to be understood that the offense may not be committed, without the entire mutilation of one of these members. The object of the statute was to provide against such a wilful mutilation of these members as would be obvious to a casual observer, and disfigure the person, and it follows, necessarily, that the cutting or biting off a small portion of the ear, which did not disfigure the person, and could only be discovered by close inspection or examination, when attention was directed to it, would not constitute mayhem under the statute."

And in *Key v. State* (Tex.) *supra*, which sustained the conviction of maiming of one who bit off a portion of the outer rim of the ear of another which was less than one third in amount or size of the ear, it is stated in the dissenting opinion, with which the writer of the prevailing opinion states that he agrees except as to another point, to be a correct rule that where the inhibition is directed against

an injury which disfigures, it is not necessary that the whole member should be mutilated or detached if the injury only impairs comeliness, and that the authorities also laid down the proposition that the cutting or biting off a small portion of the member, which does not disfigure the person and can only be discovered by close inspection or examination when attention is directed to it, will not constitute maiming under the statute.

So, also, in *Green v. State* (1907) 151 Ala. 14, 125 Am. St. Rep. 17, 44 So. 194, 15 Ann. Cas. 81, a prosecution for mayhem in which the injury consisted of biting off a portion of an ear, the court said: "In this instance the disfigurement necessary to justify conviction must have been such as would afford to the casual observer of the person injured, and not such as requires a close or unusual inspection to detect. In other words, the injury to the ear must be such as disfigures to ordinary observation, as distinguished from a wounding which merely mars the member. . . . Whether the injury is of the necessary character must ordinarily be determined by the jury."

And in *Territory v. Gallagher* (1894) 9 Haw. 587, the court said: "To constitute a biting off an ear the whole ear need not be taken away, provided enough be removed to impair the personal appearance and render the individual less comely;" and held that the question of whether the injured person's personal appearance was in fact impaired was properly left to the jury.

In *State v. Harrison* (1878) 30 La. Ann. 1329, it was held that to constitute a disfiguring under a statute which reads: "If any person, with malice aforethought, shall cut or bite off an ear . . . of any person with intention in so doing to maim," etc., it was essential that the ear or some portion thereof should be actually severed from the head, and that the nature of the wound be such as to attract attention and to render the person less comely; and in accordance therewith the conviction was set aside where it appeared that no portion of

the ear was severed from the head of the person assaulted, but that the lobe was slit by the bite, and the slit sewed up by a surgeon, although, in consequence of subsequent neglect of the wound, ulceration ensued, and there was a loss of tissue of the ear.

And in *Pool v. State* (1910) 59 Tex. Crim. Rep. 482, 129 S. W. 1135, a prosecution for maiming by biting off the injured person's right ear, the court approved the action of the trial court in directing the jury that if the defendant, with intent to injure, unlawfully bit off a part of the ear of the injured person, and thereby inflicted on his person a serious injury, but the evidence failed to establish that enough was bitten off to essentially deprive him of his ear, they should find the defendant guilty of aggravated assault and battery.

In *State v. Girgin* (1840) 23 N. C. (Ired. L.) 121, it was held that biting off a piece of the ear of another, such piece being the segment of a circle about an inch along the rim of the ear and about a quarter of an inch deep in the gristle, and constituting about one fifth part of the ear, was within the statute, the court saying: "The object of the legislature was to protect individuals from such injuries as disfigure, that is to say, alter and impair the natural personal appearance. Where, therefore, the injury reaches that extent, the case must be within the meaning of the act."

And in *State v. Enkhous* (1916) 40 Nev. 1, 160 Pac. 23, it was held that under a statute defining mayhem as unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless, and providing that any person who should cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, or disable any limb or member of another, or shall voluntarily or of purpose put out an eye, shall be guilty of mayhem, but that no conviction for maiming shall be had unless the injury inflicted would result in permanent disfiguration of appearance, diminution of vigor, or other permanent injury, the biting off of a portion of an ear, consisting of about a fourth

of the cartilage including the entire top of the external ear and the posterior part of the ear down to about the middle of the outer edge, constituted a permanent injury or disfigurement such as would bring the person causing it within the condemnation of the statute, even conceding that the injury to the ear must be such as disfigures to ordinary observation, as distinguished from a wounding which merely mars the member.

The loss of a portion of an ear constitutes a deformity within the meaning of article 416, § 3, of the Code. *United States v. Judit* (1903) 2 *Philippine*, 5.

And one who bit off part of the ear of another was held guilty under the same provision in *United States v. Solis* (1905) 4 *Philippine*, 178.

Whether a wound to the outer edge of an ear caused by the defendant's biting and tearing it off came within a statute which enumerated cutting out or disabling the tongue, putting out an eye, slitting the lip, or destroying the nose, or cutting off or disabling any limb or member, where there was no evidence that the ear was disabled in the sense that its usefulness for the purpose for which it was designed was impaired, although its perfection as an organ of the human frame was destroyed, was given some consideration in *Burke v. People* (1875) 4 *Hun* (N. Y.) 481. The court seemed in some doubt as to whether such an injury would constitute mayhem, but said: "The violent intentional disfigurement of the ear is an offense which should be punished, and doubtless with severity; and it may be that such an act would be a felony within the provision of the statute mentioned, although the legislature has not so expressly declared. It reads, 'To cut off or disable.'" The actual decision of the case, however, went on other grounds.

g. Teeth.

The holding of the reported case (*KEITH v. STATE*, ante, 949) that a front tooth is a member of the body within the meaning of a statute making it maiming to cut off, or deprive

a person of, a member of his body, is supported by *High v. State* (1888) 26 *Tex. App.* 545, 8 *Am. St. Rep.* 488, 10 *S. W.* 238, a prosecution for homicide, in which the defense was set up that it was committed in preventing maiming, the evidence showing that the defendant's "corner" tooth had been knocked out by the man whom he killed. It was stated that to deprive one of a front tooth is to maim him as understood at common law, and that although "front tooth" is not used in terms in the Texas statute, which provides that "to maim is to wilfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear; to put out an eye, or in any way to deprive the person of any other member of his body," it is clear that it comes within the import of the word "member" as used in that statute and in common acceptation, and that the court might well assume that it is a member of the body without submitting the question as a matter of fact to the jury, although in the instant case it would be a question of fact to be found by the jury whether a "corner tooth" was a "front tooth."

This is also in line with the statements of Coke, Blackstone, Hawkins, and East, by each of whom the foretooth is mentioned as one of the members the deprivation of which constitutes mayhem. It will be noted, however, that Blackstone states that the loss of one of the "jaw teeth" is not mayhem.

h. Private parts.

Blackstone, Hawkins, and East include castration in their lists of injuries which constituted mayhem at common law (see *supra*, I.), and it seems to be so regarded under modern statutes.

Thus, in *State v. Sheldon* (1917) 54 *Mont.* 185, 169 *Pac.* 37, it was held that the right testicle of a man is a member of his body within the meaning of the statute defining the crime of mayhem, the court saying: "The contention that it is not is based upon the claim that at common law the only members of the body within the defi-

nition of mayhem are those directly useful in fighting,—such as to enable one to defend himself or to annoy his adversary. However this may be,—and there is room for doubt about it,— . . . the answer is that our statute is not so restricted.”

And in *Worley v. State* (1850) 11 *Humph. (Tenn.)* 172, it was held that a statute providing that “no person shall unlawfully and maliciously, by cutting or otherwise, cut off or disable the organs of generation of another, or any part thereof,” applies to offenses committed by white men upon the persons of slaves, so as to authorize the conviction thereunder of a master who castrated his slave.

See also such cases as *People v. Schoedde* (1899) 126 *Cal.* 373, 58 *Pac.* 859; *State v. Fry* (1885) 67 *Iowa*, 475, 25 *N. W.* 738; *Choate v. Com.* (1917) 176 *Ky.* 427, 195 *S. W.* 1080; *Daggs v. State* (1918) 15 *Okla. Crim. Rep.* 127, 175 *Pac.* 266, in which the injuries involved were of this character, and no question seems to have been raised but that they came within the statutes of the respective states.

In *Cole v. State* (1911) 62 *Tex. Crim. Rep.* 270, 138 *S. W.* 109, one who cut a man's penis nearly off with a razor was held to be properly convicted of assault with intent to maim, where the statute defined maiming to be, among other things, depriving a person of any member of his body.

The private parts of women are also held to be within the protection of maiming statutes. *Kitchens v. State* (1888) 80 *Ga.* 810, 7 *S. E.* 209; *Moore v. State* (1851) 4 *Chand. (Wis.)* 168, 3 *Pinney*, 373.

Thus, in *Kitchens v. State* (Ga.) *supra*, it was held that a provision of the law as to mayhem which related to injuring, wounding, or disfiguring the private parts of another, was for the protection of females as well as males.

And in *Moore v. State* (1851) 3 *Pinney (Wis.)* 373, it was held, under a statute providing that “if any person, with malicious intent to maim or disfigure, shall cut out or maim the tongue, put out or destroy an eye, cut or tear off an ear, cut or slit or mu-

tilate the nose or lip, or cut off or disable a limb or member of any person,” etc., and that “if any person shall assault another with intent to murder or to maim or disfigure his person in any of the ways mentioned,” etc., that an indictment would lie for assault upon a woman, with intent to maim or disfigure her private parts, the court saying: “Nor can we see a reason to support the query made, that ‘it is extremely doubtful whether an indictment will lie under our statute for disabling an internal organ of the body, like the uterus in a female.’ Our legislature certainly gave the same protection to the internal organs of the female that it did to the external organs of the male, and there is no reason why it should not.”

So, also, in *Rex v. Cox* (1818) *Russ. & R. C. C. (Eng.)* 362, 1 *Leach, C. L.* 71, it was held that cutting the private parts of a child so as to enlarge them for the time would justify conviction under an indictment based on 43 *Geo. III. chap. 58*, for cutting her with intent to do her grievous bodily harm, even though the hymen was not injured and the incision was not deep nor the wound dangerous.

4. Miscellaneous.

In *Rex v. Lee* (1763) 1 *Leach, C. L. (Eng.)* 51, it was held that the act of a person in cutting his wife's throat while she was asleep in bed was not within the provision of the *Coventry Act* “that if any person shall on purpose, and of malice aforethought, and by lying in wait, unlawfully cut out, or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject of his Majesty, with intention in so doing to maim and disfigure, that then the person or persons so offending shall suffer death without clergy.”

In *Com. v. Lester* (1820) 2 *Va. Cas.* 198, it was held that an indictment which charged the accused with feloniously breaking the jawbone of another with intent to maim, disfigure, disable, or kill was not good as a charge of maiming at common law, be-

cause it did not state facts which constitute a common-law maim, and also because it used the word "feloniously," whereas a maim was not ordinarily a felony at common law. It was also held that it was defective as an attempt to charge a maim under the statute, because it did not aver that the defendant "disabled" the injured person, which was one of the elements of mayhem as defined by the statute. There would seem to be an implication

that such an injury might, if the indictment had been correct, have been held to be within a provision of the statute which specified disabling "by cutting, biting, or wounding any limb or member of another."

See also *Reg. v. Smith* (1837) 8 Car. & P. (Eng.) 173, *supra*, under II.

As to the breaking of a collar bone, see *Rex v. Wood* (1830) 4 Car. & P. (Eng.) 381, *supra*, under II.

M. A. L.

CHARLES L. ISBELL

v.

SAMUEL G. HOUGHTON, Circuit Judge, Bay County.

Michigan Supreme Court—July 19, 1921.

(Isbell v. Bay Circuit Judge, — Mich. —, 183 N. W. 721.)

Bail — cash — application to fine.

1. Cash bail cannot, in the absence of statutory permission, be applied in satisfaction of a fine imposed upon the principal, who surrenders himself and submits to the jurisdiction of the court.

[See note on this question beginning on page 975.]

— to whom returned.

2. Although the statute does not expressly state to whom cash bail shall be returned when it has served its purpose, it is proper for the court to order it returned to the person

providing it, where it was deposited by a father to secure the release of his son through attorneys acting as agents for both father and son, who are the only possible claimants to the fund.

[See 3 R. C. L. 30.]

ORIGINAL proceeding for a writ of mandamus to compel defendant to return to plaintiff money deposited by him as bail for his son's appearance in a criminal case. *Writ granted.*

The facts are stated in the opinion of the court.

Messrs. McCormick & Sharpe, for plaintiff:

A deposit in lieu of bail, for the appearance of a defendant in a criminal case for trial, may not be appropriated to the payment of a fine or costs in any case where there has been no forfeiture of appearance.

Tiffany, Crim. Law, Howell's 5th ed. 153; 6 C. J. 994, § 231; *Sowders v. State*, 37 Kan. 209, 14 Pac. 865; *Court-right v. Kirchner*, 43 Mich. 411, 5 N. W. 441; *People v. Hanaw*, 106 Mich. 421, 64 N. W. 328; *Mundell v. Wells*, 181 Cal. 398, 7 A. L. R. 383, 184 Pac. 666.

Even if the deposit may be appropriated to the payment of fine and cost where made by the prisoner him-

self, it may not be so appropriated where deposited by a third person, and the remainder, if any, legally paid to the prisoner.

Wright & Taylor v. Dougherty, 138 Iowa, 195, 115 N. W. 908; *Doty v. Braska*, 138 Iowa, 396, 116 N. W. 141; *People ex rel. Meyer v. Gould*, 75 App. Div. 524, 78 N. Y. Supp. 279; *Finelite v. Sonberg*, 78 App. Div. 455, 78 N. Y. Supp. 338; *Brasfield v. Milan*, 127 Tenn. 561, 44 L.R.A. (N.S.) 1150, 155 S. W. 926; *Way v. Day*, 187 Mass. 476, 73 N. E. 543; *Campbell v. Reno County*, 97 Kan. 68, 154 Pac. 257, Ann. Cas. 1918D, 533.

Mr. William A. Collins, for defendant:

Since the deposit was made by the

respondent, it must be presumed, under the law, that it was his money, or at least that it had been loaned to him by a third party, and the money being the money of respondent, we believe it is liable for the fine and costs which the defendant was required to pay in the sentence imposed.

6 C. J. p. 1024; *Mundell v. Wells*, 181 Cal. 398, 7 A.L.R. 383, 184 Pac. 666.

Steere, Ch. J., delivered the opinion of the court:

Plaintiff's son, Charles S. Isbell, was arrested, proceeded against before a committing magistrate, and by him held for trial at the next ensuing term of the Bay county circuit court on a charge of unlawfully having intoxicating liquor in his possession. Bail for his appearance at the time and court specified was fixed by the magistrate at the sum of \$500, in default of which he was remanded to the county jail to await trial or until released on bail.

Counsel who had charge of his case consulted with plaintiff in regard to securing bail for his son, resulting in plaintiff borrowing \$500 from a bank in Detroit, which he caused to be sent to the attorneys to deposit in lieu of bail for his son's release, as he was advised could lawfully be done.

The remittance was made by a Western Union Telegraph Company check, payable to order of the attorneys. They indorsed and deposited it with the clerk of the court, who accepted and subsequently cashed the same, and the son was released from custody in compliance with the statute in such case provided.

The son, Charles S. Isbell, duly appeared as his bail required at the ensuing September, 1920, term of the Bay county circuit court, was arraigned on the charge for which he was bound over, pleaded guilty to the information filed against him for unlawfully having in possession intoxicating liquor, and on October 8, 1920, was sentenced therefor to confinement at hard labor in the state prison at Jackson for not less than six months nor more than one year, with a recommended maxi-

mum of ten months, "and also pay to the people of the state a fine of \$200 and cost of \$50;" and forthwith remanded to custody of the sheriff for execution of the prison sentence imposed upon him.

Oral request was then made for return to plaintiff of the money he had deposited as bail for his son's appearance, which was refused. On October 16, 1920, he filed a verified petition supported by affidavits, showing his ownership of the money and the circumstances of its deposit, asking for an order for its release and return to him. An adverse written opinion by the court was filed and treated by the clerk as an order of denial. Thereafter, on November 28, 1920, counsel for plaintiff presented to the court a petition asking that the opinion of the court previously filed and treated by the clerk as an order be vacated as such and the fund deposited as bail for his son's appearance be ordered returned to plaintiff, or, at least, should any legal claim be established against any part thereof for fine or costs imposed that the balance be ordered returned to him. The court then denied both that and the previous petition by a formal order entered November 29, 1920, which concluded as follows: "And it is further ordered that the sum of \$200 fine and \$50 costs imposed upon the said defendant, Charles S. Isbell, at the time of his sentence on the 8th day of October, 1920, be deducted from said deposit of \$500, and that the remainder thereof be paid to the said defendant, Charles S. Isbell."

Plaintiff's contentions against this order are interrogatively stated as follows:

"(1) May a deposit in lieu of bail, under act 332, P. A. 1919, for the appearance of a defendant in a criminal case for trial, be appropriated by the court to the payment of fine and costs imposed upon the defendant by sentence?

"(2) If so, may such a deposit in fact made and owned by a third person, be appropriated to such pur-

pose, and the remainder, if any, be legally paid over to the defendant?"

The only authority for making this money deposit in lieu of bail or any proceedings had thereunder in this case rests in the provisions of Act 332, Pub. Acts 1919, entitled: "An Act to Provide for the Furnishing and Acceptance of Cash, Certified Checks or Certain Obligations of the United States Government or of Municipal Corporations in Lieu of Bonds or Bail of Other Character Required or Permitted by Law."

The act covers both civil and criminal proceedings, and plainly contemplates that the obligation attaching to a deposit so made shall be coextensive with the requirements or conditions of the bond or bail for which it is permitted to be substituted.

In civil proceedings different forms of bonds, with varying conditions according to the nature of the proceeding, are required or permitted by various statutory provisions, which furnish a test for the obligations which attach to deposits made in lieu of bonds in such cases.

Here we are considering a criminal case in which the respondent is held for trial at the ensuing term of the circuit court by the examining magistrate, on a charge beyond his jurisdiction to try, under the following requirements of § 15,682, Comp. Laws 1915: "If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken, and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to prison for trial."

The statute provides no form of recognizance, nor specifies conditions to be imposed in such cases, except that the bail required and accepted shall be "sufficient." The amount of bail imposed in this case was \$500. Cash to that amount

furnished by plaintiff was thereafter deposited with the county clerk in lieu of such bail, and his son was released from custody. Except as provided by statute, money cannot be deposited as security in place of bail, and an officer empowered to let to bail has no authority to receive it as such. 1 Bishop's Crim. Proc. 2d ed. § 264. As applicable here, § 1 of said Act 332 provides: "In any cause, action, proceeding or matter before any court . . . where . . . bail of any character is required or permitted for any purpose, it shall be lawful for the party or parties required or permitted to furnish such bail . . . to deposit, in lieu thereof, in the manner herein provided for, cash . . . equal in amount to the amount of the . . . bail so required or permitted."

While the parties transacting the business were somewhat lax in following prescribed details, the money was received by the clerk of the court for the purpose it was offered, accepted and held as such ever since, and the prisoner was released on the strength of it. It has been consistently recognized and acted upon by all parties, including the court, as a deposit authoritatively made under the act in lieu of bail for the appearance of a respondent bound over for trial in a criminal case.

Under common-law criminal procedure, in the absence of special statutory provisions, the scope and purpose of bail in such cases is the appearance of the party accused at the time and place specified. It is called "sufficient surety for his appearance" in Blackstone's chapter on "Commitment and Bail." 4 Bl. Com. 296. In the chapter of Bacon's Abridgment on "Bail in Criminal Cases," it is said: "For if a man's bail, who are his jailors of his own choosing, do as effectually secure his appearance, and put him as much under the power of the court as if he had been in custody of the proper officer, they seem to have answered the end of the law, and to have done all that can reasonably be required of them."

In Black's Law Dictionary it is defined as follows:

"Bail, v. To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court. . . .

"Bail, n. In Practice. The sureties who procure the release of a person under arrest by becoming responsible for his appearance at the time and place designated."

Substantially the same definition appears in Tiffany's Criminal Law of Michigan, p. 139. It would scarcely be claimed the sureties who by recognizance or bond, which is essentially the same, procured the release of a prisoner by becoming responsible for his appearance to answer to a charge against him, would be holden for any fine and costs imposed upon him on conviction after he had personally appeared for trial and submitted himself to the jurisdiction of the court at the time and place required. Had he defaulted in that particular, the court could declare his bail forfeited in its entirety, and hold the sureties for the full penalty of the bail. We find nothing in this statute providing for partial forfeiture of a deposit in lieu of bail to cover such fine and costs as the court might impose.

An examination of the text in Corpus Juris and other authorities cited to sustain defendant's contention discloses that theory supported only by decisions in states where it is not only specifically provided by statute that cash may be deposited in lieu of bail, as here, but that the deposit may be applied by the court, in whole or in part, to satisfy a fine or costs following conviction, for which our statute does not provide. The decisions in those states sustaining application of bail money to satisfy fines and costs particularly note the express statutory provisions for their authority to so hold. This is well illustrated in *State v. Ross*, 100 Tenn. 303, 45 S. W. 673,

where, in holding fine and costs were properly retained from a fund deposited in lieu of bail, the court cites *People ex rel. Gilbert v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910, and says: "Our statute clearly proceeds on the same theory, but the statute of Tennessee goes further than the statute of New York, in providing that such deposit shall be applied to costs as well as fine, and directs, in express terms, that the surplus, if any, shall be paid to the defendant."

There is no authority in this state under said Act 332, or otherwise, to appropriate any part of a deposit made in lieu of bail for appearance of a defendant in a criminal case, to payment of fine and costs imposed, when he has duly appeared at the time and place enjoined upon him and submitted himself to the jurisdiction of the court.

Bail—cash—
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fine.

As to the right of a third party who furnished the funds for deposit, to its return after the conditions of the deposit have been satisfied, the statute is not entirely clear. Section 1 extends the privilege of deposit in lieu of bail to the "party or parties required or permitted to furnish such bail." Section 2 prescribes the course to be followed by "any person, firm, or corporation desiring to avail himself of the provisions of this act," and directs that the officer with whom the deposit is made shall "deliver to the depositor a duplicate receipt reciting the fact of such deposit." Section 4 provides that "if such bond or security be discharged, an order to that effect shall be entered upon the records of the court, board or commission, with a statement of the amount to be returned to the person making the deposit."

It also provides that the deposit shall not be subject to garnishment.

We think it fairly inferable from the act considered as a whole that a deposit made and accepted in compliance with and for the purposes of the statute is, while serving such purpose, conclusively presumed, so far as the pending proceeding is con-

cerned, to have been deposited by, and the property of, the defendant, to the exclusion of any other claimant; but if, and when, all conditions under which it was deposited as a substitute for bail have been fulfilled, entitling the security to discharge the presumption of ownership, though yet remaining, is not necessarily conclusive.

We, however, see no occasion here to pursue that subject into supposititious cases, for it appears undisputed that the deposit was made

by the respondent's attorneys, also acting as agents for plaintiff in that particular as claimed, at the same time representing both father and son, the only possible claimants for the fund. Under such circumstances ^{—to whom returned.} it is proper, and safe, for the court to order "the amount to be returned to the person making the deposit."

Writ may issue in harmony with this opinion, but without costs to either party.

ANNOTATION.

Right to apply cash bail in payment of fine.

This annotation, discussing the right to apply cash bail to the payment of a fine, is supplemental to that in 7 A.L.R., beginning at p. 389.

The reported case (*ISELL v. HOUGHTON*, ante, 971) holds that, in the absence of a statute expressly so providing, money deposited in lieu of bail cannot be taken in satisfaction of a fine imposed on the accused.

In *State v. Fowler* (1921) 59 Mont.

356, 197 Pac. 847, apparently the only other recent case on the point, the court, referring to a statute expressly authorizing the application of cash bail to the payment of a fine, said that it was the duty of the clerk of court, under the direction of the court, so to apply it, and held that such a direction was proper though the time for appeal had not expired, there being no stay of proceedings. W. A. S.

W. H. PIPKORN COMPANY, Respt.,

v.

JOSEPH TRATNIK and Wife, Appts.,

and

GRANITE SIDEWALK COMPANY et al., Respts.

Wisconsin Supreme Court — April 18, 1915.

(161 Wis. 91, 152 N. W. 141.)

Mechanic's lien — subcontractor — rejected work.

1. Materialmen are entitled to a mechanic's lien for proper materials furnished to and used by a contractor in the construction of a portion of a building, although his work is so poorly done that it is not accepted but removed and reconstructed.

[See note on this question beginning on page 981.]

— priority over dower.

2. The lien for materials furnished under a contract with a property owner has no priority over the in-

choate dower right of his wife, if she did not know of or consent to the improvement.

[See 18 R. C. L. 904.]

(*Siebecker and Kerwin, JJ., dissent.*)

APPEAL by defendants Tratnik from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff and the other defendants in an action brought to enforce a claim for a mechanic's lien against defendants Tratnik. *Affirmed as to Joseph Tratnik. Reversed as to his wife.*

Statement by Barnes, J.:

Plaintiff brought this action as a subcontractor of the defendant Granite Sidewalk Company to enforce a claim for mechanic's lien against the defendants Joseph and Mary Tratnik. The complaint alleged that the Granite Sidewalk Company was a principal contractor employed by the defendant Joseph Tratnik for the construction of the walls of the basement and other cement and concrete work on a certain building to be erected upon the property of the defendant Tratnik; that plaintiff, as a subcontractor of the Granite Sidewalk Company, furnished building materials to be used in the construction of said walls and building, and that there was still due the plaintiff from said defendant the sum of \$284.83. The other defendants, Lake Shore Stone Company, Arthur J. Reiske, Sands Lumber Company, and P. J. Lavies & Company, subcontractors and materialmen, served cross complaints for their respective claims to enforce same under the Mechanic's Lien Statute.

The answer of the defendants Tratnik alleged, among other things, that the work done in the construction of said walls by the Granite Sidewalk Company was performed in such an unsatisfactory, improper, and unsafe manner that it was condemned by the building inspector of the city of Milwaukee, and was never accepted by the defendants Tratnik or by the architect and superintendent of said building, to whose satisfaction under the terms of the contract the work was to be performed; that numerous notices were served upon the Granite Sidewalk Company requesting them to perform the work in compliance with the terms of the contract, and that it failed, neglected, and refused to do so, and that the defendants were obliged to have the entire work torn down and removed, and to have

said walls and other work provided for in the contract reconstructed, at a cost of \$1,950.

Judgment was entered in favor of the plaintiff, adjudging a subcontractor's lien against the property of the defendants Joseph and Mary Tratnik, and in favor of the various other subcontractors named as defendants herein, for the amounts claimed by them for materials furnished. From such judgment this appeal is taken.

Messrs. Doerfler, Green, & Bender, for appellants:

It was error to adjudge a lien in favor of the various materialmen, against the property of the defendants Tratnik and wife, and to direct the enforcement thereof by sale, in accordance with the Mechanic's Lien Statutes, for the purpose of satisfying the amounts of the claims of said materialmen as adjudged.

Siebrecht v. Hogan, 99 Wis. 437, 75 N. W. 71; Seeman v. Biemann, 108 Wis. 365, 84 N. W. 490; Francis & N. Foundry Co. v. King Knob Coal Co. 142 Wis. 619, 126 N. W. 39; Houlahan v. Clark, 110 Wis. 43, 85 N. W. 676; Boisot, Mechanic's Liens, p. 5; 27 Cyc. 17; Esslinger v. Huebner, 22 Wis. 632; Barker & S. Lumber Co. v. Marathon Paper Mills Co. 146 Wis. 12, 36 L.R.A. (N.S.) 873, 130 N. W. 866; Taylor v. Dall Lead & Zinc Co. 131 Wis. 348, 111 N. W. 490.

Messrs. Lorenz & Lorenz, Otjen & Otjen, James T. Drought, and Ira S. Lorenz, for respondents:

Subcontractors who furnish material contemplated by the contract between the principal contractor and the owner cannot be deprived of their lien rights by reason of the default of the principal contractor.

Fitzgerald v. Walsh, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717; Halsey v. Waukesha Springs Sanitarium Co. 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94; Siebrecht v. Hogan, 99 Wis. 437, 75 N. W. 71; Taylor v. Dall Lead & Zinc Co. 131 Wis. 348, 111 N. W. 490; Seeman v. Biemann, 108 Wis. 365, 84 N. W. 490; Berger v. Turnblad, 98 Minn. 163, 116 Am. St.

Rep. 353, 107 N. W. 543; Burns v. Sewell, 48 Minn. 425, 51 N. W. 224.

Barnes, J., delivered the opinion of the court:

It is not improbable that the owner of the premises involved and the subcontractors are innocent of any wrong. If so, one or the other must suffer for the default of the principal contractor, and the question is, Which? The owner could have protected himself in the first instance by dealing with a responsible party, or else by requiring an adequate bond. But there were also means open to the subcontractors to protect themselves.

The relation between owner, principal contractor, and subcontractor has been pretty well settled by this court. The principal contractor is the agent of the owner to purchase the materials required by the principal contract. The owner consents that the principal contractor may do what is necessary to carry out the principal contract, and makes his property liable therefor in accordance with the statute, which becomes a part of the contract. Siebrecht v. Hogan, 99 Wis. 437, 441, 75 N. W. 71; Taylor v. Dall Lead & Zinc Co. 131 Wis. 348, 111 N. W. 490.

The materials here furnished by the subcontractors consisted of crushed stone, lumber for falsework in basement walls, gravel, cement, and flue linings for chimneys; and elbows and galvanized iron. There is no claim that the material was not such as the principal contract called for and as the principal contractor was required to furnish under his contract. The court expressly found that the materials furnished by the subcontractors were of a merchantable quality and in accordance with the contract entered into between the owner and the principal contractor. The court further found that the necessity for tearing out the walls was due to improper method of construction, and not because of the material used being defective.

As far as the rights of the subcon-

tractors are concerned, it can make no difference whether the owner himself contracted for the materials or his duly authorized agent did so. The owner is responsible for the authorized acts of his agent, the principal contractor, to the same extent that he would be liable had he done the acts himself.

The real question therefore is: Would the subcontractors have a lien if the material had been purchased by the owner and had been wrought into the walls by the servants or contractors of the owner, but by reason of poor workmanship the walls had to be removed and the material destroyed? This court has held that, where a principal contractor delivers material on the ground to be used in the erection of a building, he is entitled to a lien, although the owner sells the material and it is used elsewhere. Esslinger v. Huebner, 22 Wis. 632. It is so ruled in Fitzgerald v. Walsh, 107 Wis. 92, 98, 81 Am. St. Rep. 824, 82 N. W. 717, and in Spruhen v. Stout, 52 Wis. 517, 9 N. W. 277, and these cases are approved in Francis & N. Foundry Co. v. King Knob Coal Co. 142 Wis. 622, 126 N. W. 39. The destruction of the material delivered was no more complete in the instant case than it was in Halsey v. Waukesha Springs Sanitarium Co. 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94, where the building was destroyed by fire, and where it was held that the right of lien existed for the burned material. As the court there points out, a mechanic's lien may fasten on land before any building or structure exists thereon, and, if so, "it may persist after any such structure disappears."

In Fitzgerald v. Walsh, supra, an architect was allowed a lien on the land on which a building was to be erected, although the construction was abandoned after the excavation was made.

It has also been held that the fact that the principal contractor has not complied with the conditions of his contract so as to enable him to en-

force a lien on the building will not militate against the subcontractor enforcing such a lien if the subject of the subcontractor's lien might, in any event, be lienable in favor of the principal contractor. *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490.

There is no conflict between the cases cited and *Houlahan v. Clark*, 110 Wis. 43, 85 N. W. 676. There the principal contractor was held not to be the agent of the owner, because he did not build the kind of a structure which his contract called for, nor at the place the contract called for. The contractor was acting without the scope of his authority in doing what he did, and his acts were therefore held not to be binding on his principal. Here the contractor was acting strictly within his authority in purchasing the materials which were delivered by the lien claimants. His default occurred in improperly using such materials. It seems clear that the materialmen are no more affected

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by the default of the owner's agent in this regard than they would be had the owner himself made the improper use of the materials. It is clear that, had the owner himself purchased the material in question to be used in the basement walls, and it was so used by the contractor, a right of lien would attach to the land, although the construction, because of poor workmanship, became worthless. If so, we see no escape from the proposition that the same result would follow where the purchase of the material was made by an agent acting within the scope of his authority in purchasing the material.

Mary Tratnik was evidently made a party defendant for the purpose of barring her inchoate right of dower. It was neither proven nor found that she knew the improvement in question was being made, or that she consented there-
to. We do not think the Mechanic's Lien Statute was intended to

reach an inchoate dower right and cut it off as a matter of course whenever the interest of the husband owner was cut off. If Joseph Tratnik should die before his wife, the judgment would bar her dower right in the property, provided it was sold to pay the lien claims. In this respect it is erroneous. *Phillips, Mechanics' Liens*, 3d ed. § 195.

Judgment affirmed as to Joseph Tratnik, and reversed as to Mary Tratnik, and cause remanded for further proceedings according to law.

Timlin, J., took no part.

Kerwin, J., dissenting:

The facts are undisputed. The Granite Sidewalk Company, principal contractor, was employed by appellant Joseph Tratnik to construct basement walls of cement upon his property. The plaintiff furnished to the Granite Sidewalk Company, principal contractor, for such work, cement which was used by the principal contractor in a structure on the appellant's property, which afterwards, on account of improper construction, was condemned by the city inspector and ordered torn out, and was torn out and removed, because not in compliance with the city ordinance or contract with the appellant.

The question presented is whether the plaintiff had a lien for material furnished to the principal contractor which was rendered valueless by the failure of the contractor to perform his contract; therefore did not become a part of the structure upon appellant's premises or add to its value, and without any fault on the part of the appellant. The defendant Granite Sidewalk Company, principal contractor, violated its contract with appellant and the ordinance of the city in erecting a structure on appellant's premises which was of no value and in violation of the city ordinance.

The question arises whether the appellant is liable for the material bought by the defendant Granite Sidewalk Company and destroyed.

**—priority over
dower.**

The subcontractor acquires no right of lien where the material never became part of the structure, simply by delivery to the principal contractor. *Francis & N. Foundry Co. v. King Knob Coal Co.* 142 Wis. 621, 126 N. W. 39, and a long line of Wisconsin cases cited. It is well settled by the decisions of this court that the materialman, in delivering material to the principal contractor, acquires no greater right than the principal contractor. In *Seeman v. Biemann*, 108 Wis. 365, at page 378, 84 N. W. 490, at page 494, this court said: "The subcontractor's authority to bind the principal depends upon the right of his principal to do so under the same circumstances. To that extent only the proprietor is deemed, by force of the statute, to have authorized the principal contractor to indirectly bind his principal under the lien laws of the state."

The principal contractor binds the owner when acting within the scope of his authority, and not otherwise. If the materialman sells material and delivers it to the original contractor, and the original contractor fails to use the same in the structure, but uses it elsewhere, the materialman has no lien for the material so diverted. *Francis & N. Foundry Co. v. King Knob Coal Co.* supra.

It is the duty of the principal contractor, in order to subject the owner's premises to a lien, to perform his contract and use the material so as to become a part of the structure contemplated by the contract between the owner and the principal contractor. *Francis & N. Foundry Co. v. King Knob Coal Co.* supra. In order to secure the lien given the materialman by the statute, it is necessary that the principal contractor comply with his contract with the owner and make the material furnished a part of the structure, and thereby add to its value. *Houlahan v. Clark*, 110 Wis. 43, 85 N. W. 676. The right to a mechanic's lien given by the statute is based upon considerations of natural jus-

tice, namely, that one who has enhanced the value of property by attaching thereto his property or labor shall have a claim on such property for the value of such labor or material. This is the doctrine of the decisions of this court.

To secure a lien by the materialman, the contractor must keep within the scope of his contract with the owner. *Houlahan v. Clark*, supra. This is admitted by respondent's counsel in their brief, where they say, in referring to the claim made by appellant: "The proposition above stated merely means that the right of the subcontractor is restricted within the scope of the contract existing between the owner and the principal contractor."

Where the contractor complies with his contract with the owner, and erects a lawful structure upon the premises, the materialman has a lien for the material furnished and placed in such structure. But, where the contractor erects an unlawful structure—a nuisance—contrary to his contract with the owner, and in violation of the city ordinance, in consequence of which it is ordered abated and removed, and is abated and removed, the materialman has no lien for the material used in such unlawful structure. This doctrine is in harmony with the Wisconsin decisions. *Siebrecht v. Hogan*, 99 Wis. 437, 75 N. W. 71; *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490; *Houlahan v. Clark*, 110 Wis. 43, 85 N. W. 676; *Taylor v. Dall Lead & Zinc Co.* 131 Wis. 348, at page 355, 111 N. W. 490; *Francis & N. Foundry Co. v. King Knob Coal Co.* 142 Wis. 619, 126 N. W. 39; *Barker & S. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12, 36 L.R.A. (N.S.) 875, 130 N. W. 866; *Moritz v. Sands Lumber Co.* 158 Wis. 49, 51 L.R.A. (N.S.) 1040, 146 N. W. 1120.

In all Wisconsin cases the basis of the lien is that the material is consumed in the structure and increases the value of the premises. Of course, a well-known exception to the above rule is where the own-

er wrongfully diverts the material from the structure for which it is furnished. In *Barker & S. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12, 36 L.R.A. (N.S.) 875, 130 N. W. 866, this court said: "Another principle is that, if material be furnished to the owner for use in the construction of a building, and the construction be actually commenced, the materialman is entitled to his lien even though the owner does not use the materials at all, but disposes of them elsewhere; . . . but, if a subcontractor delivers materials to the principal contractor at the latter's place of business, which materials are neither incorporated into the structure, delivered upon the premises, nor placed under control of the owner of the structure, no lien arises, because the material cannot be said to have been furnished for, in, or about the erection of the structure."

In the majority opinion the court relies upon *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717, and *Halsey v. Waukesha Springs Sanitarium Co.* 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94. In the former case it was held that an architect's lien attached as soon as the excavation of the building commenced; and in the latter the building was partially constructed when destroyed by fire. These cases are not in point here. In the former case the plans and specifications were drawn at the instance of the owner, and subsequently some work was done on the premises in pursuance of the contract, and, by reason of the acts of the owner, the building was not completed. In the latter case the principal contractor was prevented from completing the building because of destruction by fire. All that was done up to the time of the fire was regular in pursuance of the contract with the owner, and of course the lien attached as soon as the material entered into the structure.

The majority opinion holds that the liability is the same here as if

the owner had purchased the material for the building, and it had been diverted or converted by him. If the owner diverted or converted the material, the materialman clearly would have a lien. But that is a very different thing from a diversion or conversion by a contractor who had no authority to do so. The cases cited in the majority opinion clearly show the distinction. *Esslinger v. Huebner*, 22 Wis. 632; *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717; *Francis & N. Foundry Co. v. King Knob Coal Co.* 142 Wis. 619, 126 N. W. 39. Where the principal contractor purchases from the materialman, he must use the material substantially in accordance with his contract with the owner. *Houlahan v. Clark*, 110 Wis. 43, 85 N. W. 676; *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490.

In the majority opinion *Seeman v. Biemann*, *supra*, is relied upon on the point that compliance by the contractor with his contract with the owner is not necessary in order to enable the subcontractor to enforce a lien, if the subject of the subcontractor's lien might in any event be lienable in favor of the principal contractor. It is distinctly held in the above case that a subcontractor's lien cannot, to the prejudice of the proprietor of the building, be extended beyond the scope of the principal contract.

"The subcontractor's authority to bind the principal depends upon the right of his principal to do so under the same circumstances." 108 Wis. 378, 84 N. W. 494.

Of course, where the lien statute has been complied with, and the contractor has performed his contract so as to make the material a part of the structure, and the subcontractor has served the notice required, and has become entitled to a lien, then no act of the contractor can deprive him of the lien. This is the effect of the holding referred to in the majority opinion. See *Seeman v. Biemann*, 108 Wis. 365 to 379, inclusive, 84 N. W. 490.

Respondents rely strongly upon a Minnesota decision. It is unnecessary to go outside of Wisconsin for authority. The statutes of Wisconsin and the decisions here control the case. The equities are with the appellant. The plaintiff furnished material for which he was entitled to a lien on compliance with the statute, and compliance by the contractor to whom he furnished the same, with his contract with appellant. The contractor disregarded his contract; erected a nuisance upon the premises, instead of a lawful

structure. It was by lawful authority abated. If the lien is enforced, the appellant is required to pay for the unlawful structure, which added no value to the premises.

I cannot agree with the majority opinion, and think the judgment below should be reversed as to both appellants.

Siebecker, J., concurs in this dissent.

Petition for rehearing denied, June 1, 1915.

ANNOTATION.

Right of subcontractor or materialman to mechanic's lien for labor or material entering into work rejected as not in compliance with principal contract.

This note, in discussing the right of a subcontractor or materialman to a mechanic's lien for labor or material entering into work rejected as not in compliance with the principal contract, reviews only those few cases wherein it appeared that the performance tendered by the principal contractor was rejected because of defective materials or faulty construction. The many cases wherein it appeared that the work was rejected on some other ground, or on grounds not appearing, are not included in the discussion.

The authorities are not in accord as to the right of a subcontractor or materialman to a mechanic's lien for labor or material entering into work rejected as not in compliance with the principal contract. Thus, while it appears from the reported case (*W. H. PIPKORN CO. v. TRATNIK*, ante, 975), that in Wisconsin the right to a lien exists under these circumstances, and a similar result has been reached in Indiana by statute, the contrary rule has been expressed in Kentucky.

In the reported case (*W. H. PIPKORN CO. v. TRATNIK*), it is held that one furnishing material to a contractor for the construction of a building is entitled to a mechanic's lien on the property even though the construction is so improper that the building is condemned and the work is never accept-

ed by the owner. The court seems to predicate the liability of the owner on the theory that the principal contractor is acting as the agent of the owner in his purchase of material. In *Houlihan v. Clark* (1901) 110 Wis. 43, 85 N. W. 676, it appeared that a structure which, by the terms of the contract, was to have been placed on piles in line with a certain dock, had been built otherwise. The owners claimed that, by reason of this deviation from the contract, the structure was useless and such a noncompliance with the contract as would preclude any liability on their part to the contractor. In an action to enforce a mechanic's lien on the structure, the court, holding that the contractor had no right to recover, held, further, that the subcontractors were in no better position to enforce a lien against the owner. But it should be noted that the reported case reconciles the foregoing decision by pointing out that the principal contractor in that case, by engaging a subcontractor to do work in other than the agreed manner, was acting without the scope of his authority as an agent of the owner.

In Indiana there has been adopted what is known as the "Pennsylvania system," which gives a subcontractor or materialman an absolute lien for material or labor furnished in accordance with the statute (*Burns's Anno.*

Stat. 1914, §§ 8295-8307), which lien is not affected by the failure of the principal contractor to perform his contract. In *Coonse & C. Ice Co. v. Home Stove Co.* (1918) 70 Ind. App. 226, 121 N. E. 293, it was held that under this statute a noncompliance with the provisions of the principal contract would not affect the right of a subcontractor to a mechanic's lien for material or labor furnished. But it appearing that the subcontractor was in partnership with the principal contractor in installing a stoker, the court held that the fact that the stoker, after installation, had been rejected and removed as defective, was a defense in a suit to foreclose such a lien.

In Kentucky it seems that a nonacceptance of the principal contractor's tender of performance, because of faulty construction or defective materials entering therein in noncompliance with the contract of construction, deprives a subcontractor of the right to a mechanic's lien. Thus in *Terrell v. McHenry* (1905) 121 Ky. 452, 89 S. W. 306, wherein a subcontractor maintained that he was entitled to a

mechanic's lien for his services in putting a roof on the defendant's structure, it appeared that the original contractor had agreed to construct a roof, to be paid for only in case it did not leak. The roof did leak, and the defendant having refused to accept this performance as a compliance with the contract, the court held that the subcontractor was in no better position than the original contractor, and was not entitled to a lien on the property. So, in *Monyahan v. Lancaster* (1916) 168 Ky. 677, 182 S. W. 862, wherein the defendant, in an action by a subcontractor to assert a mechanic's lien, maintained that it was not liable, since it had refused to accept the performance tendered by the original contractor, the work, it was alleged, being so defective as to be worthless, the court held that since the defendant had received nothing of value, the subcontractor had no right to a mechanic's lien, and this was so although he might not have been responsible for the conditions resulting in the defective performance.

R. E. B.

STATE OF SOUTH DAKOTA, Respt.,

v.

CLIFTON C. SMITH, Appt.

South Dakota Supreme Court—July 16, 1921.

(— S. D. —, 183 N. W. 873).

Evidence — hostility of witness — offer of pay.

Evidence of offer to pay a state's witness for giving false testimony against accused is competent to impeach him, although no foundation has been laid by cross-examination to show hostility or bias.

[See note on this question beginning on page 984.]

APPEAL by defendant from a judgment of the Circuit Court for Walworth County (Bottum, J.) convicting him of adultery. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Caldwell & Caldwell, for appellant:

The jury had the right to know, in passing upon testimony of the state's

witness, that he had been offered a consideration for the same.

State v. Mulch, 17 S. D. 321, 96 N. W. 101; 5 *Jones*, Ev. § 829; *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189; 40

Cyc. 26; *Schultz v. Third Ave. R. Co.* 89 N. Y. 242; *Brink v. Stratton*, 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148; *Garnsey v. Rhodes*, 138 N. Y. 461, 34 N. E. 199.

Messrs. Byron S. Payne, Attorney General, and Edwin R. Winans, Assistant Attorney General, for the State:

If defendant desired to connect Martin with any conspiracy, or to show that he was guilty of receiving payment from the conspirators, he should have followed the questions of the prosecuting attorney with an offer of proof clearly indicating their purpose.

2 R. C. L. 278.

McCoy, J., delivered the opinion of the court:

From a conviction of the crime of adultery, defendant appeals.

One Martin, a witness for the state, testified to an alleged confession made to him by the appellant whereby the appellant is alleged to have confessed his guilt, and which alleged confession constitutes the only direct evidence against him. One Wright, the complaining witness, was called as a witness for appellant, and in substance was asked the question if it was not a fact that before the prosecution was commenced he had been employed by one Caster to find the witness Martin, for the purpose of having him give false testimony against appellant, and if Caster did not, in the presence of Wright, offer Martin a consideration if he would give false testimony for the purpose of convicting appellant. Objection by the state was made to this question, on the ground that it was immaterial, and which objection was sustained and exception taken to such ruling, which is now assigned as error. The said witness Wright was also asked the question if Caster had not paid one Kellerson, a brother-in-law of Martin, \$50 for procuring Martin to testify falsely against defendant, and that Kellerson agreed to get Martin as a witness for \$100, and if the complaining witness himself did not receive \$50 for swearing to the complaint or information against appellant. This question was ob-

jected to, on the ground that the same was immaterial, and not within the issues. The objection was sustained, and such ruling is now assigned as error.

The witness Martin was not cross-examined as to his hostility or bias against the appellant. It is the contention of appellant that the testimony sought to be brought out before the jury by means of these questions was material for the purpose of discrediting the testimony of said Martin, notwithstanding the failure of the appellant to cross-examine said Martin concerning his hostility or bias. We are of the opinion that it was error to sustain these objections. In the case of *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189, the trial court held that such evidence should not be admitted without proper foundation having been laid on cross-examination of the witness sought to be discredited. In that case, in rendering the opinion, the court, among other things, said: "We think the rule of law laid down by the trial judge was erroneous. The hostility of a witness towards a party against whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. There can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility."

To the same effect are the following authorities: *Schultz v. Third Ave. R. Co.* 89 N. Y. 242; *Garnsey v. Rhodes*, 138 N. Y. 461, 34 N. E. 199; *Martin v. Barnes*, 7 Wis. 239; *Barkly v. Copeland*, 86 Cal. 483, 25

Pac. 1, 405. In *Martin v. Barnes*, 7 Wis. 239, supra, in rendering the opinion granting a new trial where this same rule of evidence was involved, the court said: "We are of the opinion the evidence offered was competent. It went to the credibility of the witness, and respected conduct of his which did not require to be called to his attention, like conversations he may have had respecting the subject-matter of his testimony. Besides, it tended to show a corrupt combination, not to say conspiracy, between the witness and defendant, to injure the latter."

In 2 *Elliott*, Ev. § 973, the rule is stated as follows: "The fact of hostility or bias may be brought out upon cross-examination or by competent evidence of witnesses called to testify concerning it."

The same rule is referred to in note in *Lodge v. State*, 82 Am. St. Rep. 54. See *Wigmore*, Ev. §§ 948 to 959.

Respondent contends there is nothing shown by the questions

asked or the offer made that would tend to connect the witness Martin with the rejected evidence. The first question involved an offer by Caster to Martin in the presence of witness Wright. We are of the opinion that this question called for evidence and circumstances necessarily connecting Martin with the evidence and circumstances sought to be brought out before the jury by means of these questions. We are therefore of the view that it was prejudicial error to exclude testimony of this character. There seems to be a well-grounded distinction between contradicting a witness for the purpose of impeachment and showing hostility or bias to impeach his credibility, and that it is not necessary to lay a foundation on cross-examination concerning the latter class of impeachments.

The judgment and order appealed from are therefore reversed.

Whiting, J., concurs in the result.

ANNOTATION.

Necessity of laying foundation for evidence showing bias or prejudice of witness.

- I. View that foundation is necessary:
 - a. In general, 984.
 - b. Sufficiency of foundation, 990.
- II. View that foundation is not necessary, 991.
- III. View in Alabama, 994.

I. View that foundation is necessary.

a. In general.

In most jurisdictions a party is not permitted to impeach the credibility of a witness against him by introducing independent testimony of a statement or act of the witness which shows his bias or prejudice, without laying a foundation for the testimony by calling the attention of the witness to the statement or act alleged to show bias or prejudice, and thus giving him an opportunity to explain it.

United States. — See *McKnight v. United States* (1899) 38 C. C. A. 115,

97 Fed. 208. Compare *United States v. Schindler* (1880) 18 Blatchf. 230, 10 Fed. 547.

Arkansas. — See *Hollingsworth v. State* (1890) 53 Ark. 387, 14 S. W. 41; *Wright v. State* (1918) 133 Ark. 16, 201 S. W. 1107.

California.—*Baker v. Joseph* (1860) 16 Cal. 173; *Silvey v. Hodgdon* (1874) 48 Cal. 185; *People v. Turner* (1884) 65 Cal. 540, 4 Pac. 553; *People v. Gardner* (1893) 98 Cal. 127, 32 Pac. 880; *People v. Delbos* (1905) 146 Cal. 734, 81 Pac. 181; *Fagan v. Lentz* (1909) 156 Cal. 681, 105 Pac. 951, 20 Ann. Cas. 221; *Re Bedford* (1910) 158 Cal. 145, 110 Pac. 302; *Ash v. Soo Sing Lung* (1918) 177 Cal. 356, 170 Pac. 843; *People v. Emmons* (1908) 7 Cal. App. 685, 95 Pac. 1032.

Delaware.—*State v. Deputy* (1900) 3 Penn. 19, 50 Atl. 176.

Idaho.—*State v. Goodrich* (1921) 33 Idaho, 654, 196 Pac. 1043.

Illinois.—*Aneals v. People* (1890) 134 Ill. 414, 25 N. E. 1022. See also *Blanchard v. Blanchard* (1901) 191 Ill. 450, 61 N. E. 481; *Phenix v. Castner* (1883) 108 Ill. 207. Compare *Aurora v. Scott* (1899) 82 Ill. App. 616, affirmed in (1900) 185 Ill. 539, 57 N. E. 440.

Indiana.—See *Ford v. State* (1887) 112 Ind. 373, 14 N. E. 241.

Iowa.—*Stewart v. Chadwick* (1859) 8 Iowa, 463, 13 Mor. Min. Rep. 236. Compare *Lucas v. Flinn* (1872) 35 Iowa, 9.

Kentucky.—*Horner v. Com.* (1897) 19 Ky. L. Rep. 710, 41 S. W. 561.

Minnesota.—See *State v. Dee* (1869) 14 Minn. 35, Gil. 27. Compare *Goss v. Goss* (1907) 102 Minn. 346, 113 N. W. 690.

Mississippi.—*Newcomb v. State* (1859) 37 Miss. 383.

Missouri.—*State v. Downs* (1886) 91 Mo. 19, 3 S. W. 219; *Bates v. Holladay* (1888) 31 Mo. App. 162.

Nebraska.—*Davis v. State* (1897) 51 Neb. 301, 70 N. W. 984.

North Carolina.—*Edwards v. Sullivan* (1848) 30 N. C. (8 Ired. L.) 302; *State v. Dickerson* (1887) 98 N. C. 708, 3 S. E. 687; *Re Craven* (1915) 169 N. C. 561, 86 S. E. 587. See also *Burnett v. Wilmington, N. & N. R. Co.* (1897) 120 N. C. 517, 26 S. E. 819.

Oregon.—*State v. Stewart* (1883) 11 Or. 52, 4 Pac. 128. See also *State v. Ellsworth* (1896) 30 Or. 145, 47 Pac. 199.

Texas.—*Booker v. State* (1878) 4 Tex. App. 564; *Mitchell v. State* (1897) 38 Tex. Crim. Rep. 170, 41 S. W. 816; *Nite v. State* (1899) 41 Tex. Crim. Rep. 340, 54 S. W. 763; *Galveston, H. & S. A. R. Co. v. La Prelle* (1900) 22 Tex. Civ. App. 593, 55 S. W. 125; *Good v. Texas & P. R. R. Co.* (1914) — Tex. Civ. App. —, 166 S. W. 670; *Timmins v. State* (1918) 2 Tex. Crim. Rep. 263, 199 S. W. 1106. See also *Jenkins v. State* (1895) 34 Tex. Crim. Rep. 201, 29 S. W. 1078. Compare *Cockrell v. State* (1910) 60 Tex. Crim. Rep. 124, 131 S. W. 221; *Burnaman v. State* (1913) 70 Tex.

Crim. Rep. 361, 46 L.R.A. (N.S.) 1001, 159 S. W. 244.

Vermont.—*State v. Glynn* (1879) 51 Vt. 577; *State v. Bardelli* (1905) 78 Vt. 102, 62 Atl. 44. Compare *Pierce v. Gilson* (1837) 9 Vt. 216; *State v. Goodrich* (1847) 19 Vt. 116, 47 Am. Dec. 676; *Ellsworth v. Potter* (1869) 41 Vt. 685.

Virginia.—*Davis v. Franke* (1880) 33 Gratt. 413. See also *Langhorne v. Com.* (1882) 76 Va. 1012.

Wisconsin.—*Baker v. State* (1887) 69 Wis. 32, 33 N. W. 52; *Ferguson v. Truax* (1908) 136 Wis. 637, 118 N. W. 251; *Pfeiffer v. Chicago & M. Electric R. Co.* (1916) 163 Wis. 317, 156 N. W. 952. Compare *Martin v. Barnes* (1858) 7 Wis. 239; *Martineau v. May* (1864) 18 Wis. 54.

England.—*Queen's Case* (1820) 2 Brod. & B. 284, 129 Eng. Reprint, 976, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183. See also *Thomas v. David* (1836) 7 Car. & P. 350.

In *Re Bedford* (1910) 158 Cal. 145, 110 Pac. 302, the material facts and the conclusion of the court were stated as follows: "Appellant sought to impeach a witness against him by proof of declarations and conduct tending to show an unfriendly feeling on the part of the witness toward appellant. The witness was not asked concerning these acts or declarations. There was therefore no foundation laid for the introduction of impeaching testimony of third persons, and the ruling excluding it was correct. It is necessary to lay the foundation for such evidence by calling the attention of the main witness to the alleged acts and declarations, and giving him an opportunity to explain them, as in the case of inconsistent statements."

So, in *State v. Goodrich* (1921) 33 Idaho, 654, 196 Pac. 1043, the court said: "We think . . . that where it is sought to show the bias of a witness by proof of his declarations to that effect, the evidence should be considered as impeaching in character, and should be governed as to the method of its production by Comp. Stat. § 8039. There is the same reason for calling the witness's attention to his former statements, with

opportunity to explain them, as there is with reference to any other statement made concerning which he has testified."

Similarly, in *Re Craven* (1915) 169 N. C. 561, 86 S. E. 587, it was said: "The attack on the witness . . . could not be made by showing his bias, without first directing his attention to the impeaching evidence, and recalling the circumstances, so that he might have an opportunity to admit, deny, or explain it."

In *Fagan v. Lentz* (1909) 156 Cal. 681, 105 Pac. 951, 20 Ann. Cas. 221, the facts of the case and the conclusion of the court were stated as follows: "Mrs. Minnie Tucker was a witness for plaintiff, but was not questioned and did not give any testimony as to her feelings toward either of the defendants, or as to the making of any statement tending to show hostility or bias. On the direct examination of defendant Charles W. Lentz, he was asked whether Mrs. Tucker did not, after some difficulty between her husband and himself, shake her hand and fist at him and say: 'I will give you all the court you want, before I get through with you.' An objection to this question was sustained. It is settled in this state that the same foundation as must be laid for introducing prior contradictory statements of a witness is equally necessary to the introduction of evidence of declarations showing hostility or ill feeling on the part of the witness, in other words, that before such evidence of hostile statements by the witness can be introduced, the witness so sought to be attacked must be asked as to the making of such statements. . . . The ruling of the trial court sustaining the objection to the question asked Mr. Lentz relative to Mrs. Tucker was in accord with this rule."

In *Baker v. Joseph* (1860) 16 Cal. 173, it was said: "It is unquestionable that where a witness is sought to be impeached by proof of contradictory statements, made or alleged to have been made by him, it must be brought to the knowledge of the witness what the precise matter of these

contradictions is, and the time and place of making them. This rule is based upon a principle of justice which requires that the witness have a fair opportunity of explaining what, without such explanation, might appear to be suspicious. But it is said that the same rule does not hold in regard to expressions of hostility or ill feeling on the part of the witness. It is argued that the value and weight of testimony, in some degree, depend upon the state of feeling of a witness; that a witness whose feelings are embittered against a party is not so worthy of credence as a witness standing indifferent; and that, therefore, proof of this state of unfriendly feeling is admissible as independent evidence affecting the testimony of the witness. This distinction is more plausible than sound. No mode of ascertaining the state of feeling of the witness exists, except that disclosed by the declarations or the acts of the witness sought to be impeached by these declarations. The same principle which assures to him the privilege of explanation when contradictory declarations are offered applies to assure him the right of explanation when declarations of hostility are sought to be introduced. In effect, it is attempted to be shown that the witness has asserted, directly or impliedly, something different from the present testimony; that whereas he professes or holds himself out to be an indifferent and impartial witness, testifying without prejudice or feeling, yet really and in fact he is a prejudiced witness, whose passions color his testimony. The weight of authority and the reason of the rule are as we have stated them. We can see no distinction between admitting declarations of hostility of the witness by way of impairing the force of his testimony, and admitting contradictory statements for the same purpose, so far as this rule is concerned; for in either case an opportunity should be given the witness to explain what he said. We understand this doctrine to be laid down by the best standards."

In *Hollingsworth v. State* (1890) 53

Ark. 387, 14 S. W. 41, the court said: "The appellant should have been permitted to prove that the witness had an interest and bias in the cause, by his statement disclosing it. Whether he could make such proof by those who heard the statement, without first interrogating the witness concerning it, we need not decide. Such would have been the better practice, and should be observed where it is practicable. That it must be followed we do not hold, for highest authorities upon the subject differ."

It has been held that the fact that there has been an open quarrel between the witness and a party may be shown without first questioning the witness. *Ellsworth v. Potter* (1869) 41 Vt. 685, wherein the court, following *Pierce v. Gilson* (1837) 9 Vt. 216, said: "It is true that a witness who is examined in open court may not be impeached by proving his declarations out of court, unless he is first particularly inquired of upon the subject. There is some reason for applying the same rule to mere proof of ill feeling which has only been evinced by unkind or threatening remarks about the party; but when there has been an open quarrel or a suit at law between the party and the adverse witness, it becomes a substantive fact, and may be proved like relationship, or interest in the event of the suit, without previous inquiry of the witness in regard to it. . . . The proof of such a difficulty, lawsuit, interest, or relationship is not, in the ordinary sense, impeaching testimony, although it may be considered in determining the credit to be given the witness. The inquiry is not collateral, but pertinent to the issue."

Where the plaintiff testified that the defendant, who had been called as a witness, had on the day before stated that he (defendant) would beat the plaintiff if it cost him \$25,000, and immediately afterward the defendant took the stand as a witness and gave his version of the alleged statement, the appellate court was of the opinion that the admission of the evidence as to the statement, without laying a foundation therefor, could not have

been in any event prejudicial. *Goss v. Goss* (1907) 102 Minn. 346, 113 N. W. 690, wherein the court said: "The statement of the defendant complained of was admissible as independent evidence tending to show such feeling and bias on the part of the witness with reference to the pending suit as to affect his credibility. . . . The extent to which such evidence shall be received is a question resting largely in the discretion of the trial court. Query: Is it necessary in any case to lay a foundation for the admission of such evidence by first calling the witness, especially if he be a party, and interrogating him in reference to it?"

A corrupt motive for testifying, like other facts showing bias, cannot, in jurisdictions where the majority rule prevails, be proved by independent testimony, without laying a foundation by cross-examining the witness whose motive is to be proved. *People v. Gardner* (1893) 98 Cal. 127, 32 Pac. 880; *Good v. Texas & P. R. R. Co.* (1914) — Tex. Civ. App. —, 166 S. W. 670; *Timmins v. State* (1917) 82 Tex. Crim. Rep. 263, 199 S. W. 1106; *Davis v. Franke* (1880) 33 Gratt. (Va.) 413; *Ferguson v. Truax* (1908) 136 Wis. 637, 118 N. W. 251; *Queen's Case* (1820) 2 Brod. & B. 284, 129 Eng. Reprint, 976, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183. Compare *Martin v. Barnes* (1858) 7 Wis. 239.

Thus, in *Good v. Texas & P. R. R. Co.* (1914) — Tex. Civ. App. —, 166 S. W. 670, supra, it was held that independent testimony that a witness had received money for his testimony was not admissible in the absence of a foundation by questioning the witness as to the transaction, though the witness had left the county after giving his testimony and could not be recalled.

In *Martin v. Barnes* (1858) 7 Wis. 239, the defendant offered to prove by independent testimony that an agreement was made between one of the plaintiffs and a physician who testified in the case, that if he would give false testimony in favor of the plaintiff the suit would be prosecuted for the benefit of both. The court held

that it was not necessary to call the physician's attention to the alleged agreement before independent testimony thereof was introduced. In a later Wisconsin case, however, on a state of facts not materially different from those in the case last cited, it was held that the attention of the witness had to be called to his alleged offer to testify falsely before independent evidence thereof was admissible. *Ferguson v. Truax* (1908) 136 Wis. 637, 118 N. W. 251.

In an action against a city for damages for injuries arising from defects in a street caused by the construction of a sewer, the plaintiff, in rebuttal of the affidavit of one of the contractors as to the condition of the street, offered in evidence a part of the contract between the city and the contractors for the building of the sewer, which showed that they had agreed to save the city from all damages to person or property because of injuries received by the work which the contractors were doing, and to defend the city against any suit for any such injuries, and to pay any judgment rendered against the city in any such suit. The contract was offered to discredit the witness by showing his interest in the event of the suit. The appellate court said: "The offer was expressly limited to that purpose. The objection urged is that such evidence was not competent till the witness had been cross-examined upon the subject and denied his interest, and that when the plaintiff agreed to admit the affidavit to avoid a continuance he waived the right to cross-examine, and therefore put himself in a position where he could not impeach or discredit the witness. It is true, statements by the witness, either oral or in writing, contradictory to his evidence, cannot in such cases be shown, because the foundation therefor can only be laid by a cross-examination. . . . If Lakin [the witness] had been present and had been cross-examined upon the subject of his interest, while he could have been asked whether he had entered into a contract with the city, yet a question calling for the contents of the writ-

ing would have been objectionable; and if an objection had been interposed that the writing furnished the best evidence of its provisions, that objection must have been sustained. Notwithstanding the presence of the witness, the objection would have driven plaintiff to prove Lakin's interest by the contract itself. Therefore a cross-examination of said witness was not necessary in order to show his interest." *Aurora v. Scott* (1899) 82 Ill. App. 616, affirmed in (1900) 185 Ill. 539, 57 N. E. 440.

It seems that if by inadvertence or misapprehension counsel fails to interrogate a witness as to alleged hostile declarations before introducing other evidence of them, the witness may be recalled and examined for that purpose. *State v. Dickerson* (1887) 98 N. C. 708, 3 S. E. 687.

In *Martineau v. May* (1864) 18 Wis. 54, the court said: "Where it appears, as it does here, that the witness thus sought to be discredited, though not previously interrogated, had not departed the court, but was afterwards recalled and testified as fully upon the subject as he desired, there is nothing in the mere disregard of the order of time in which the two witnesses should have been heard that would justify a reversal of the judgment. It appears, in such a case, that the party and the witness had all the benefit which a strict compliance with the rule could have given."

The objection that no foundation was made for impeaching the testimony of a witness by evidence of bias cannot be raised for the first time on appeal. *Goss v. Goss* (1907) 102 Minn. 346, 113 N. W. 690.

Nor can such objection be held to have been included in the objection that the evidence was insufficient and immaterial. *Ibid.*

In a carefully considered opinion by English judges in answer to questions referred to them by the House of Lords, it has been determined that no distinction should be made between an act showing bias or corruption on the part of a witness and a statement showing such bias or corruption. See *Queen's Case* (1820) 3

Brod. & B. 284, 129 Eng. Reprint, 976, 11 Eng. Rul. Cas. 183, wherein Abbott, Ch. J., speaking for the judges, said: "The questions proposed by your lordships comprise not only declarations made by a witness, but also, in the language of the first of those questions, 'acts done by him to procure persons corruptly to give evidence in support of the prosecution;' and in the language of the latter question, 'a discovery that the witness has corrupted or endeavored to corrupt another person to give false testimony in such cause.' My lords, we understand the acts thus mentioned to be acts occurring in the ordinary mode and usual course wherein such transactions are proved in common experience to take place, because we presume, if the questions had related to an act done in an extraordinary and unusual manner, our attention would have been directed to the special mode and circumstances of the act, by the frame and language of the questions. Now, such acts of corruption are ordinarily accomplished by words and speeches; an offer of money or other benefit derives its entire character from the purpose for which it is made, and this purpose is notified and explained by words; so that an inquiry into the act of corruption will usually be, both in form and effect, an inquiry as to the words spoken by the supposed corrupter; and words spoken for such a purpose do, in our opinion, fall within the same rule and principle, with regard to the course of proceeding in our courts, as words spoken for any other purpose; and we do not, therefore, perceive any solid distinction with regard to this point between the declarations and the acts mentioned in the questions proposed to us. It will be obvious that the observations regarding convenience and inconvenience, which we have taken the liberty to offer to your lordships as to the proof of words, are alike applicable to the proof of acts. Nice and subtle distinctions are avoided in our courts as much as possible, especially in matters of practice, on account of the delay, confusion, and uncer-

tainty, to which such distinctions naturally lead. For these reasons, my lords, we have thought ourselves called upon to answer both questions wholly in the negative."

In *Burnaman v. State* (1913) 70 Tex. Crim. Rep. 361, 46 L.R.A.(N.S.) 1001, 159 S. W. 244, an attempt was made to reconcile the conflicting views on the question herein discussed, by showing that it was only where evidence of a prior statement of hostility to a party was in conflict with his testimony at the trial that a foundation was required by cross-examination before his hostility could be shown by another witness. The court said: "In 30 Am. & Eng. Enc. Law, 2d ed. 1127, it is said: 'In some states evidence showing that a witness is interested in the result of litigation, or otherwise biased in favor of or against one of the parties, is admissible without first examining the witness on the subject'—citing the decisions of several states so holding. In the same section, however, it is further stated: 'The weight of authority is to the contrary; at least, where the bias is sought to be shown by the declarations of the witness himself.' Again, in 40 Cyc. p. 2676, it is laid down: 'A party seeking to show interest or bias of an adverse witness is not confined to cross-examination, but may introduce independent evidence for the purpose'—citing many decisions, some the same as cited in 30 Am. & Eng. Enc. Law, above noted. Again, in the following section the further rule is laid down indicating that the foundation for this must first be laid by asking the witness himself. We think it is evident that the two rules are not in conflict. The latter proposition in both of these authorities indicates that the latter rule is where it is attempted by independent testimony to show such bias, interest, etc., by the witness having made statements contradicting his testimony on the trial. The distinction in the books is not always kept clear. So, in this case, if it had been attempted to impeach the witness Philip Burnaman by showing by the witness Lee that he

had made statements theretofore in contradiction of his testimony on the trial, and such had been attempted to be introduced, then, as a foundation therefor, it would have been necessary to have asked the witness Philip Burnaman himself such questions before such contradictory statements could have been proven." The later Texas cases, however, do not support the principle stated in the quotation from *Burnaman v. State* (Tex.) *supra*.

Thus, in *Timmins v. State* (1917) 82 Tex. Crim. Rep. 263, 199 S. W. 1106, it was held not to be error to exclude independent testimony tending to show an agreement by a witness, one Reese, to testify against the defendant, if a prosecution against Reese was discontinued, where it did not appear that Reese had been examined as to the agreement.

b. Sufficiency of foundation.

It is necessary, in order to lay a sufficient foundation on which to show that a witness is hostile or biased, directly to question the witness as to the precise statements to be used against him and the time when and place where they are alleged to have been made. *Wright v. State* (1918) 133 Ark. 16, 201 S. W. 1107; *Baker v. Joseph* (1860) 16 Cal. 173; *Silvey v. Hodgdon* (1874) 48 Cal. 185; *Ash v. Soo Sing Lung* (1918) 177 Cal. 356, 170 Pac. 843; *State v. Ellsworth* (1896) 30 Or. 145, 47 Pac. 199; *State v. Glynn* (1879) 51 Vt. 577; *State v. Bardelli* (1905) 78 Vt. 102, 62 Atl. 44; *Ferguson v. Truax* (1908) 136 Wis. 637, 118 N. W. 251; *Pfeiffer v. Chicago & M. Electric R. Co.* (1916) 163 Wis. 317, 156 N. W. 952. See also *Blanchard v. Blanchard* (1901) 191 Ill. 450, 61 N. E. 481. Compare *People v. Turner* (1884) 65 Cal. 540, 4 Pac. 553.

In *Wright v. State* (Ark.) *supra*, the court said: "It may also be stated in this connection that, before witnesses can be called to show that statements have been made out of court tending to show bias or prejudice on the part of the witness, it is necessary to lay the proper foundation by calling his attention to the

time, place, and person involved in the supposed contradiction. Then, if he denies having made the declaration or done the act imputed, the contradictory evidence becomes proper. This is done for the purpose of refreshing the mind of the witness and to give him an opportunity to admit having made the statement attributed to him, and, in the case of inconsistent statements, to explain the declarations intended to be used against him. In this way the witness has a fair opportunity to explain what, without such explanation, might appear to be suspicious. It will be observed that this mode of assailing the witness is not an attack on his general credit as a witness, but is an attack upon his credit in the particular case. The scope of such attempts should be largely in the discretion of the trial court, but the right itself may not be denied in the discretion of the court. If the court should exclude the question because it did not contain a particular statement of the time, place, and occasion when such impeaching declarations were made, counsel should be informed so that he might lay the proper foundation."

So, in *Ash v. Soo Sing Lung* (1918) 177 Cal. 356, 170 Pac. 843, the court said: "The particular question objected to called for declarations of the witness Morgan, and it is a well-settled rule that, when a witness is sought to be impeached by evidence of his declarations showing his interest in the case, the foundation for such an inquiry must first be laid by directing the attention of the former witness to the particular statements sought to be proven, with such circumstances of time, place, and persons present as will give the witness intended to be impeached a full opportunity for explanation."

In *Pfeiffer v. Chicago & M. Electric R. Co.* (1916) 163 Wis. 317, 156 N. W. 952, an action for death by wrongful act, it was held that independent testimony as to remark by a witness for the defendant indicating personal animosity toward the deceased and his family was not admissible unless a foundation for it had been laid by

calling the attention of the witness sought to be impeached to the particular remark.

In *Blanchard v. Blanchard* (1901) 191 Ill. 450, 61 N. E. 481, the court said: "The witness, although he may have answered that he has no ill will or prejudice against the party, may be asked whether he has not made certain statements or declarations, (specifying them) tending to prove such ill will or prejudice—and this, too, whether the proper foundation, by specifying time and place, has been laid or not; for the witness may admit having made such statements or declarations, in which case no impeaching witnesses to prove them need be called. It is, of course, true that before impeaching witnesses can be called to prove that the witness did make such statements or declarations when he has denied that he made them, the proper foundation must be laid before their testimony can be heard; but the failure to lay such foundation is not, and for the reason above given, a sufficient ground for sustaining an objection to the question, unless, indeed, it appears to the court that the witness is unable to answer without having his attention called to time and place, or to other circumstances which would be likely to refresh his recollection."

On a prosecution for assault with intent to commit murder, a part of the cross-examination of a witness for the defense was stated by the court as follows: "Paul Lenneux . . . was asked the following question: 'Did you not state, in the month of September, in the presence of William Knowles and James Robinson, on the way between town here and the race track, that you would go into court and swear anything at all that would injure the Thomases?' The answer was, 'No, sir.' For the purpose of contradicting or impeaching the witness, the prosecution afterwards called William Knowles and interrogated him on the subject of the supposed conversation. He was asked: 'Did you have a conversation with Paul Lenneux during the fair week, on the road between Quincy and the

fair grounds, in the presence of James Robinson and others?' Answer: 'The conversation was directed to James Robinson. I heard it.' Question: 'What was the conversation?' To the question the defendant objected, upon the ground that no proper foundation had been laid. The objection was overruled and exception noted. Answer: 'He said he would do anything to injure the Thomases, or do anything he could to help Turner.'" On appeal the court said: "The objection that a proper foundation had not been laid for asking the question put to the impeaching witness can only mean that the question put to the witness whom it was sought to impeach was not sufficiently definite. We think it was, and as that is the sole ground of the objection, it was not error to overrule it." *People v. Turner* (Cal.) supra.

II. *View that foundation is not necessary.*

In a number of jurisdictions, on the other hand, the rule is that no foundation need be laid before introducing evidence to show that a witness is hostile or biased.

Florida.—*Alford v. State* (1904) 47 Fla. 1, 36 So. 436. See also *Pittman v. State* (1906) 51 Fla. 94, 8 L.R.A. (N.S.) 509, 41 So. 385; *Telfair v. State* (1908) 56 Fla. 104, 47 So. 863.

Georgia.—*Lundy v. State* (1916) 144 Ga. 833, 88 S. E. 209. Compare *Gardner v. State* (1888) 81 Ga. 144, 7 S. E. 144.

Louisiana.—*Chavigny v. Hava* (1910) 125 La. 710, 51 So. 696, overruling in effect *State v. Goodbier* (1896) 48 La. Ann. 770, 19 So. 755, and *State v. Angelo* (1880) 32 La. Ann. 407.

Maine.—*State v. Blake* (1845) 25 Me. 350; *New Portland v. Kingfield* (1867) 55 Me. 172.

New Hampshire.—*Titus v. Ash* (1851) 24 N. H. 331; *Cook v. Brown* (1857) 34 N. H. 471.

New York.—*People v. Brooks* (1892) 131 N. Y. 321, 30 N. E. 189, affirming with disapproval of ruling on this point (1891) 61 Hun, 619, 39 N. Y. S. R. 827, 15 N. Y. Supp. 362;

Brink v. Stratton (1903) 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148; *People v. Lustig* (1912) 206 N. Y. 162, 99 N. E. 183; *People v. Michalow* (1920) 229 N. Y. 325, 128 N. E. 228. See also *Novogrucky v. Brooklyn Heights R. Co.* (1908) 125 App. Div. 715, 110 N. Y. Supp. 28. Compare *Sanford v. Shafer* (1888) 50 Hun, 600, 18 N. Y. S. R. 665, 2 N. Y. Supp. 357; *People v. Mallon* (1906) 116 App. Div. 425, 101 N. Y. Supp. 814, affirmed without opinion on ground that no substantial right was affected, in (1907) 189 N. Y. 520, 81 N. E. 1171.

South Dakota.—See the reported case (*STATE v. SMITH*, ante, 982).

Tennessee.—See *Creeping Bear v. State* (1904) 113 Tenn. 322, 87 S. W. 653.

It has been held in one New York case that the rule that a foundation is unnecessary before showing that a witness is biased governs those cases only wherein acts of the witness are relied on as evidence of hostility or bias, and not those wherein it is sought to introduce declarations of alleged hostility or bias. *People v. Mallon* (1906) 116 App. Div. 425, 101 N. Y. Supp. 814, wherein the New York cases were analyzed, and an examination of a witness was held to be necessary before introducing evidence of utterances of his alleged to indicate hostility. The court said: "There are two rules firmly established by the decisions in this state. . . . The second rule is that the hostility of a witness towards a party, against whom he is called, may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. It would have been competent, therefore, without previous cross-examination upon the subject, to have proved facts tending to establish hostile relations between the witness O'Brien and the defendant. The question is whether, under this rule, mere utterances of the witness claimed to show hostility can be proved without preliminary interrogation of the witness himself as to those utterances. The reason for the rule

requiring, in the case of mere contradictory statements, that there should be a preliminary interrogation, is primarily based upon the uncertainty of hearsay evidence. When one person undertakes to say, after more or less lapse of time, what another person said, the accuracy of the repetition depends upon the correct understanding, in the first instance, of the statement; its accurate preservation in the memory of the testifying witness; its accurate reproduction upon the trial, together with the circumstances under which it was first uttered, and its relation to the rest of the transaction of which it purports to be a part. With these numerous chances for misunderstanding, forgetfulness, and misrepresentation, it has always been thought, in this state at least, that it was due not only to the convenience of trials and the interest of justice, but also to the rights of the witness, that he should have an opportunity of tendering his version of the matter in the first instance. Therefore, preliminary interrogation of a witness as to contradictory utterances has always been required. There does not seem to be any reason why the same rule should not apply to mere utterances claimed to indicate hostility. A careful examination of the cases in this state has failed to discover the establishment of a contrary rule. In *People v. Brooks* (1892) 131 N. Y. 321, 30 N. E. 189, . . . the question of utterances was not involved. The questions were addressed to the defendant, a witness in her own behalf, and were direct as to facts, as follows: 'Now state whether or not Charlotte [a previous witness] was friendly to you or unfriendly.' 'Did you and Charlotte have frequent difficulties during that time?' 'Did Charlotte assault you on other occasions previous to the fire?' And it was in regard to such questions that the court held that no preliminary inquiries of the witness were necessary. So, in *Brink v. Stratton* (1903) 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148, where the rule laid down in the *People v. Brooks* Case, supra, was

reasserted, the questions ruled on and held proper were not as to utterances, but as to facts. In *Starks v. People* (1847) 5 Denio (N. Y.) 106, which was the case of an utterance tending to show hostility, the alleged hostile witness was, upon cross-examination, first interrogated thereon, and such was the case also in *Newton v. Harris* (1852) 6 N. Y. 345. In *Stacy v. Graham* (1856) 14 N. Y. 492, the testimony of a witness had been taken *de bene esse*, and was read at the trial. After the plaintiffs had rested, the defendant offered to prove conversations with that witness after the examination, in which he confessed that his evidence was false, that he had given it under threats, that he regretted what he had to swear to, etc. The court of appeals sustained the rejection of the testimony, and expressly overruled *People v. Moore* (1836) 15 Wend. (N. Y.) 419, saying: "The principle on which the practice essentially rests is that both the party and the witness are entitled of right to any explanation which the latter can give of the statements imputed to him." In *Lee v. Chadsey* (1866) 3 Abb. App. Dec. (N. Y.) 43, where evidence was rejected that a witness had said that he would swear falsely in a case of usury, the court said: "The same foundation must be laid for the reception of evidence of particular declarations or acts of a witness of the nature above stated, as in the case of evidence of his contradictory statements and for the same reasons." In *Schultz v. Third Ave. R. Co.* (1882) 89 N. Y. 242, where the rule was again stated as to the competency of evidence showing the hostility of a witness, the witness had been first interrogated in his cross-examination as to his conversation. In *Garnsey v. Rhodes* (1893) 138 N. Y. 461, 34 N. E. 199, the questions held to have been erroneously ruled out were those addressed in cross-examination to the witness himself for the purpose of showing his own hostility. In *People v. Webster* (1893) 139 N. Y. 73, 34 N. E. 730, there was a preliminary cross-examination of the witness as to matters subsequently proved. In *Lamb v.*

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Lamb (1895) 146 N. Y. 317, 41 N. E. 26, proof of a quarrel and dispute was admitted between the parties to the action. In *Gumby v. Metropolitan Street R. Co.* (1901) 65 App. Div. 38, 72 N. Y. Supp. 551, 11 Am. Neg. Rep. 483, affirmed without opinion in (1902) 171 N. Y. 635, 63 N. E. 1117, there was a preliminary cross-examination of the alleged hostile witness."

The distinction made in *People v. Mallon* (1906) 116 App. Div. 425, 101 N. Y. Supp. 814, has not been recognized by the court of appeals in subsequent cases, though it is not clear that the impeaching evidence in any of the later cases related to mere statements of hostility rather than to acts of hostility. As was pointed out in an English case, an act of corruption or hostility is frequently inseparable from a statement showing hostility. See the excerpt from *Queen's Case* (1820) 2 Brod. & B. 284, 129 Eng. Reprint, 976, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183, set out, *supra*, I. In *People v. Michalow* (1920) 229 N. Y. 325, 128 N. E. 228, the defendant sought to show that an important witness for the state was trying to influence the testimony of other witnesses against the defendant, and to that end was instructing them as to the defendant's appearance so that they could identify him. It was held to be error to require a foundation to be laid by questioning the state's witnesses as to the conversation relating to the testimony they should give, or the appearance of the defendant, before admitting independent testimony as to that conversation.

In *People v. Lustig* (1912) 206 N. Y. 162, 99 N. E. 183, the defendant's counsel asked a witness to relate a conversation between him and one of the principal witnesses for the state. When an objection was raised on the ground that the question was immaterial, irrelevant, and incompetent, the counsel for the defendant stated that he desired to show the hostility of the state's witness. The objection to the question was sustained on the ground that the state's witness had not been questioned as to the conversation. In holding that the ruling of

the trial court was error, the court of appeals said: "The rule is settled in this state, by repeated decisions of this court, that the hostility of a witness towards a party against whom he is called may be proved by any competent evidence. As it was stated in *People v. Brooks* (1892) 131 N. Y. 325, 30 N. E. 189, the hostility 'may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. There can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him.'"

In the reported case (*STATE v. SMITH*, ante, 982) it is held that independent testimony to the effect that sums of money have been paid to procure the testimony of a witness may be introduced without laying a foundation therefor by cross-examining the witness whose credibility is thus impeached.

Evidence that a witness was the paramour of the defendant has been held to be admissible in a Georgia case, without first laying a foundation for the impeachment of the witness. *Lundy v. State* (1916) 144 Ga. 833, 88 S. E. 209. The court cited Civil Code 1910 (§ 5878), which provides that the state of a witness's feelings towards the parties, and his relationship, may always be proved for the consideration of the jury. Compare *Gardner v. State* (1888) 81 Ga. 144, 7 S. E. 144, wherein the testimony impeaching the witness for bias also implicated the defendant in blackmail, and was held to be inadmissible chiefly on the ground that it was thus prejudicial to him, though the fact that no foundation had been laid for the testimony was also mentioned.

III. *View in Alabama.*

In Alabama, there is much uncertainty as to the need for cross-examining a witness as to bias or prejudice before impeaching his credibility on that ground by other witnesses. A distinction is apparently made between cases in which the bias or prejudice is shown by acts and those

in which it is shown by previous statements. In the latter class of cases it is held that the foundation must be laid, but it seems that in the former class impeachment for bias or prejudice may be made by other witnesses without laying such foundation. See *Weaver v. Traylor* (1843) 5 Ala. 564; *Jones v. State* (1884) 76 Ala. 8; *Haralson v. State* (1886) 82 Ala. 47, 2 So. 765; *Allen v. Fincher* (1914) 187 Ala. 599, 65 So. 946; *Sexton v. State* (1915) 13 Ala. App. 84, 69 So. 341.

In *Allen v. Fincher* (1914) 187 Ala. 599, 65 So. 946, an action for slander, it was held that where there was evidence that a witness had prosecuted the defendant for the alleged slander, another witness might properly be questioned as to the prosecution to show the hostility of the former witness. Although it is not clear whether the former witness had been examined as to his participation in the criminal action, and the principal question discussed was the extent of the impeaching testimony and not the foundation for it, the supreme court was apparently of the opinion that under the later Alabama decisions the laying of such a foundation was unnecessary. The court said: "As the multiplication of issues is not desirable, it would seem that the better rule would require the party against whom a witness is testifying to develop, on cross-examination, the fact of the bias of the witness. If, on the cross-examination, the witness admits the facts showing his bias, then there should, at once, be an end of the matter. If he, on such cross-examination, denies the facts showing such bias, then the party against whom he has testified should be—and in all courts, including our own, is—allowed to show by other witnesses the existence of such facts. Indeed, this seems to have been the rule which this court had in mind in the well-considered cases of *McHugh v. State* (1858) 31 Ala. 320, and *Fincher v. State* (1877) 58 Ala. 215; and this seems to have been the custom followed in most of the cases which, on appeal, have found their way into this court. This court, however, in the case of *Jones v. State*

(1884) 76 Ala. 8, in discussing this subject, said: 'It is a common mode of discrediting a witness for the prosecution to ask him, on cross-examination, whether he has not expressed feelings of animosity or revenge towards the prisoner, and so, of a witness for the prisoner, whether he has not previously evinced a feeling of partiality or friendliness for him. . . . There is no reason why the fact indicating such bias may not be as well proved in any other legal way, because it is the fact, and not its mode of proof, which goes to the root of the witness's credibility.' The same doctrine was announced by this court in *Haralson v. State* (1886) 82 Ala. 47, 2 So. 765, and in that case a judgment was reversed because the trial court refused to allow a witness for the defendant to testify to a statement made to him by a witness who had testified in the case for the state, which tended to show that such witness for the state was unfriendly towards the defendant, although the defendant on the cross-examination had not interrogated such witness for the state about the particular statement. While for administrative purposes, the better rule on the subject is, in our opinion, the one which we have above indicated, and while the question is one only of practice, our predecessors, in the cases above cited, have declared the rule in this state to be as we have quoted it. The doctrine of *stare decisis* is, and should be, of great force, even as to matters of mere practice, and for that reason we are of the opinion that the trial court should have allowed the defendant to ask, and the witness *Copeland* to answer, the question by which the defendant sought to elicit the testimony which we have had under consideration. *Hereford v. Combs* (1899) 126 Ala. 369, 28 So. 582. It is better for us to follow decisions which are not in express conflict with any well-fixed principle of law, than to create uncertainty and doubt by overruling them simply because we regard them as not in harmony with a rule which has been adopted in many of our states—and usually followed here—

simply as an administrative aid to the courts in keeping before juries the true issues which they are impaneled to try."

In *Jones v. State* (1884) 76 Ala. 8, from which the court quoted in *Allen v. Fincher*, *supra*, it was stated that the order of the introduction of evidence showing a witness for the defendant in a homicide case to have been unfriendly to the deceased was immaterial. Apparently the court intended by its statement that the evidence as to the hostility of the defendant's witness to the state might be introduced before the latter had testified.

In *Weaver v. Traylor* (1843) 5 Ala. 564, the court said: "But one question arises under the assignment of errors. That question is, whether it was proper to permit evidence to go to the jury, to impeach the credibility of the witness, *Laughridge*, on account of declarations of his interest in the matter in controversy, made before his deposition was taken. The general rule is 'that, whenever the credit of a witness is to be impeached, by proof of anything he has said or declared or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said or declared or done that which is intended to be proved.' If the witness admits the declarations or acts, he has it in his power to explain, or give the reasons which go in exculpation of his conduct, and the whole matter is brought fairly before the court. If he deny the declarations or acts imputed to him, then witnesses may be called to contradict him. This rule is extended so far that 'although the fact to be adduced in order to impeach the witness's testimony be not discovered until after the conclusion of the cross-examination, the rule still holds; and evidence cannot be given for the purpose of thus impeaching his testimony; without previous examination of the witness, even although the witness should have departed the court, and cannot be brought back, after the discovery has been made.' See 3 *Starkie*, Ev. 1753, 1754, 1756. This rule is equally necessary to

protect the witness from unjust aspersion, and to protect the interest of the party who relies on his testimony."

It has been held in Alabama that a witness whose credibility is to be impeached on the ground of a statement showing hostility to a party should, on cross-examination, be questioned as to the state of his feelings toward the party at the time the testimony is given, as well as at the time and place of the statement showing hostility. *Sexton v. State* (1915) 13 Ala. App. 84, 69 So. 341, writ of certiorari denied in (1915) 195 Ala. 697, 70 So. 1014. In that case the court distinguished cases in which the hostility of the witness was proved by testimony as to acts showing hostility or bias, saying: "The witness to be impeached should be interrogated on cross-examination as to the state of his feelings toward the party at the time of giving his testimony. . . . The reason for this is that the impeaching evidence relates to the feelings that would tend to bias the testimony of the witness at the time it is given, and not at some time in the past, and this course affords the witness an opportunity to explain his previous declarations. Such requirement imposes no additional burden upon the party seeking to impeach the witness, and exacts fairness to the witness and the party who is relying upon the testimony of the witness. When the evidence offered is of some independent fact not involving a previous contradictory statement of the witness, such as that the witness had had a previous difficulty with the party against whom he was called, as in *Jones v. State*, *supra*, or that the witness had been active in a previous prosecution against such party, as in *Allen v. Fincher* (1914) 187 Ala. 599, 65 So. 946, *supra*, or when the evidence is not to impeach the declaration of the witness made on the stand, but is offered for the purpose of corroboration and to show the degree of his bias, as in the cases of *Haralson v. State* (1886) 82 Ala. 47, 2 So. 765, *supra*, and *Yarbrough v. State* (1882) 71 Ala. 376, it is not necessary to lay such

predicate." If the witness on cross-examination admits that he entertains unfriendly feelings toward a party, then it appears that it is not necessary in Alabama to question him as to a particular statement showing hostility, or the time and place of its utterance, as a prerequisite to proof of such statement of hostility by another witness. *Haralson v. State*, *supra*. In that case the prosecutor, who appeared as a witness, testified, among other things, that he was not friendly to the defendant, and that he had employed counsel to aid in the prosecution of the case. The defendant asked another witness whether he had not heard the prosecutor say that he could not give the defendant justice. The ruling of the trial court in sustaining an objection to the question was held to be error, the court saying: "The question, we think, should have been allowed, and its exclusion was error. It tended to corroborate the admission of the prosecutor that he entertained unfriendly feelings towards the defendant, of so hostile a character as to bias his testimony. It may, if answered affirmatively, have disclosed a fact which affected the credit of the witness in this particular case. The purpose was not to impeach the prosecutor by proof that he had made a statement out of court contrary to what he testified at the trial. This could not be done without first having laid the necessary predicate by asking him as to the time, place, and person involved in the alleged contradiction. The evidence offered does not fall within the requirements of this principle. The fact, responsive to and disclosed by the answer, could clearly have been proved by the prosecutor; and why not, therefore, by any other competent witness? It would have been competent, of course, to permit the prosecutor to be re-examined for the purpose of explaining, or denying the declaration attributed to him. *Yarbrough v. State*, *supra*; *Burke v. State* (1882) 71 Ala. 377; *Bullard v. Lambert* (1866) 40 Ala. 204."

W. S. R.

GEORGE J. McQUADE et al.
v.

MARY M. WILCOX et al., Appts.

Michigan Supreme Court — July 19, 1921.

(— Mich. —, 183 N. W. 771.)

Record — effect — negative covenant.

1. The recording of deeds in a residential subdivision of a city, containing restrictive covenants which impose negative covenants on remaining land of the grantor, is constructive notice to future purchasers of remaining land of the grantor, so as to bind them with the conditions of the covenant.

[See note on this question beginning on page 1013.]

Covenant — building restrictions — mutuality.

2. One subdividing land for residential purposes, and inserting in his deed the restriction that the land granted shall be used for residential

purposes only, and providing that the conditions are for the benefit of all present and future owners of lots in this subdivision, bars himself from using other lots in the subdivision for other than residential purposes.

APPEAL by defendants from a decree of the Circuit Court for Oakland County in Chancery (Covert, J.) in favor of plaintiffs in a suit brought to enjoin defendants from selling and using certain property for any other than residence purposes. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Pelton & McGee and Peter B. Bromley, for appellant Wilcox:

The lots contained in the Oakland park subdivision were not restricted for residential purposes only.

Berry, Real Prop. 448; 23 Am. & Eng. Enc. Law, 2d ed. 478; Williams v. Lawson, 188 Mich. 88, 153 N. W. 1080; Casterton v. Plotkin, 188 Mich. 333, 154 N. W. 151.

The Shelbourn Company is not affected by any restrictions, even if such existed as to those purchasing with notice.

Williams v. Lawson, 188 Mich. 88, 153 N. W. 1080; Berry, Real Prop. p. 446.

There had been such a change in the character of the neighborhood as would warrant a court of equity in setting aside the restrictions.

Berry, Real Prop. § 367; 2 Devlin, Real Estate, 3d ed. § 850; Casterton v. Plotkin, *supra*.

Messrs. Finkelston & Lovejoy, for appellant company:

Restrictions on the use of property are not favored in law.

18 C. J. 387; Loomis v. Collins, 272 Ill. 221, 111 N. E. 999; James v. Irvine, 141 Mich. 380, 104 N. W. 631;

Williams v. Lawson, 188 Mich. 88, 153 N. W. 1080; Casterton v. Plotkin, 188 Mich. 333, 154 N. W. 151.

Covenants restricting the use of property are not binding upon purchasers who have no notice of the same.

Allen v. Detroit, 167 Mich. 464, 36 L.R.A.(N.S.) 890, 133 N. W. 317; Tiffany, Real Prop. § 348.

The record of a deed is constructive notice to those persons who claim title through such deed, and no purchaser is affected with notice of instruments not contained in the chain of title of their property.

Tiffany, Real Prop. 1912 ed. § 476; Meacham v. Blaess, 141 Mich. 253, 104 N. W. 579; Berry, Real Prop.

The mere existence of a binding line would not create a restriction which would be binding upon purchasers of property.

Bradley v. Walker, 188 N. Y. 291, 33 N. E. 1079; Zinn v. Sidler, 268 Mo. 680, L.R.A.1917A, 455, 187 S. W. 1172.

The general character of improvements is not notice.

Schadt v. Brill, 173 Mich. 650, 45 L.R.A.(N.S.) 726, 139 N. W. 878; Allen v. Detroit, 167 Mich. 464, 36 L.R.A.

(N.S.) 890, 133 N. W. 317; Casterton v. Plotkin, 188 Mich. 333, 154 N. W. 151; Williams v. Lawson, 188 Mich. 88, 153 N. W. 1080; James v. Irvine, 141 Mich. 380, 104 N. W. 631; DeGray v. Monmouth Beach Club House Co. 50 N. J. Eq. 329, 24 Atl. 388.

There is no rule in Michigan, or elsewhere, which puts a purchaser of a lot, the chain of title of which bears no restriction, on inquiry, by reason of extraneous facts.

Lambrecht v. Gramlich, 187 Mich. 256, 153 N. W. 834.

Messrs. Andrew L. Moore and John C. Brondige, for appellees:

The lots contained in Oakland park subdivision were restricted for residence purposes only until July 1st, 1935.

Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; Frink v. Hughes, 133 Mich. 63, 94 N. W. 601; Bagnall v. Young, 151 Mich. 69, 114 N. W. 674; Baxter v. Ogooshevitz, 205 Mich. 249, 171 N. W. 385; Hammond v. Hibbler, 168 Mich. 66, 133 N. W. 932; Davison v. Taylor, 196 Mich. 605, 162 N. W. 1033; Schadt v. Brill, 173 Mich. 647, 45 L.R.A. (N.S.) 726, 139 N. W. 878; Stewart v. Stark, 181 Mich. 412, 148 N. W. 393; Andre v. Donovan, 198 Mich. 256, 164 N. W. 543; Moore v. Curry, 176 Mich. 456, 142 N. W. 839.

There has been no such change in the character of the neighborhood as would warrant a court of equity in setting aside the restrictions.

Moore v. Curry, 176 Mich. 456, 142 N. W. 839; Stott v. Avery, 156 Mich. 674, 121 N. W. 825; Casterton v. Plotkin, 188 Mich. 343, 154 N. W. 151; Andre v. Donovan, 198 Mich. 256, 164 N. W. 543; Rosenzweig v. Rose, 201 Mich. 681, 167 N. W. 1008; Misch v. Lehman, 178 Mich. 225, 144 N. W. 556; Swan v. Mitshkun, 207 Mich. 70, 173 N. W. 529.

Fellows, J., delivered the opinion of the court:

In 1910 defendant Mary Millington Wilcox was the owner of 105 acres of farm land lying along Woodward avenue at the 10-mile road. It was over in Oakland county and near Royal Oak. She and her husband, an attorney then practising in Detroit, conceived the idea of platting a portion of it for a high-class residential subdivision. The plat was prepared and record-

ed. Its residential and restricted character was made the subject of advertisement and pointed out in conversation as an inducement to prospective purchasers. A general plan was adopted to make it a high-class restricted residential district. A considerable number of men, many of them with children growing up, desiring a home in such a district, purchased lots. Substantial homes were built, and an additional subdivision was platted adjoining it. To insure and preserve the residential character of the subdivisions, substantially uniform restrictions were inserted in the deeds executed by Mrs. Wilcox to the purchasers. We quote the restrictions found in the original conveyance of the lot now owned by plaintiffs McQuade: "It is agreed that said lot shall be used for residence purposes only; that only one (single) residence shall be placed thereon, the value of which shall be not less than \$3,000, the front wall thereof to be at least 50 feet from the front line of the lot, and the side wall not less than 20 feet from the side line of the lot, and all other buildings in the rear of the lot and at least 150 feet from the street line. A sewer may be made and perpetually maintained along the rear line of the lots in this block, whenever the owners of a majority of the frontage of lots so desire, for which each of the then owners of property adjoining said sewer line agrees to pay the pro rata part of its cost according to the frontage on said sewer line. These conditions are for the benefit of all present and future owners of property in this subdivision, and are to remain in force until July 1, 1935, and shall then terminate."

All of the deeds executed by Mrs. Wilcox are not in the printed record. Many of them were introduced in evidence in the court below. It is insisted by defendants' counsel that most or all of them use the word "block" instead of "subdivision" in the last sentence just quoted. We do not find this to be the case in the original deed to the property of

plaintiffs Stanton. The language there found is as follows: "These conditions are for the benefit of all present and future owners of property in this subdivision, and are agreed to by all such owners, and are to remain in force until July 1, 1935, and shall then terminate."

The original deeds through which plaintiff Hewitt and plaintiff Bogart claim use the word "block," but both of these lots are in the same block,—if it may be said there are blocks on the plat,—as the Wilcox lot, so that this difference in the word used becomes unimportant. As we understand the record, the deeds all contained substantially the same restrictions.

Lot 2 on the plat is a very large lot said to contain 4 acres. On it is the Wilcox home, built before the platting. It is a large substantial residence, and faces Woodward avenue. After substantially all the lots in the subdivision had been sold, and expensive residences had been erected and improvements made upon them, making the neighborhood a high-class residential district, all in conformity with the restrictions and without a breach by any of the purchasers or their grantees, Mrs. Wilcox on May 29, 1919, entered into a contract with one Ben B. Jacob, a real estate dealer of Detroit, to sell him the Wilcox home, together with part of lot 2, for \$47,500, to be used for restaurant or café purposes with this clause in the contract: "Music, dancing, and other legal amusements and uses are permitted." Mr. Jacob transferred the contract to the defendant the Shelbourn Company, a corporation organized for the purpose of owning and operating the restaurant. There seems to have been a fruitless attempt to adjust differences, and this bill was filed by resident owners to enforce the restrictions.

The testimony in this ample record is convincing that to allow the defendants to transfer the palatial Wilcox home into a restaurant, no matter of how high a grade, would

be subversive of every purpose prompting the restrictions, would reduce the value of plaintiffs' property, and that of other residents of the subdivision, thousands of dollars, and would destroy the high-class residential character of the neighborhood which induced the residents to move there and to expend their money in developing. We recognize the rule that, in construing restrictions, ambiguous expressions must be taken most strongly against those seeking to enforce them, but we perceive no ambiguity in the ones before us; hence no necessity to resort to rules of construction. By each deed executed by Mrs. Wilcox, she restrained the use to be made of the lot sold, and by accepting it each grantee, and the lot conveyed in each deed, became bound by these restrictions. By each of these deeds she covenanted that the restrictions were for the benefit of all present and future owners. She was the present owner of lot 2. By each deed she restricted the use to which the lot sold could be put, and by the same instrument restricted a different use of her own lot. The restrictions were mutual. Her grantees and the land conveyed were bound, and by the same instrument she and her residential lot were bound. When made, the restrictions were alike beneficial to her and her grantees, and she cannot now, having accepted the benefits of the restrictions, and the purchase price enhanced by them, disregard her own covenant and free her own land from its effect. Upon this record a clear case for the relief prayed is made against defendant Wilcox. We do not deem it necessary to review the law of building restrictions. Numerous cases involving them and the right to their enforcement will be found in the recent reports of this court. Among them, see *Allen v. Detroit*, 167 Mich. 464, 36 L.R.A. (N.S.) 890, 133 N. W. 317; *Erichsen v. Tapert*, 172 Mich. 457, 138 N. W. 330; *Frink*

Covenant—
building
restrictions—
mutuality.

v. Hughes, 133 Mich. 63, 94 N. W. 601; Misch v. Lehman, 178 Mich. 225, 144 N. W. 556; Schadt v. Brill, 173 Mich. 647, 45 L.R.A. (N.S.) 726, 139 N. W. 878; Moore v. Curry, 176 Mich. 456, 142 N. W. 839; Davison v. Taylor, 196 Mich. 605, 162 N. W. 1033; Swan v. Mithskun, 207 Mich. 70, 173 N. W. 529. The case of Williams v. Lawson, 188 Mich. 88, 153 N. W. 1080, most strongly relied upon by counsel for defendant Wilcox, is clearly distinguishable from the instant case. In that case there were certain restrictions on lots on the south side of the street. It does not appear that there were any on those on the north side of the street, at least, there were none on the lot involved. The restrictions themselves on the lots on the south side of the street did not show that they were made applicable to the other lots; nor does it appear that the grantors covenanted and agreed that their remaining property or all the lots should be subject to the same restrictions. It was sought to show a general plan, but, if such plan had been formulated, defendant had no notice of it. In the instant case there was a general plan, one originated by defendant Wilcox and her husband,—one of which she had knowledge,—and such general plan was incorporated in every deed she executed. Casterton v. Plotkin, 188 Mich. 333, 154 N. W. 151, also relied upon, is likewise distinguishable. There the lots were restricted to residence purposes only, and the erection of an apartment house was held not to offend the restrictions. But the moving parties there were subsequent purchasers under restrictions not originally imposed on defendant's title.

There is testimony in the record that there are business places on Woodward avenue across the street from these subdivisions and in the vicinity, and that others are being erected, but this testimony is not convincing that the character and environment of this locality have so changed since the platting of this property as to make it inequitable

to enforce the restrictions. As was said by Mr. Chief Justice Steere, speaking for the court in Moore v. Curry, 176 Mich. 456, 142 N. W. 839: "The only equitable consideration for refusing this relief, under present conditions, is that the lots on Woodward avenue would sell for more with the restrictions removed. This is not sufficient.

"No such radical change has been shown in the environment and character of the neighborhood in which the restricted district is situated as to invoke the limitation contended for, and justify the court in refusing at this time the relief asked."

This leaves for consideration the contention of defendant the Shelbourn Company that it purchased without notice of the restrictions, and is therefore not bound by them. This presents the most difficult question in the case. Before considering the legal question, let us restate some of the pertinent facts: Defendant Wilcox originated the general plan of restricting all the lots in the plat to use for residential purposes only. This included the lot upon which her home was located. This plan she incorporated in the deeds executed by her, which were recorded. By these restrictions reciprocal negative easements were created (Allen v. Detroit, *supra*) alike upon the land sold and upon lot 2. The question therefore presented is whether the recording of the deeds creating these reciprocal negative easements gave constructive notice to subsequent purchasers of lot 2.

The courts have not had this question before them with any degree of frequency. The New Jersey court has sustained defendants' contention (Glorieux v. Lighthipe, 88 N. J. L. 199, 96 Atl. 94, Ann. Cas. 1917E, 484), and the decision of the supreme court of Colorado in Judd v. Robinson, 41 Colo. 222, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018, 92 Pac. 724, has that effect. Mr. Tiffany says, in the latest edition of his work on Real Property (2 Tiffany, Real Prop. 1920 ed. p. 2188): "A

purchaser is, it appears, ordinarily charged with notice of an encumbrance upon the property created by an instrument which is of record, although the primary purpose of such instrument is not the creation of such encumbrance, but the conveyance of neighboring property. For instance, if one owning two adjoining city lots conveys one of them, the instrument of conveyance expressly granting an easement as against the lot retained in favor of that conveyed, the record of such conveyance will, it seems, affect a subsequent purchaser of the former lot with notice of such easement, and he will take subject thereto. In such a case, at common law, the purchaser would take subject to the easement previously created, as being a legal interest, irrespective of whether he has notice thereof, and the rule in this respect could not well be regarded as changed by the adoption of the recording law, as applied to a case in which the grant of the easement does appear of record, though in connection with the conveyance of other land, to which the easement is made appurtenant. . . . And if, in conveying lot A, the grantor enters into a restrictive agreement as to the improvement of lot B, retained by him, a subsequent purchaser of lot B would ordinarily be charged with notice of the agreement, by reason of its record as a part of the conveyance of lot A. Were he not so charged, the restrictive agreement might be to a considerable extent nugatory."

The court of last resort of Maryland had the question before it in the case of *Lowes v. Carter*, 124 Md. 678, 93 Atl. 216, and there said:

"In holding that covenants creating such limitations may, if they manifest that intent, be enforced against the grantees of the original covenantors, the decisions we have cited on that subject have uniformly indicated that such a right could be asserted only against those acquiring title with notice of the restrictions. This was recognized as a reasonable and just qualification

to be mentioned in connection with a statement of the general rule, but in none of the cases referred to was any intimation required or given as to the nature of the notice which would be necessary and sufficient to charge the assigns of the grantor with the observance of the covenant. In each instance the party sought to be bound by the restrictive conditions appeared to have actual knowledge of their terms. It was therefore not essential in the former cases to decide whether constructive notice was sufficient to support such a liability, and that question is now presented to this court for the first time. . . .

"The covenant in question undoubtedly vested in the grantee a substantial interest in the reserved real estate. The right conferred, as appurtenant to the granted lot, to enforce the prescribed method of improvement as to the remaining parcels, was a valuable and important consideration for the purchase. It was the evident design of the parties the interest or easement thus contracted for should be securely vested in the vendee and given all the protection which the law affords. To that end the covenant was inserted in the deed for the lot, to which the right was appurtenant, and placed upon the public land records. The statute does not require that such an agreement shall be recorded in the form of a separate instrument. The method adopted was practical and appropriate, and was authorized by the law as a means of safeguarding the rights created by the deed against adverse interests of later origin. In our opinion, this purpose has been accomplished in the present case. As the appellee obtained his title through the foreclosure of a mortgage which was executed after the easement which he is now contesting had become a matter of public record, he is chargeable with implied notice of its existence and effect, and must be held to have acquired his property subject to the conditions thus imposed."

The supreme court of Missouri has likewise had the question under consideration in *King v. St. Louis Union Trust Co.* 226 Mo. 351, 126 S. W. 415. After considering some of the cases, it is said: "From this decision, and the *Maguire Case*, 10 Mo. 34, referred to therein, it is clear that a purchaser is affected with constructive notice of all duly recorded conveyances by his grantor affecting the latter's title; and the deed to Mrs. Sweringen did affect the grantor's title in this, that the grantor could not convey any of the lots in 'Rex subdivision,' save subject to the restrictions and conditions set out in the deed to Mrs. Sweringen. In that deed the grantor covenanted 'that it will not at any time thereafter convey or otherwise dispose of any lot in Rex's subdivision except upon and subject to such restrictions and conditions as are hereinbefore mentioned, and as are common to all the lots in said subdivision.' The rule is that a recital in a deed of a fact will generally conclude the grantor and his privies."

The court then considers some further authorities and concludes on this subject: "The foregoing decisions, and many more which we might cite, but with which we do not deem it necessary to burden this opinion, make it clear to our mind that the defendant was bound by the covenants and restrictions in the recorded deed of the Rex Realty Company to Mrs. Sweringen, and of which the defendant must be held to have constructive notice."

The question was also considered and decided in *Holt v. Fleischman*, 75 App. Div. 593, 78 N. Y. Supp. 647. We quote from the syllabus: "Plaintiff's grantor, owning several adjoining lots, conveyed a part of the property to plaintiff under a deed containing a covenant providing that, on the improvement of her

adjoining lots, the houses erected thereon should be on a line with the fronts of the present adjoining houses annexed thereto, which deed was duly recorded; and defendant acquired title to such adjoining property under a deed in partition between the heirs of such prior grantor. Held, that defendant was bound to take notice of the record of plaintiff's deed, and was therefore bound by the restrictive covenant therein contained, imposing an easement on the adjoining property."

Upon principle we think the rule adopted by Mr. Tiffany and the Maryland, Missouri, and New York courts is the correct one. By the deeds executed by Mrs.

Record—effect—negative covenant.

Wilcox, a negative easement was by her placed upon lot 2. When these deeds were placed on record this gave constructive notice of that negative easement. Defendant the Shelbourn Company was not a bona fide purchaser and took subject to the rights of the plaintiffs.

Upon the argument it was pointed out that the Shelbourn Company had expended some money and entered into engagements for the carrying out of the plan of converting the Wilcox home into a restaurant. But there has been no laches on the part of plaintiffs. As soon as they learned of the sale they at once took up the matter with Mr. Wilcox and the officers of the company. Failing by negotiations to secure their rights, this bill was filed.

The decree will be affirmed, with costs.

NOTE.

The record of a deed as constructive notice of covenant or easement affecting another parcel owned by grantor is discussed in the annotation following *HANCOCK v. GUMM*, post, 1013.

B. D. HANCOCK et al., Plffs. in Err.,
v.
MRS. J. A. GUMM et al.

Georgia Supreme Court—June 18, 1921.

(— Ga. —, 107 S. E. 872.)

Notice — covenant in chain of title.

1. A purchaser of land is conclusively charged with notice of a restrictive agreement or covenant contained in a deed which constitutes one of the muniments of his own title; and generally this is true, whether the deed containing such covenant is recorded or not. (a) In view of the provisions of Civil Code 1910, § 3320, a deed which constitutes one of the muniments of a purchaser's title is a deed to the same land, and not a deed from his grantor to other land; and this is true, even though the prior deed of his grantor conveys a lot or parcel of the same general tract.

[See note on this question beginning on page 1013.]

Covenant — restrictive — purchaser without notice.

2. The burden of a restrictive agreement does not pass to the assignee, where such assignee is a purchaser of the land for value and without notice, actual or constructive, of the agreement.

[See 27 R. C. L. 760-762.]

— purchaser from bona fide purchaser.

3. If one with notice sell to one without notice, the latter is protected; or if one without notice sell to one with notice, the latter is protected; as

otherwise a bona fide purchaser might be deprived of selling his property for full value.

Vendor and purchaser — reference to plat — effect as to building restrictions.

4. Reference in a bond for title to a plat for description of the property does not charge the purchaser with notice of building restrictions shown by a plat subsequently filed, if they are not shown to have been indicated on the plat at the time the bond was given.

Headnotes 1-3 by GEORGE, J.

ERROR to the Superior Court for Fulton County (Pendleton, J.) to review a judgment in favor of plaintiffs in a suit brought to enjoin defendants from erecting a building nearer than 40 feet to a certain street. *Reversed.*

Statement by George, J.:

Prior to and on November 6, 1908, the Atlanta Banking & Savings Company (for convenience hereinafter referred to as the Banking Company) owned a tract of land in the city of Atlanta, fronting 810 feet on Ponce de Leon avenue and extending south from said avenue 500 feet, more or less, to Blue Ridge avenue. The tract of land was at the time bounded on the east by Panola street, now Linwood avenue. The Banking Company offered the frontage on Ponce de Leon avenue for sale. Mrs. C. Helen Plane, through her son, W. F. Plane,

entered into negotiations with the Banking Company for the purchase of a portion of the property fronting on Ponce de Leon avenue. An officer of the Banking Company stated to W. F. Plane that it was proposed to sell the Ponce de Leon avenue frontage in lots of 100 feet in width, and running south 220 feet to an alley. The agent of the Banking Company agreed with the agent of Mrs. Plane that, as a part of a scheme for developing the property, a building line on Ponce de Leon avenue should be established, said line to be 40 feet from said avenue. On November 6, 1908, the

Banking Company and Mrs. Plane entered into the following contract: "Received of Mrs. C. H. Plane fifty (\$50) dollars as part of purchase money for a lot beginning at the southeast corner of Ponce de Leon avenue and Panola street, and running thence east along Ponce de Leon avenue one hundred and twenty (120) feet, and extending back south same width as front two hundred and twenty (220) feet, for the sum of thirty-five (\$35) dollars per front foot. Terms: Twelve hundred (\$1,200) dollars cash, as soon as titles can be examined, and the rest to be paid one year from date, with interest at 6 per cent. An additional consideration of this trade is that Mrs. Plane is to erect a residence on said lot to cost not less than \$4,000. It is also agreed by the Atlanta Banking & Savings Company that a building line of forty (40) feet is to be established on this property and all the other property of the Atlanta Banking & Savings Company fronting on Ponce de Leon avenue." Signed in duplicate.

On November 19, 1908, the Banking Company issued its bond for title to Mrs. Plane, binding it to convey to her the property described in the contract, and containing the following covenant: "Part of the consideration of this contract is that no building shall be erected on the property of the Atlanta Banking & Savings Company nearer than forty (40) feet to Ponce de Leon avenue. This meaning that no part of the building shall project over this line; and it is further agreed that Mrs. C. H. Plane's house is not to be built nearer than fifteen (15) feet to the east side of Panola street."

This bond for title was duly recorded in the clerk's office of Fulton superior court on November 27, 1908. On April 1, 1909, the banking company executed and delivered to Mrs. Plane its warranty deed to the property as described in the bond for title, said deed containing the restrictive covenant or agreement inserted in the bond for title

quoted above. This deed was duly filed for record on April 3, 1909. After the execution of its bond for title to Mrs. Plane, the Banking Company had the property fronting on Ponce de Leon avenue platted into eight lots, lot 1 fronting 90 feet on said avenue, lots 2, 3, 4, 5, 6, and 7 fronting 100 feet on the avenue, and lot 8, the lot sold to Mrs. Plane, fronting 120 feet on Ponce de Leon avenue. On December 16, 1908, the Banking Company issued its bond for title to W. R. Jester to lots 3 and 4 of the subdivision, as shown by the plat of same of "C. E. Kauffman, C. E." This bond for title, which was duly recorded on November 28, 1908, contained the following covenant: "This lot is sold upon the express consideration that no building, or part thereof, shall be built upon same at a less distance than forty (40) feet from Ponce de Leon avenue, nor shall the house thereon cost less than the sum of \$4,000."

On February 27, 1909, the Banking Company issued its bond for title to Mrs. Margaret A. Farland, to "lot No. 5 of the O. F. Kauffman plat." This bond for title was transferred, and a deed was made by the banking company to Mrs. Farland's assignee on May 26, 1911, conveying the property as described in the bond for title. Neither the bond for title issued by the company to Mrs. Farland, nor the deed executed and delivered by the Banking Company to Mrs. Farland's assignee, contained any restrictive covenant or agreement. On April 21, 1920, Buford Hancock, the real plaintiff in error in this case, became the owner of lot 5, which was originally conveyed by the banking company to Mrs. Farland on the date and as aforesaid. The deed to Hancock contained no restrictive agreement. On November 12, 1909, subsequently to the date of the bond for title to Mrs. Farland, the Banking Company conveyed by warranty deed to W. L. Peel "lot No. 2 of the plat of O. F. Kauffman & Bro." This deed, which was duly recorded

on November 17, 1909, contained the same restrictive covenant as appeared in the Jester bond for title. On May 30, 1911, the Banking Company conveyed by warranty deed to George W. Brine a lot adjoining the lot of Mrs. Plane. This deed did not give the number of the lot, and did not refer to the Kauffman, plat, but did contain a restrictive covenant similar to or identical with the covenant in the Jester bond for title. Subsequently to the date of the bond for title from the Banking Company to Mrs. Margaret A. Farland, the Banking Company, by separate deeds, conveyed lots 1 and 6. No restrictive covenant was inserted in either of these deeds. Lots 2, 3, 4, 7, and 8, which were sold with restrictive covenants against the erection of buildings nearer than 40 feet to Ponce de Leon avenue, were conveyed, by mesne conveyances, to the present owners, and in these conveyances the same restrictive covenants and the same references to the plat were made as contained in the respective original conveyances from the banking company.

On June 5, 1909 (subsequently to the date of the bond for title from the Banking Company to Mrs. Farland), there was recorded in the office of the clerk of the superior court of Fulton county, a plat of the property of the Banking Company on Ponce de Leon avenue, showing exactly the location, dimensions, and numbers of the lots described in the deeds above referred to, and across said plat was a line parallel with Ponce de Leon avenue indicating a distance of 40 feet from said avenue, and marked "Building limit." Prior to the purchase of lot 5 by Buford D. Hancock, all the lots in said tract fronting on Ponce de Leon avenue had been built upon, except lot 5. As soon as Buford D. Hancock became the owner of lot 5, he began the erection of a three-story apartment house thereon. Excavations were first made for the walls of the building, commencing at or near the building line and extending

toward the rear of the lot. Later, when the building had been partially completed, the contractor and foreman in charge began excavating between the building line and Ponce de Leon avenue. Buford D. Hancock announced his intention to build the apartment house within 10 or 15 feet of Ponce de Leon avenue, and when this fact became known to Mrs. J. A. Gumm, J. H. Bennett, F. A. Quillian, and E. J. Perkerson, they filed an equitable petition in Fulton superior court, alleging that they were the then owners of portions of the property formerly belonging to the Banking Company and included in the Kauffman plat; that they had improved their respective lots by building suitable residences thereon, and had conformed to the building line contained in the covenants in their deeds made by the Banking Company, and as shown on the Kauffman plat; and that all owners of any part of said property fronting on Ponce de Leon avenue had erected their buildings in conformity with said building line. They further alleged that the Banking Company, before selling any of said property, platted said tracts of land, divided it into lots, and sold the same as residence property; said company placed a building line of 40 feet on said plat, so that no building should be built on said property nearer than 40 feet to Ponce de Leon avenue, and sold the lots according to said plat and said building restriction. They allege that the Banking Company intended to and did establish, with reference to said property, a general building scheme, and that the placing of the building by Hancock in front of all the buildings on said property would be of great and irreparable damage to the plaintiffs' property. They prayed that Hancock and his agents be restrained from erecting said building nearer than 40 feet to Ponce de Leon avenue. Subsequently Mrs. Carrie M. Edenfield, Mrs. Nancy W. Crockett, and Mrs. Mary J. Purvis filed their interventions in the cause, alleging that they

were owners of property on the south side of Ponce de Leon avenue in the plat of the property sold by the Banking Company and were interested in the relief sought by the petition in said cause, and they adopted the allegations and prayers of the original petition. They were made parties plaintiff. Before the hearing, Mrs. C. Helen Plane filed her intervention, in which she adopted the allegations and prayers of the petition, and in which she also alleged the circumstances and conditions under which she purchased from the Banking Company the lot now owned by her and fronting 120 feet on Ponce de Leon avenue as hereinabove set out. She was also made a party plaintiff.

The defendants, Buford D. Hancock and his agents, by answer, by evidence, and by objections and contentions at the hearing, urged substantially the following defense: (1) That no general building scheme of development involving a building restriction existed, but, if any such restriction existed, it had not been observed by other owners; (2) that the Kauffman plat was never of record, but, if of record, it was recorded subsequently to the purchase by Mrs. Margaret F. Farland from the Banking Company of lot 5; (3) that no building restrictions appeared in the deed to Hancock, or any of the deeds to lot 5, and that Hancock and his predecessors in title to lot 5 had no notice of any such restriction, if such in fact existed. On the hearing the court granted a temporary injunction restraining the defendants as prayed. To this judgment they excepted, assigning error also on the admission in evidence of the contract between the Banking Company and Mrs. C. Helen Plane, the bond for title from the Banking Company to Mrs. Plane, the deed from the Banking Company to Mrs. Plane as well as deeds from the Banking Company to the purchasers of lots 2, 3, 4, 7, and 8 aforesaid, mesne conveyances to the plaintiffs, and affidavits of several persons to the effect that the

Banking Company had established a general scheme of development involving a building restriction as alleged in the petition, and that the several purchasers of lots 2, 3, 4, 7, and 8 bought with the distinct understanding and assurance that a building line had been established on said property.

Messrs. Pettigrew & Jones for plaintiffs in error.

Messrs. McElrath & Scott, J. V. Poole, and F. A. Quillian, for defendant in error:

A valid building restriction was created.

Berry, Real Prop. § 315; Landsberg v. Rosenwasser, 124 App. Div. 559, 108 N. Y. Supp. 929; Davidson v. Dunham, 159 App. Div. 207, 144 N. Y. Supp. 489; Riverbank Improv. Co. v. Bancroft, 209 Mass. 217, 34 L.R.A. (N.S.) 730, 95 N. E. 216, Ann. Cas. 1912B, 450; Hills v. Metzenroth, 173 Mass. 423, 53 N. E. 890; Tobey v. Moore, 130 Mass. 448; Yeomans v. Herrick, 178 Mo. App. 274, 165 S. W. 1112; Sharp v. Ropes, 110 Mass. 381; Beals v. Case, 138 Mass. 138; DeGray v. Monmouth Beach Club House Co. 50 N. J. Eq. 329, 24 Atl. 388; Brouwer v. Jones, 23 Barb. 153; Boyden v. Roberts, 131 Wis. 659, 111 N. W. 701; Henderson v. Champion, 83 N. J. Eq. 554, 91 Atl. 332; Chapin v. Dougherty, 165 Ill. App. 426; Morrow v. Hasselman, 69 N. J. Eq. 612, 61 Atl. 369; Beckwith v. Pirung, 134 App. Div. 608, 119 N. Y. Supp. 444; Allen v. Detroit, 167 Mich. 464, 36 L.R.A. (N.S.) 890, 133 N. W. 317; Velie v. Richardson, 126 Minn. 334, 148 N. W. 286; Silberman v. Uhrlaub, 116 App. Div. 869, 102 N. Y. Supp. 299; Rollo v. Nelson, 34 Utah, 116, 26 L.R.A. (N.S.) 315, 96 Pac. 263; Seymour v. Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108; Durkin v. Cobleigh, 156 Mass. 108, 17 L.R.A. 270, 32 Am. St. Rep. 436, 30 N. E. 474; Whitney v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715; Jewell v. Lee, 14 Allen, 145, 92 Am. Dec. 744; East Atlanta Land Co. v. Mower, 138 Ga. 380, 75 S. E. 418; Bayard v. Hargrove, 45 Ga. 342; Ford v. Harris, 95 Ga. 97, 22 S. E. 144; Schreck v. Blun, 131 Ga. 489, 62 S. E. 705; Jeffris v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; Aiken v. Wallace, 134 Ga. 873, 63 S. E. 937; Talmadge Bros. v. Interstate

Bldg. & L. Asso. 105 Ga. 550, 31 S. E. 618.

There was positive evidence that Hancock had actual notice of the building restriction before he began to violate it.

Talmadge Bros. v. Interstate Bldg. & L. Asso. supra; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Whitney v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715; Whistler v. Cole, 81 Misc. 519, 143 N. Y. Supp. 478.

The covenant in the bond for title and deed of Mrs. Plane created a covenant running with the land affecting all other lots in the tract.

Atlanta Consol. Street R. Co. v. Jackson, 108 Ga. 638, 34 S. E. 184; Atlanta, K. & N. R. Co. v. McKinney, 124 Ga. 929, 6 L.R.A. (N.S.) 436, 110 Am. St. Rep. 215, 53 S. E. 701; 11 Cyc. 1081; 8 Am. & Eng. Enc. Law, 139; Georgia Southern R. Co. v. Reeves, 64 Ga. 496; Planters Gin Co. v. Rea, 146 Ga. 694, 92 S. E. 220; Horne v. Macon Teleg. Pub. Co. 142 Ga. 489, 83 S. E. 204, Ann. Cas. 1916B, 1212; Stovall v. Coggins Granite Co. 116 Ga. 376, 42 S. E. 723; Holt v. Fleischman, 75 App. Div. 593, 78 N. Y. Supp. 647; Taylor v. Dyches, 69 Ga. 455; McElvaney v. McDiarmid, 131 Ga. 97, 62 S. E. 20; Murphey v. Harker, 115 Ga. 77, 41 S. E. 585.

But whether the restriction was a covenant running with the land or a mere equitable restriction, Hancock having bought with notice of the restriction, it was binding upon him.

Lewis v. Gollner, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81, reversing 37 N. Y. S. R. 613, 14 N. Y. Supp. 362; Frye v. Patridge, 82 Ill. 267; Peabody Heights Co. v. Willson, 82 Md. 186, 36 L.R.A. 393, 32 Atl. 386, 1077; Stevens v. Annex Realty Co. 173 Mo. 511, 73 S. W. 505; Leaver v. Gorman, 73 N. J. Eq. 129, 67 Atl. 111; Maurer v. Friedman, 125 App. Div. 754, 110 N. Y. Supp. 320; De Gray v. Monmouth Beach Club House Co. 50 N. J. Eq. 329, 24 Atl. 388; Smith v. Graham, 161 App. Div. 803, 147 N. Y. Supp. 773; Merchants Union Trust Co. v. New Philadelphia Graphite Co. 10 Del. Ch. 18, 83 Atl. 520; Howland v. Andrus, 80 N. J. Eq. 276, 83 Atl. 982; Hayes v. Waverly & P. R. Co. 51 N. J. Eq. 345, 27 Atl. 648; Bricker v. Grover, 10 Phila. 91; Kirkpatrick v. Peshine, 24 N. J. Eq. 206; Berry, Real Prop. pp. 414, 415.

The record of the Plane bond for

title and deed was binding upon the purchasers of all other lots in the tract.

Horne v. Macon Teleg. Pub. Co. 142 Ga. 489, 83 S. E. 204, Ann. Cas. 1916B, 1212; Tiffany, Real Prop. 2d. ed. § 390; Holt v. Fleischman, 75 App. Div. 593, 78 N. Y. Supp. 647; Whistler v. Cole, 81 Misc. 519, 143 N. Y. Supp. 478.

George, J., delivered the opinion of the court:

From the foregoing statement of facts it will be noted that the Atlanta Banking & Savings Company (for convenience herein referred to as the Banking Company) on November 6, 1908, owned a tract of land in the city of Atlanta, fronting 810 feet on the south of Ponce de Leon avenue, and extending south from Ponce de Leon avenue 500 feet, more or less, to Blue Ridge avenue. The Banking Company subdivided the tract of land, and offered for sale the several parcels thereof fronting on Ponce de Leon avenue. Admittedly the Banking Company contracted to sell to Mrs. C. Helen Plane, one of the plaintiffs, a parcel of the entire tract fronting 120 feet on Ponce de Leon avenue and running south 220 feet. In its contract with Mrs. Plane the Banking Company agreed that "a building line of 40 feet is to be established on this property, and all other property of the Atlanta Banking & Savings Company fronting on Ponce de Leon avenue." In its bond for title to Mrs. Plane the Banking Company covenanted that "part of the consideration of this contract is that no building shall be erected on the property of the Atlanta Banking & Savings Company nearer than 40 feet to Ponce de Leon avenue." It appears that the Banking Company did in fact cause the tract to be subdivided and a plat thereof made. The map or plat introduced in evidence on the interlocutory hearing shows a line 40 feet south of Ponce de Leon avenue and parallel thereto, marked "Building limit."

Certain of the lots in the subdivision sold by the Banking Company to other persons, subsequently to

the purchase by Mrs. Plane of the lot now owned by her, were sold with reference to the plat, and contained the express covenant that no building or part thereof should be built on the lot sold at a less distance than 40 feet from Ponce de Leon avenue. As we shall presently notice, the bond for title executed by the Banking Company to Mrs. Margaret A. Farland, under whom Buford D. Hancock claims, contains no restrictive covenant. It is also conceded that the deeds from the Banking Company to the purchasers of lots 1 and 6 in the subdivision of the property contained no restrictive covenants, and made no mention of any building limit or line. While the evidence is conflicting, we are of the opinion that the judge of the superior court was authorized to find that the Banking Company intended to and did in fact establish a general scheme of development with respect to the tract of land owned by it on Ponce de Leon avenue, involving the building restriction hereinabove recited. There is evidence tending to show that the building restriction had not been observed by other owners, but there is also evidence to the contrary; and upon this disputed issue of fact the judge was authorized to find that the building restriction had been observed by other owners of lots in the subdivision. Conceding, therefore, that a general scheme of development involving the building restriction hereinbefore mentioned existed, and that the restriction had been observed by other owners, we reach a consideration of the question involved in this case.

Restrictive agreements are sometimes spoken of as creating covenants running with the land, and sometimes as creating reciprocal negative easements. Referring to *Tulk v. Moxhay*, 2 Phill. Ch. 774, 41 Eng. Reprint, 1143, 1 Hall & Tw. 105, 47 Eng. Reprint, 1345, 18 L. J. Ch. N. S. 83, 13 Jur. 89, 15 Eng. Rul. Cas. 254, a leading case on the subject. *Jessel, M. R.*, in *London & S. W. R. Co. v. Gomm*, L. R. 20 Ch.

Div. 562, 583, said that the doctrine of the case, rightly considered, appeared to him "to be either an extension in equity of the doctrine of *Spencer's Case*, 5 Coke, 16a, 77 Eng. Reprint, 72, 15 Eng. Rul. Cas. 233, to another line of cases, or else an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light." Many American courts seem to have adopted the supposed analogy between restrictive agreements and negative easements. See *Peck v. Conway*, 119 Mass. 546; *Webb v. Robbins*, 77 Ala. 176, 183; *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218; *Watertown v. Cowen*, 4 Paige, 510, 515, 27 Am. Dec. 80; *Wetmore v. Bruce*, 118 N. Y. 319, 322, 23 N. E. 303; *Beckwith v. Pirung*, 134 App. Div. 608, 119 N. Y. Supp. 444. It has also been held that such a restrictive agreement creates a covenant running with the land, and binds a subsequent grantee with notice. *Holt v. Fleischman*, 75 App. Div. 593, 78 N. Y. Supp. 647. It appears that the subsequent grantee in that case purchased with notice of the restrictive agreement; and while it was held that the agreement created a covenant running with the land, it was distinctly declared that the covenant was binding upon "a subsequent grantee with notice." The New Jersey courts seem to have rejected the supposed analogy between restrictive agreements and negative easements. *Brewer v. Marshall*, 19 N. J. Eq. 537, 543, 97 Am. Dec. 679, 4 Mor. Min. Rep. 119; *DeGray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 339, 24 Atl. 388. For Georgia cases defining and dealing with covenants running with the land, see *Georgia Southern R. Co. v. Reeves*, 64 Ga. 496; *Atlanta, K. & N. R. Co. v. McKinney*, 124 Ga. 929, 6 L.R.A. (N.S.) 436, 110 Am. St. Rep. 215, 53 S. E. 701, and citations; *Horne v. Macon Teleg. Pub. Co.* 142 Ga. 489, 83 S. E. 204, Ann. Cas. 1916B, 1212;

Planters' Gin Co. v. Rea, 146 Ga. 694, 92 S. E. 220. A collection of the leading cases, English and American, on the question, will be found in 1 Ames, Cas. Eq. Jur. 147 et seq. The superficial resemblance between restrictive covenants and negative easements is not denied. But as pointed out by Dean Ames in 17 Harvard L. Rev. 174, 182: "The differences between them are fundamental. An easement is an obligation between two estates. This relation is indicated by the common terms 'dominant and servient estates.' Because the one is obligee and the other obligor, the relation continues the same into whosoever hands one or both estates may successively pass, and, except for registry acts, whether the subsequent owners bought with or without notice. This cannot be said of restrictive agreements. The burden vanishes as soon as the land subject to the restriction comes to the hands of a purchaser for value, without notice of the restriction. Moreover, the burden, by the intention of the parties, may be limited at the outset to the original promisor. The benefit, too, if such is the understanding of the parties to the promise, may be limited to the promisee, or, in England, to the promisee and subsequent occupant of the promisee's land by express assignment of the contract. The analogy of the negative easement is objectionable for the further reason that easements are confined to real property, but restrictive agreements apply equally to personal property."

The writer then adds: "Nor is the doctrine of restrictive agreements illuminated by the suggested analogy to the doctrine of Spencer's Case. Upon covenants running with the land assignees are bound, without regard to notice, or absence of value; whereas notice, or the absence of value, is the very foundation of the subsequent possessor's liability on restrictive agreements. Nor does the doctrine of Spencer's Case apply to personal property."

It does not follow, however, that

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an agreement restricting the use of land is unenforceable in equity.

Although an agreement between owners of land, restricting the use thereof, is not a covenant running with the land, or a legal exception or reservation out of it, but simply a personal contract, equity treats it, if valid, as one which goes with the land into the hands of a purchaser with notice, who did not buy innocently or in good faith, and he will be required to observe such restrictive agreement. *Lewis v. Gollner* (1891) 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81, reversing (*City Ct. Brook.*) 37 N. Y. S. R. 613, 14 N. Y. Supp. 362.

See also *Frye v. Patridge* (1876) 82 Ill. 267; *Peabody Heights Co. v. Willson* (1895) 82 Md. 186, 36 L.R.A. 393, 32 Atl. 386, 1077; *Stevens v. Annex Realty Co.* (1903) 173 Mo. 511, 73 S. W. 505; *Leaver v. Gorman* (1890) 73 N. J. Eq. 129, 67 Atl. 111; *Maurer v. Friedman* (1908) 125 App. Div. 754, 110 N. Y. Supp. 320; *De Gray v. Monmouth Beach Club House Co.* (1892) 50 N. J. Eq. 329, 24 Atl. 388; *Smith v. Graham* (1914) 161 App. Div. 803, 147 N. Y. Supp. 773; *Hayes v. Waverly & P. R. Co.* (1893) 51 N. J. Eq. 345, 27 Atl. 648.

"The question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

See also *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388, and *Tulk v. Moxhay*, supra.

Even in England, where, as it seems, the burden of a covenant does not run with the land, an agreement as to the use of land may, under certain circumstances, affect a subsequent purchaser of the land who takes with notice of the agreement. 2 Tiffany, Real Prop. 2d ed. § 394. While the reasoning in *Tulk v. Moxhay*, supra, has been criticized (see Clark, on Eq. § 96), the

doctrine there announced has been generally followed.

Equity will not, however, impose the burden of the restrictive agree-

**Covenant—
restrictive—
purchaser with-
out notice.**

ment on one who purchases the land without notice, actual or constructive, of the agreement. One who purchases for value and without notice of the agreement takes the land free from the restrictive agreement. *Carter v. Williams*, L. R. 9 Eq. 678, 39 L. J. Ch. N. S. 560, 23 L. T. N. S. 183, 18 Week. Rep. 593; *Nottingham Patent Brick & Tile Co. v. Butler*, L. R. 16 Q. B. Div. 778, 787, 55 L. J. Q. B. N. S. 280, 54 L. T. N. S. 444, 34 Week. Rep. 405; *Rowell v. Satchell* (1903) 2 Ch. 212, 89 L. T. N. S. 267, 73 L. J. Ch. N. S. 20; *Washburn v. Miller*, 117 Mass. 376; *Moller v. Presbyterian Hospital*, 65 App. Div. 134, 72 N. Y. Supp. 483, and cases cited in 1 Ames, Cas. Eq. Jur. 173, note 1. If the plaintiff in error is a purchaser of the land without notice, actual or constructive, of the agreement between the Banking Company and the defendants in error, or either of them, the grant of the injunction cannot be sustained.

Civil Code, § 4535, provides: "If one with notice sell to one without notice, the latter is protected; or, if

**—purchaser from
bona fide
purchaser.**

one without notice sell to one with notice, the latter is protected, as otherwise a bona fide purchaser might be deprived of selling his property for full value."

This general doctrine is applicable here. *McCusker v. Goode*, 185 Mass. 607, 71 N. E. 76. There is evidence in the record tending to show that the plaintiff in error, at the time of his purchase of lot 5, had notice of facts and circumstances sufficient to put him on inquiry and to lead to the discovery of the agreement. If, however, Mrs. Farland, through whom the plaintiff in error claims, was without notice, actual or constructive, at the time of her purchase of the lot, of the restrictive agreement, the plain-

tiff in error must be deemed to stand in the position of a bona fide purchaser for value.

It is not contended that Mrs. Farland had actual notice or knowledge, at the time of her purchase, of the restrictive agreement or of the general scheme of development involving the building restriction. It is not contended that she had actual notice or knowledge of the contract between the banking company and Mrs. C. Helen Plane, one of the plaintiffs, or that she had such notice or knowledge of the bond for title issued by the Banking Company to Mrs. Plane or to W. R. Jester. It is conceded that, at the time of her purchase of lot 5, none of the lots in the subdivision had been improved. Defendants in error seek to charge Mrs. Farland with notice of the restrictive agreement, by reason of facts and circumstances hereinafter considered. Mrs. Plane's bond for title was duly recorded in the office of the clerk of Fulton superior court on November 27, 1908, before any other lot in the tract was sold, and before the Banking Company issued to Mrs. Farland its bond for title to lot 5.

It is insisted that the record of the bond for title which contained the restrictive agreement is constructive notice. The cases of *Holt v. Fleischman*, supra, and of *Whistler v. Cole*, 81 Misc. 519, 143 N. Y. Supp. 478, are cited in support of this contention. In the first case it was ruled that, where the plaintiff's grantor, owning several adjoining lots, conveyed a part of the property to the plaintiff under a deed containing a covenant providing that, on the improvement of her adjoining lots, the house erected thereon should be on a line with the fronts of the present adjoining houses annexed thereto, which deed was duly recorded, and where the defendant acquired title to such adjoining property under a deed in partition between the heirs of the prior grantor, the defendant was bound to take notice of the record of plaintiff's deed, and was there-

fore bound by the restrictive covenant therein contained, imposing an easement on the adjoining property. In the second case it was held that a grantee of a lot was chargeable with notice of a building restriction, which was contained in the grantor's deed of an adjoining lot to another and covered both lots, where an examination of the records would have disclosed such covenant, and reasonable prudence required such examination to be made, and that a purchaser is chargeable with notice by implication of every fact affecting the title and discoverable by an examination of the deeds, or other muniments of title of his grantor, and of every fact as to which the purchaser, by reasonable diligence, ought to become acquainted. See also *Lowes v. Carter*, 124 Md. 678, 93 Atl. 216; *Hitt v. Caney Fork Gulf Coal Co.* 124 Tenn. 334, 139 S. W. 693; *King v. St. Louis Union Trust Co.* 226 Mo. 351, 126 S. W. 415; 2 Pom. Eq. Jur. § 228, note b; 2 *Tiffany*, Real Prop. 2d ed. §§ 398, 567. Under our Civil Code, § 3320, "deeds, mortgages, and liens of all kinds, which are now required by law to be recorded in the office of the clerk of the superior court of each county within a specified time, shall, as against the interests of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time they are filed for record in the clerk's office."

The rule in this state is that a recorded deed, in order to operate as constructive notice to a bona fide purchaser of land, must be a link in the purchaser's chain of title. See

Notice—cove- *Felton v. Pitman*,
nant in chain of 14 Ga. 531; *Cours-*
title. *ey v. Coursey*, 141
Ga. 68, 80 S. E. 462. A deed lying outside of a purchaser's chain of title is not constructive notice of the instrument. There is no difficulty in applying the general rule where a registered deed is executed by one who is a stranger to the title under which the purchaser claims.

Where, however, a recorded deed to a lot forming a part of a larger tract contains restrictive covenants which, by the terms of the deed, apply to other lots in a subdivision or general tract, the application of the rule is not without difficulty. In view of the provisions of Civil Code, § 3320, quoted above, we are of the opinion that where a recorded deed to a lot forming part of a larger tract contains restrictive covenants, which, by the terms of the deed, are not only to apply to the lot conveyed, but, as in this case, to other lands of the grantor, a purchaser of one of the lots is not charged with notice of the covenant contained in a prior deed from the common grantor to another lot or parcel of the general tract.

It is to be noted that the bond for title from the Banking Company to Mrs. Plane, which contained the restrictive agreement, applicable not only to the lot conveyed, but to other lands of the grantor, did not specifically describe such other lands; but we do not rest our decision upon this circumstance alone. In the case of *Glorieux v. Lighthipe*, 88 N. J. L. 199, 96 Atl. 94, Ann. Cas. 1917E, 484, the New Jersey recording acts are considered, and the recording acts of New Jersey as there construed, so far as the point here involved is concerned, differ in no material respect from our registry acts. The conclusion reached in that case directly sustains the ruling here made. The rule insisted upon by defendants in error would compel us to hold that any restrictive agreement in any deed from the same grantor affecting any land in the same county owned by him, which covenant is expressed in a manner as to indicate what lands it operates upon, is notice from the date of the record of the deed to all subsequent purchasers from the same grantor, although not of the same land. Logically, the rule contended for cannot be limited to conveyances by the common grantor of adjoining lots or of parcels of a general tract. We therefore agree with

the New Jersey court that it would "impose an intolerable burden to compel him [the purchaser] to examine all conveyances made by everyone in his chain of title."

It is insisted, however, that the bond for title from the Banking Company to Mrs. Farland described the lot as "lot No. 5 of the O. F. Kauffman plat," and that the "O. F. Kauffman plat" became a part of the bond for title, as if physically attached. For descriptive purposes the plat did become a part of the terms of the bond for title. *Talmdge Bros. v. Interstate Bldg. & L. Asso.* 105 Ga. 550, 554, 555, 31 S. E. 618; *Tilley v. Malcolm*, 149 Ga. 514, 515, 101 S. E. 127. It is, however, unnecessary to decide whether the purchaser would be compelled to examine the map for reservations, exceptions, or restrictions. The only plat introduced in evidence on the interlocutory hearing was a plat made by Kauffman in May, 1909, and filed with the clerk of the superior court of Fulton county in May, 1909. As heretofore pointed out, Mrs. Farland purchased lot No. 5 on February 27, 1909. The reference in her bond for title to the Kauffman plat, and the like reference in other conveyances executed by the Banking Company to lots of the general tract, would indicate that a Kauffman plat of the tract was in existence at the time of Mrs. Farland's purchase. However this may be, there is in the record no

Vendor and purchaser—reference to plat—effect as to building restrictions.

evidence tending to show that the plat in existence at the date of Mrs. Farland's purchase, even if such plat had then been made, showed any building limit or building line.

It seems to be conceded, and such is the case, that the Kauffman plat was never of record, for the reason that the record of such plat in the office of the clerk of the superior court of Fulton county is not authorized by statute. Even if of record, the map or plat offered in evidence, and which was in fact deposited in

the office of the clerk of the superior court of Fulton county, was not of record at the date of Mrs. Farland's purchase. It cannot be assumed that the plat made in May, 1909, which appears in the record, is an exact duplicate of the Kauffman plat referred to in the bond for title from the Banking Company to Mrs. Farland; at least, so far as the building limit or line shown thereon is concerned. Assuming for the purpose of the case, therefore, that Mrs. Farland was bound to call for the Kauffman plat, and that a plat showing a building limit or line would be sufficient to charge her with notice of the general scheme of development, as contended by defendants in error, the evidence did not authorize the judge to find that the plat of February 27, 1909, if any plat was then in existence, indicated any building limit or restriction whatever. The plaintiff in error, Hancock, having purchased from one without notice, is protected, and the grant of the interlocutory injunction was unauthorized by the evidence.

We have said that if Mrs. Farland, through whom the plaintiff in error claims, was without notice, actual or constructive, of the restrictive agreement at the time of her purchase of the lot, the plaintiff in error must be deemed to stand in the position of a bona fide purchaser for value. We do not overlook the rule in equity that to constitute one a bona fide purchaser in the full sense, three conditions must concur: He must pay the purchase money, or at least place himself in a position where he is, in all events, bound to pay the purchase money; he must get title; and he must pay the purchase money and get title before notice of the rights of third persons. See *Gleaton v. Wright*, 149 Ga. 220, 100 S. E. 72. We are not called upon to decide whether the rule in equity is applicable to the case at bar, because the evidence in the record entirely fails to show that either Mrs. Farland or her transferee had notice or knowledge,

actual or constructive, of the restrictive agreement before the payment of the purchase money and the execution and delivery of the deed by the Banking Company to the lot involved in this case.

The evidence to the admission of which exception is taken was admissible for the purpose of showing a

general scheme of development involving a building restriction, but was inadmissible to show that Mrs. Farland purchased the lot with notice, either actual or constructive, of the restrictive agreement.

Judgment reversed.

All the Justices concur.

ANNOTATION.

Record of deed or contract for conveyance of one parcel with covenant or easement affecting another parcel owned by grantor as constructive notice to subsequent purchaser or encumbrancer of latter parcel.

Majority rule.

The weight of authority is to the effect that if a deed or a contract for the conveyance of one parcel of land, with a covenant or easement affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel. The rule is based generally upon the principle that a grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the records of the deeds or other muniments of title of his grantor. *Lowes v. Carter* (1915) 124 Md. 678, 93 Atl. 216; *MCQUADE v. WILCOX* (reported herewith) ante, 997; *King v. St. Louis Union Trust Co.* (1910) 226 Mo. 351, 126 S. W. 415; *Holt v. Fleischman* (1902) 75 App. Div. 593, 78 N. Y. Supp. 647; *Whistler v. Cole* (1913) 81 Misc. 519, 143 N. Y. Supp. 478, affirmed in (1914) 162 App. Div. 920, 146 N. Y. Supp. 1118; *Jones v. Berg* (1919) 105 Wash. 69, 177 Pac. 712. See also *Boyden v. Roberts* (1907) 131 Wis. 659, 111 N. W. 701.

Thus, in *MCQUADE v. WILCOX* (reported herewith) ante, 997, it appeared that the plaintiff bought of the defendant a building lot which was a part of a piece of land owned and platted by the defendant for a high-class residential district. The deed to the plaintiff's lot contained a covenant that the property in the plat should be used for residential purposes only. Subsequently the defendant sold her home and an adjoining lot, both of

which were within the plat, to be used as a restaurant and for amusement purposes. The purchaser contended that, as he had no notice of the restrictions in the plaintiff's deed he was not, bound by them. The court held that the restrictions in the deed created reciprocal negative easements in the platted property, and that the recording of the deed gave constructive notice to subsequent purchasers of lots within the plat.

Likewise, in *Lowes v. Carter* (1915) 124 Md. 678, 93 Atl. 216, it appeared that the appellant bought a lot which was a part of a subdivision known as "Ridgewood park." The deed given to the appellant contained a restriction, among others, that only one residence should be built on the lot, and also a covenant that each and every lot owned by the grantor in Ridgewood park should be subject to all the restrictions contained in the appellant's deed. The appellant's deed was duly recorded. Subsequently some of the lots owned by the grantor in Ridgewood park were sold under a mortgage foreclosure sale, and title was conveyed to the appellee without restrictions as to the use of the property, and without reference to the covenants in the appellant's deed. The appellee made preparations to erect fourteen houses on five of the lots, when he was sought to be enjoined by the appellant on the ground that the covenant in her deed permitting the building of but one house on each lot subjected the lots purchased by the appellee to the same

restrictions. The appellee, having had no actual notice of the restrictions, contended that the restrictions in the appellant's deed afforded no constructive notice of their existence or terms to subsequent purchasers of other property of the grantor, and therefore had no binding effect on him. It was held that the covenant with respect to the restrictions was required by the statute to be recorded, and the recording thereof gave constructive notice of its stipulations, the court saying: "It was the evident design of the parties that the interest or easement thus contracted for should be securely vested in the vendee, and given all the protection which the law affords. To that end the covenant was inserted in the deed for the lot, to which the right was appurtenant, and placed upon the public land records. The statute does not require that such an agreement shall be recorded in the form of a separate instrument. The method adopted was practical and appropriate, and was authorized by the law as a means of safeguarding the rights created by the deed against adverse interests of later origin. In our opinion, this purpose has been accomplished in the present case. As the appellee obtained his title through the foreclosure of a mortgage which was executed after the easement which he is now contesting had become a matter of public record, he is chargeable with implied notice of its existence and effect, and must be held to have acquired his property subject to the conditions thus imposed."

So, in the case of *King v. St. Louis Union Trust Co.* (1910) 226 Mo. 351, 126 S. W. 415, it appeared that a corporation platted a piece of land into building lots, the whole plat being known as the "Rex subdivision," which was suitable for high-class residential purposes. The deed of one of the lots to the plaintiff's grantor contained a covenant that no business or apartment houses should be erected on the lot, and recited that all the restrictions in the deed of the plaintiff's grantor were imposed on every lot in the Rex subdivision, which deed

was properly recorded. Subsequently the corporation conveyed some of the lots in the Rex subdivision to the defendant, by a deed which did not set forth the restrictions contained in the deed to the plaintiff's grantor, but which contained the following recital: "All the said above-described real estate being subject to all restrictions now of record against the same." The defendant threatened to erect apartment houses and flats, on the lots, and the plaintiff brought action to enjoin him from so doing. The defendant contended that he was not chargeable with constructive notice of anything contained in the deed to plaintiff's grantor. It was held that as the deed was properly recorded, as required by statute, the defendant was chargeable with constructive notice that his lots were burdened with the restrictions imposed by the deed to the plaintiff's grantor.

Similarly, in *Jones v. Berg* (1919) 105 Wash. 69, 177 Pac. 712, it appeared that one Peterson owned a lot which he conveyed by deed to the plaintiff, adjoining which was a lot in which he owned an undivided one-half interest. The deed to the plaintiff contained covenants that no buildings should be constructed on the land conveyed, or on the adjoining property, within 8 feet of the boundary line between the two lots, and that the covenants should be binding on all subsequent grantees, etc. Subsequently Peterson and the owner of the other one-half interest in the adjoining lot executed a quitclaim deed of that lot to a mortgagee, who executed and delivered to the defendant a warranty deed of the lot, containing no reference to any building restrictions. The defendant began the construction of a dwelling house within 8 feet of the boundary line between the two lots, and the plaintiff brought an action for an injunction to restrain the construction of the house. The defendant contended that he had no notice of the building restriction in the plaintiff's deed, and therefore was not bound by it. It was held that the record of the plaintiff's deed containing the covenant encumbering the

defendant's lot was within the chain of title to the defendant's lot, and was, therefore, constructive notice of the restriction to all subsequent purchasers of the lot. The court added: "We are of the opinion that the recording of the deed from Peterson to Jones [plaintiff], and the indexing thereof, as above noticed, were as effective notice of the building restriction covenant purporting to encumber the Berg [defendant's] lot, as it was notice of the conveyance of the Jones lot."

In *Holt v. Fleischman* (1902) 75 App. Div. 593, 78 N. Y. Supp. 647, it appeared that the plaintiff's grantor, owning several adjoining lots, conveyed one of the lots to the plaintiff by a deed containing a covenant that the houses to be erected on the adjoining lots should be placed on a line with the fronts of the then-existing houses, which deed was properly recorded. The defendant acquired title to the adjoining property under a deed in a partition suit between the devisees of the plaintiff's grantor, which deed contained no restrictions or references to the covenants in the plaintiff's deed. It was held that the covenant in the plaintiff's deed was constructive notice to the defendant of the restrictions therein contained, and that the defendant was bound thereby.

Likewise, in *Whistler v. Cole* (1913) 81 Misc. 519, 143 N. Y. Supp. 478, affirmed in (1914) 162 App. Div. 920, 146 N. Y. Supp. 1118, it appeared that the plaintiff's grantor owned two adjoining lots which she had purchased from different persons. One of the lots she conveyed to the plaintiff by a deed which contained a covenant that no building would be erected on the lot retained by the grantor, nearer to the street than the line of the front wall of the building on the lot conveyed to the plaintiff. The deed to the plaintiff was properly recorded. Subsequently the grantor conveyed to the defendant the adjoining building lot, by a deed in which there was no covenant or restriction and no reference to the covenant in the plaintiff's deed. The defendant constructed a wall on his lot nearer

to the street than the front wall of the plaintiff's building, and the plaintiff brought an action for an injunction. It was held that the action could be maintained, since the defendant was chargeable with constructive notice of the restriction in the plaintiff's deed, the court saying: "Reasonable prudence would require of the defendant, when about to purchase this lot, to examine the conveyances made by his grantor, Elizabeth P. Ladow, during the time she owned the lot which she was about to convey to him, to determine whether or not there had been any conveyances by her of the lot, or any part thereof, she was about to convey to him. An examination of the record would have disclosed that in April of the same year his vendor had conveyed to these plaintiffs the adjoining lot, and in the conveyance of said adjoining lot is the covenant in question."

Minority rule.

There is authority, however, for the view that the record of a deed is not constructive notice of a covenant or restriction therein, to a subsequent purchaser from the same grantor of another parcel of land which is affected by the covenant or restriction.

Thus, in *Glorieux v. Lighthipe* (1915) 88 N. J. L. 199, 96 Atl. 94, Ann. Cas. 1917E, 484, it appeared that the defendant's ancestor conveyed a piece of land to one Marsh by a deed containing a building restriction, and covenanted in the deed that he would not convey the adjoining lot unless the grantee of that lot entered into a covenant of the same nature and effect as the one contained in the deed to Marsh. The defendants, heirs of the grantor, conveyed the adjoining lands to the plaintiff by a deed, without inserting the building restriction covenant. The plaintiff contended that he had no notice of the restriction on the land conveyed to him. It was held that the record of the deed to Marsh was not constructive notice to the plaintiff of the restrictions contained therein under § 53 of the act respecting conveyances (Comp. Stat. p. 1552), making the record notice to all subsequent purchasers of the execu-

tion of the deed and its contents. The court said: "The words material to the present case are 'subsequent purchasers.' Unless Glorieux [plaintiff] was a 'subsequent purchaser,' the statute did not make the record notice as to him. The question, otherwise stated, is whether 'subsequent purchaser' means subsequent purchaser from the same grantor, or subsequent purchaser of the same land. The more natural meaning is subsequent purchaser of the same land. In most cases it is probable that the grantor owns no other land. Even where he holds other tracts, we must logically hold either that the statutory notice applies only to the particular land described in the deed, or affects all other land owned by the grantor,—at least, in the same county,—whether in the same or different municipalities, whether on the same street or different streets." The court in *Glorieux v. Lighthipe* (N. J.) *supra*, disapproved

of the holding of the court in the case of *Howland v. Andrus* (1912) 80 N. J. Eq. 276, 83 Atl. 982, reversed in (1913) 81 N. J. Eq. 175, 86 Atl. 391, where judgment was reserved on the point herein involved, saying: "The limitation to adjoining land suggested by the learned vice chancellor in *Howland v. Andrus*, at p. 282, is not suggested by any language in the statute, and would lead to an anomalous situation. It would charge with notice the purchaser of an adjoining lot, but not the purchaser of the next lot but one, on the same large tract."

In *HANCOCK v. GUMM* (reported herewith) ante, 1003, it is held that, where a recorded deed of a lot which is a part of a larger tract contains restrictive covenants which apply to all the lots of the larger tract belonging to a common grantor, a purchaser of one of the lots of the tract is not chargeable with constructive notice of those covenants. L. W. B.

RE ADOPTION OF CHILD BY ROBERT REICHEL and Wife.

FLORENCE REICHEL KENNING, Appt.,

v.

WALTER REICHEL, Resp't.

Minnesota Supreme Court — April 15, 1921.

(— Minn. —, 182 N. W. 517.)

Adoption — complaint by heirs.

1. The presumptive heirs of the adoptive parents cannot complain because they may be deprived of rights of inheritance by the adoption of a child.

[See note on this question beginning on page 1020.]

— purpose.

2. The purpose of an adoption proceeding is to change the status of the child in its relation to its adoptive parents, and the child, its natural parents or guardian, and the adoptive parents are the parties to the proceeding.

[See 1 R. C. L. 592, 603, 611.]

— compliance with statute.

3. A substantial compliance with the requirements of the statute will

sustain the validity of the proceeding. The decree cannot be attacked collaterally.

[See 1 R. C. L. 595, 626.]

Estoppel — denial of adoption.

4. When the adoptive parents obtain the decree they asked for and take the child into the family and treat it as their own, they and their heirs and personal representatives are estopped from asserting that the child was not legally adopted.

Headnotes by LEES, C.

Judgment — adoption — right to notice.

5. After the death of her adoptive parents, appellant made an ex parte application for the entry nunc pro tunc of a decree of adoption. The application, which was not based solely on the court records, but also on affidavits stating facts extraneous to the records, was granted. There-

after, on the motion of a son and heir at law of the adoptive parents, the judgment so entered was vacated, and he was given an opportunity to oppose appellant's application. Held, that the son was entitled to notice before the judgment was entered, and that the court properly vacated it for want of such notice.

APPEAL by the adopted daughter from an order of the District Court for Waseca County (Childress, J.) vacating and setting aside a nunc pro tunc judgment in an adoption proceeding. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. A. C. Middelstadt, for appellant: Only the adoptive parents and the child were parties to the adoption proceeding, and one not a party to a proceeding is not entitled to have a default judgment vacated.

Stewart v. Duncan, 40 Minn. 410, 42 N. W. 89; Kern v. Chalfant, 7 Minn. 487, Gil. 394; Johnson v. Lough, 22 Minn. 203; Wolf's Appeal, 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760; Cubitt v. Cubitt, 74 Kan. 353, 86 Pac. 475; Coleman v. Coleman, 81 Ark. 7, 98 S. W. 733; Re McKeag, 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039; Mullany's Adoption, 25 Pa. Co. Ct. 561; Brown's Adoption, 25 Pa. Super. Ct. 259; Nugent v. Powell, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23; Chester v. Graves, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678; Long v. Stafford, 103 N. Y. 274, 8 N. E. 522; Jones v. Leeds, 41 Ind. App. 164, 83 N. E. 526; McQuiston's Estate, 238 Pa. 313, 86 Atl. 207; Re Allen, 162 Cal. 625, 124 Pac. 237; Brown v. Brown, 101 Ind. 340; Van Matre v. Sankey, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628; Parsons v. Parsons, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; Jenkins v. Peckinpaugh, 40 Ind. 133; Plume v. Howard Sav. Inst. 46 N. J. L. 227; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321.

There was ample evidence to sustain the decree of adoption.

Horner v. Maxwell, 171 Iowa, 660, 153 N. W. 331; Young v. McClannahan, 187 Iowa, 1184, 175 N. W. 26; Ferguson v. Herr, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455; Sorenson v. Rasmussen, 114 Minn. 324, 85 L.R.A.(N.S.) 216, 131 N. W. 325; Re Anonymous, 80 Misc. 10, 141 N. Y. Supp. 700; Coombs v. Cook, 35 Okla.

326, 129 Pac. 698; Moore v. Bryant, 10 Tex. Civ. App. 131, 31 S. W. 223; Quinn v. Quinn, 5 S. D. 328, 49 Am. St. Rep. 875, 58 N. W. 808; Haworth v. Haworth, 123 Mo. App. 303, 100 S. W. 531; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; Wallis v. First Nat. Bank, 155 Wis. 533, 145 N. W. 195.

Messrs. Johnston & Carman, for respondent:

The heirs and representatives of Robert and Mary Reichel were entitled as a matter of right to notice of the application of Florence Kenning, and failure to give such notice was such a defect in the proceeding as to warrant the court in vacating the same and granting to the respondent the right to be heard.

23 Cyc. 844, 845; Black, Judgm. § 134; Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946; Berthold v. Fox, 21 Minn. 51; Reynolds v. Adams, 90 Neb. 343, 133 N. W. 401; Chester v. Graves, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678.

Lees, C., filed the following opinion:

The appellant, on May 3, 1920, obtained an ex parte order for the entry of judgment nunc pro tunc in the district court of Waseca county in an adoption proceeding commenced in that court in 1886. The order was based on affidavits, from which it appeared that appellant's age is thirty-six years; that Robert Reichel and Mary, his wife, made application for leave to adopt her; that they were represented

by attorneys; that the petition was heard at the October, 1886, term of the district court; that the petitioners were sworn as witnesses in their own behalf; that the original files in the clerk's office cannot be found, and there is no order, decree, or record showing how the court disposed of the matter; that the Reichels cared for appellant since infancy, and that she was a member of their household until she was eighteen years of age. Honorable Thomas S. Buckham, who was then the presiding judge, made an affidavit, stating that it was always his practice to grant a petition for the adoption of a child when a proper showing was made, and to instruct the attorneys representing the petitioners to draw the order for adoption; that he had no recollection of this particular proceeding, but believed from examination of certified copies of the entries in the clerk's records that he signed an order for the adoption of appellant by the Reichels.

Pursuant to the order of May 3d, judgment was entered May 6, 1920. In September, 1920, Walter Reichel, a son of Robert and Mary Reichel, applied to the court for an order vacating the judgment. His application was supported by his affidavit, showing that he is a resident of Waseca; that his father died June 20, 1909, and his mother, August 20, 1919, and that she died intestate; that she left an estate in Minnesota, and that the probate court of Redwood county has appointed an administrator; that he and his brother, George Reichel, who resides at Almont, North Dakota, are the only living children of Robert and Mary Reichel, and are the heirs at law of the latter, and that no notice of the application for the entry of the order and judgment in question was ever served on him or his brother, although appellant knew his place of residence, and that he had an interest in his mother's estate. The administrator of Mary Reichel's estate was appointed May 3, 1920, and was not notified of

appellant's application. There was no affidavit of merits, and the grounds for opposing the entry of the judgment were not disclosed. The court vacated the judgment, and granted leave to Walter Reichel to appear and file objections to the entry thereof nunc pro tunc.

The purpose of an adoption proceeding is to change the status of the child in its relation to its adoptive parents. *Van*

Matre v. Sankey, <sup>Adoption—
purpose.</sup> 148 Ill. 536, 23

L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628. The parties to it are the child, its natural parents or guardian, and the adoptive parents. *Furgeson v. Jones*, 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842. There need not be more than a substantial compliance with the requirements of the

<sup>—compliance
with statute.</sup>

statute to sustain the validity of the proceeding. *Jossey v. Brown*, 119 Ga. 758, 47 S. E. 350; *Coleman v. Coleman*, 81 Ark. 7, 98 S. W. 733; *Nugent v. Powell*, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23. An order or decree of adoption cannot be attacked collaterally by the parties to the proceeding, their heirs, or personal representatives. *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; *Re McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039. The presumptive heirs of the adoptive parents have no vested rights of inheritance of which

<sup>—complaint by
heirs.</sup>

they may not be deprived by the act of their parents in adopting a child, who will have a right to inherit from them and their descendants. *Gray v. Gardner*, 81 Me. 554, 18 Atl. 286. When the adoptive parents invoke the jurisdiction of the court and get the order or decree

<sup>Estoppel—
denial of
adoption.</sup>

they ask for, and take the child into the family and treat it as their own, they are estopped from thereafter asserting that the child was not legally adopted, and the estoppel

extends to their heirs and personal representatives. *Gray v. Gardner*, and *Van Matre v. Sankey*, supra; *Wolf's Appeal*, 10 Sadler (Pa.) 139, 22 W. N. C. 139, 13 Atl. 760; *Sankey's Case*, 4 Pa. Co. Ct. 624; *Mullany's Adoption*, 25 Pa. Co. Ct. 561. With these principles as the basis for his argument, appellant's counsel contends, in substance, that it was within the discretion of the district court to require notice of the entry of judgment to be given to the heirs or personal representatives of Mary Reichel, but that they were not entitled to notice as a matter of right. If the contention is correct, it may be that the court should not have vacated the judgment on an application unaccompanied by a showing of merits.

For the purposes of this case we will assume that, if a decree of adoption had been made and entered when the petition was heard, and pursuant thereto appellant was taken into the Reichel family, neither her adoptive parents nor their heirs or personal representatives could have it vacated. But it does not appear that a decree was entered at the time of the hearing. This was not a feature of any of the cases to which reference has been made.

If John Reichel had died without issue, his wife surviving him, would the court have had jurisdiction to enter the decree *nunc pro tunc*, without notice to the widow? The effect of the decree would be to make appellant the child of the Reichels from and as of the date thereof, with the right to inherit from them the same as though she had been their legitimate offspring. *Rev. Laws 1905*, §§ 3615, 3616; *Sorenson v. Rasmussen*, 114 Minn. 324, 35 L.R.A. (N.S.) 216, 131 N. W. 325. The entry of the decree would ipso facto diminish the widow's share in her husband's estate. We think this could not be done without notice to her.

Do the Reichels' sons occupy the same position as their mother in the case supposed? The only difference

we perceive is this: The mother was a party to the adoption proceeding, and they were not. But according to the authorities we have cited, the refusal to allow the heirs of an adoptive parent to question the decree is properly founded on the proposition that they stand in the shoes of, and are in privity with, the deceased parent, and hence are estopped from questioning the decree if he was estopped. Because of their privity, their right to notice must be the same as their parents,' if their property rights are similarly affected, as they would be in the present case.

Counsel for appellant argues that judgment may always be entered, *nunc pro tunc* and without notice, if the court records clearly show that it should and would have been entered but for the neglect of the clerk. This is asserted on the theory that a court has inherit power to correct the mistakes and omissions of the clerk in entering the judgment pronounced by the court, if the parties are still in statu quo and the rights of third parties have not intervened. *National Council v. Silver*, 138 Minn. 330, 10 A.L.R. 523, 164 N. W. 1015; *Re Wight*, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487. But when an application for the entry of judgment *nunc pro tunc* is not based wholly on the records, but on extraneous proof as well, those whose property rights will be directly affected ought to have an opportunity to present countervailing testimony. 1 *Freeman*, Judgm. 64. It seems to us, as stated in 1 *Black*, Judgm. § 134, that the necessity of notice depends largely upon the sources which are to furnish the evidence of the judgment to be entered. If the examination is to be wholly confined to the records, the presence of the parties could not affect the result, for they would have no room to contest an application based on records which speak for themselves. Appellant's application was based in part on proof *dehors* the record. Such proof was competent. *Lundberg v.*

Single Men's Endowment Asso. 41 Minn. 508, 43 N. W. 394; note to *Chester v. Graves*, Ann. Cas. 1915D, pp. 684, 687.

There are material statements of fact in appellant's affidavit which no one has had an opportunity to controvert, and we think the case is one falling within the

**Judgment—
adoption—right
to notice.**

scope of the principle stated by Mr. Black. The rule applied to the amendment of judgments in ordinary actions is that there must be notice to the adverse party (*Berthold v. Fox*, 21 Minn. 51), and to any other person whose title to property will be affected by the entry of the proposed judgment (*Montgomery v. Viers*, 130 Ky. 694, 114 S. W. 251; *Wimbberly v. Mansfield*, 70 Ga. 783).

Adoption proceedings, as already indicated, are not classified with ordinary civil actions, but there is an analogy in at least one particular. A decree of adoption invests the child with the right to inherit the property of the adoptive parents, and a judgment in many classes of actions between adverse

parties may invest the party recovering it with the title to or an interest in property.

We do not hold that the court records were insufficient to establish prima facie that the Reichels' petition for leave to adopt appellant was granted. The records show that the petition was heard, and, of course, it then became the duty of the court to act upon it, and it will be presumed that the court performed its duty. But appellant was unwilling to rely solely upon the records. She asked the court to consider additional facts set forth in her affidavit. Her statements were persuasive evidence that the petition should be granted, and sufficient, if uncontradicted, to justify the entry of the judgment nunc pro tunc. Presumably the court considered and was influenced by them. The respondent has not had his day in court to controvert statements of fact upon which the action of the court was founded. The court was right in vacating the order and judgment.

The order appealed from is affirmed.

ANNOTATION.

Right of presumptive heir to object to adoption.

- I. Direct proceeding, 1020.
- II. Collateral proceeding:
 - a. In general, 1024.
 - b. Estoppel, 1030.

I. Direct proceeding.

The presumptive or natural heir of an adoptive parent ordinarily has no standing to attack by a direct proceeding the validity of an adoption order or decree. *Gray v. Gardner* (1888) 81 Me. 554, 18 Atl. 286; *Bird v. Young* (1897) 56 Ohio St. 210, 46 N. E. 819; *Wolf's Appeal* (1888) 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760, affirming (1888) 4 Pa. Co. Ct. 624; *Brown's Adoption* (1904) 25 Pa. Super. Ct. 259; *Mullany's Adoption* (1901) 25 Pa. Co. Ct. 561; *Parsons v. Parsons* (1898) 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147. See also *Re Ward* (1908)

59 Misc. 328, 112 N. Y. Supp. 282, set out infra, II. a. Compare the reported case (*RE REICHEL*, ante, 1016).

As was said in the leading case of *Wolf's Appeal* (1888) 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760, affirming (1888) 4 Pa. Co. Ct. 624, which was a direct proceeding brought after the death of an adoptive parent: "But apart from the insufficiency of this application, what standing in court have these applicants to ask that this decree of adoption shall be vacated? When the proceedings were instituted and the decree of adoption made, the court undoubtedly had jurisdiction of the subject-matter, to-wit, the child, Caroline C. Sankey, and the promotion of her welfare. Immediately on the entry of the decree, and thereafter,

she was entitled to be maintained and educated by Samuel Sankey, and on his death was entitled to inherit as his child. Nearly nine years after the decree was entered, and more than one year after the death of her adopted father, his administrator and collateral heirs come into court and ask that this decree of adoption be vacated. They are not here in the interest nor on behalf of the innocent subject of adoption, but decidedly against the same. They are either strangers to the adoption proceedings, and therefore have no standing in court, or they are privies in blood, or in law, and stand in the shoes of Samuel Sankey, through and under whom they claim. Surely Samuel Sankey, if living, would not be heard in this court questioning its decree made at his solicitation. He invoked the jurisdiction of the court; he asked that the decree of adoption should be made; he got what he desired; and he would not now be allowed to question the means he set in motion. If any wrong was done, Samuel Sankey did it, and neither he nor those who claim under him can be permitted to take advantage of his wrong to the prejudice of an innocent party."

See to the same effect, *Mullany's Adoption* (1901) 25 Pa. Co. Ct. 561, and *Brown's Adoption* (1904) 25 Pa. Super. Ct. 259, quoting with approval from the opinion in *Wolf's Appeal* (Pa.) supra.

In *Parsons v. Parsons* (1898) 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147, the widow of an adoptive father alleged that her consent to the adoption was without any independent will on the subject, but solely to gratify her husband; that neither intended to give the child any rights as heir of the father; that she did not know when she signed the petition that the allegation therein to the effect that an uncle, one Russell, was one of the child's next of kin, was untrue, but that the said Russell knew that the boy then had, as the fact was, a brother living who was twenty-one years of age. It was held, on the ground, among others, of estoppel, that the widow was not entitled to

have the decree of adoption vacated, the court saying: "The proceedings to avoid the judgment of adoption are clearly of an equitable nature, and after the lapse of many years, during which time the status of the subject of adoption has been recognized as legally fixed by the judgment of the county court by all parties to the proceedings, one of those parties on whose motion the judgment was rendered is in no position to appeal to the equity powers of the court to declare it void. The plainest principles of estoppel apply to the situation. Appellant petitioned for the judgment. It was entered on her motion. The person most interested, the child, was a ward of the court, and its status for life was entirely and irrevocably changed by the result of the proceedings, if they were valid. Their validity was recognized by the appellant till she became pecuniarily interested in changing her position. Clearly, she cannot be aided by a court of equity to do that, to the injury of the person she was instrumental in locating in her family as her adopted son."

With respect to the right of presumptive heirs to attack the validity of an adoption in a direct proceeding, the court said in *Bird v. Young* (1897) 56 Ohio St. 210, 46 N. E. 819; Even if this entry were held to be a judgment, it is not easy to see how these plaintiffs can have a standing to attack it. The record is valid on its face, and by force of the statute, save as to fraud, imports absolute verity. The ancestor of these plaintiffs invoked the action taken, and surely he could not be heard to question its validity on the ground that the acknowledgment was had away from the office of the court. Courts are not ordinarily open for the purpose of setting aside action taken and entries made, on the motion of the party who has procured them. And if the ancestor would be estopped to ask a vacation of this entry on the ground stated, how can those who stand as privies in blood, and acquire their rights, if any they have, directly from him, have any better right to be heard?"

The decision in *Gray v. Gardner* (1888) 81 Me. 554, 18 Atl. 286, was to the same effect, but was based on a statute naming the persons who might appeal from an order of adoption. It appeared that the adopting parent died a few weeks after the order of adoption was entered, and the presumptive heirs after his death filed an appeal. The court said: "The statute provides that 'any petitioner, or any such child by his next friend, may appeal from such decree to the supreme court of probate . . . as in other cases.' Rev. Stat. chap. 67, § 36. Here is a precise designation of the parties allowed the right of appeal. Neither of these parties saw fit to appeal at the time the decree was passed. At that time, the petitioner living, it is clear the heirs presumptive had no right of appeal. They were not the petitioners, nor could they in any legal sense be the representatives of the petitioner. The adoption of the child would impose no duties or obligations upon them. Nor had they any vested rights as heirs which the adoption would interfere with, nothing in this respect, the prospect of which, it was not entirely competent for the petitioner to deprive them, either by the adoption of an heir or in the various other methods known to the law. Nor are their rights increased by her death. If they are deprived of their inheritance, it is by an act of the ancestor legal and competent for her to perform, and by which they must abide."

It has been held, moreover, that a statute providing for adoption without notice to the next of kin of the adoptive parent is constitutional. *Bird v. Young* (Ohio) *supra*, wherein the court said: "A point advanced, though not argued, is that the act is unconstitutional. It rests, we suppose, upon the assumption that rights of parties next of kin to the declarant may be taken away without notice. This is answered by the proposition, heretofore suggested, that no vested rights do or can exist at the time of the proceeding. And, as to mere presumptive rights, it is clearly within the competency of the general as-

sembly to modify, amend, or repeal statutory provisions regulating descents and distributions at any time; and it is equally competent to reach such result by indirection, as by the short cut of a direct repeal."

In the reported case (*RE REICHEL*, ante, 1016), however, it is held that, on an application to have an order and decree of adoption entered nunc pro tunc after the death of the adoptive parents, the natural heirs of the parents are necessary parties to the proceeding. It is to be noted that the decision is based on the ground that the heirs stand in the place of the adoptive parents, who would, of course, in their lifetime, be necessary parties to such a proceeding. It is stated, on the other hand, that the presumptive heirs of adoptive parents have no vested rights of inheritance of which they may not be deprived by the adoption.

In Massachusetts the presumptive heirs or next of kin of an adoptive parent are permitted to maintain a direct proceeding to have an adoption decree revoked, on the ground of fraud or undue influence on the adoptive parent. *Tucker v. Fisk* (1891) 154 Mass. 574, 28 N. E. 1051; *Phillips v. Chase* (1909) 203 Mass. 556, 30 L.R.A.(N.S.) 159, 89 N. E. 1049, 17 Ann. Cas. 544; *Raymond v. Cooke* (1917) 226 Mass. 326, 115 N. E. 423. Thus, in *Tucker v. Fisk* (Mass.) *supra*, it was held that the next of kin of an adoptive parent were entitled to have an adoption decree set aside after her death, on the ground that the adoptive parent was insane at the time of the adoption, and that a fraud was practised on her. The court said: "The respondent further insists that the petitioners have no standing in court, and no right to be heard. It is true that the next of kin of Eliza Jane Fisk could not have appealed from the decree of adoption during her lifetime. The only way in which they could have attacked it would have been to procure the appointment of a guardian who could have taken an appeal or other proceedings in her name. Whether, in case they had petitioned for the appointment of a

guardian and the probate court had refused to appoint one, that would have been conclusive upon them in any subsequent proceedings, we do not now consider. The petitioners lived out of the state at the time when the adoption proceedings were instituted, and do still so reside, and were entirely ignorant, till after the death of said Eliza, of her condition and of the facts attending the adoption. If they cannot now be heard, there would seem to be no way in which the adoption proceedings, however fraudulent, can be reached, and the death of Eliza will have operated to clothe the respondent's fraud with immunity from attack. We do not think her death can have that result. But for the alleged adoption, the petitioners, who were the next of kin of Eliza, would have been her heirs at law. If the adoption proceedings should turn out for any reason to be invalid, they will be entitled to her estate as her heirs at law. They have, therefore, a direct pecuniary interest in the matter, like disinherited heirs in proceedings concerning their ancestor's will, or heirs whose ancestor was frequently induced to make a conveyance of real estate. *Holman v. Loynes* (1854) 4 DeG. M. & G. 270, 43 Eng. Reprint, 510, 23 L. J. Ch. N. S. 529, 18 Jur. 839, 2 Week. Rep. 205; *Gresley v. Mousley* (1859) 4 DeG. & J. 78, 45 Eng. Reprint, 31, 28 L. J. Ch. N. S. 620, 5 Jur. N. S. 583, 7 Week. Rep. 427, *Kerr, Fraud & Mistake*, 371. No law required that any notice should be given to them before the decree of adoption was passed. They were not parties to the proceeding, had no opportunity to be heard, did not live in this state, and are not concluded by the decree." Similarly, in *Raymond v. Cooke* (1917) 226 Mass. 326, 115 N. E. 423, the next of kin of an adopting parent, after her death, sought to have the decree of adoption revoked on the ground of fraud and undue influence practised by the person adopted on the adopting parent. The court said: "The petitioners are the heirs at law and next of kin of Mrs. Cooke. They allege that fraud was practised on the probate court. When this petition was

filed, Mrs. Cooke's will had not been allowed. They were interested in her estate, and as such heirs and next of kin it was to their interest to resist the claims set up by the respondent. The petitioners, therefore, have an undoubted right to maintain this petition. *Tucker v. Fisk* (1891) 154 Mass. 574, 28 N. E. 1051; *Phillips v. Chase*, (1909) 203 Mass. 556, 30 L.R.A. (N.S.) 159, 89 N. E. 1049, 17 Ann. Cas. 544." The decision in *Phillips v. Chase* (Mass.) *supra*, was to the same effect. In that case a decree of adoption was set aside on the ground of undue influence. It appeared that the husband of the adopting parent was a physician who married her while she was in feeble health, and within a few months thereafter threatened to desert her unless she adopted his son by a former marriage. It also appeared that on the death of the adopting parent a petition was filed by her next of kin to have the decree of adoption set aside, and that the death of the adopted son occurred while the action was pending. In holding that the next of kin had a standing in court in such suit, as against the adopted child's natural father and heir, who was charged with exerting the undue influence, the court said: "But the peculiarity of the case at bar and of the case before this court in *Tucker v. Fisk* (Mass.) *supra*, is and was that the decree which entitled the respondent disentitled the petitioners. . . . If the adoption of Woodruff as Mrs. Chase's son is not set aside, the petitioners are not entitled to her property as her next of kin. Under those circumstances no relief can be given unless the decree of adoption is set aside. If a decree of adoption is ever to be set aside to prevent a person taking or keeping property obtained through his own fraud, it can be properly done when (as in the case at bar) the adoption was originally made, not for the personal relations thereby created, but for its effect upon property, where both parties to it are dead, and where the only person entitled to property by force of it is the person who committed the fraud. Under the facts existing when the

decree of revocation in this case was made, the petition for revocation here in question could be treated as a petition founded on the principle that a wrongdoer will not be allowed to profit by his own fraud, that the only way of preventing the fraud was to revoke the decree of adoption, and that there were no reasons then existing why that should not be done."

II. Collateral proceeding.

a. In general.

Formerly, the courts were inclined to construe the adoption statutes strictly, since they were in derogation of the rights of the natural heirs at common law. No presumptions were indulged in favor of the jurisdiction of a court of limited powers, and where the record failed to show a finding of fact required by the adoption statute, the defect was regarded as a jurisdictional one, available to the next of kin of the adoptive parent in a collateral proceeding. *Morris v. Dooley* (1894) 59 Ark. 483, 28 S. W. 30, 430; *Furgeson v. Jones* (1888) 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842. Compare *Coleman v. Coleman* (1906) 81 Ark. 7, 98 S. W. 733, the holding of which is given *infra*, II. b.

Thus, in *Furgeson v. Jones* (Or.) *supra*, the failure of the record to show that the father of an adopted child consented to the adoption was held to be a jurisdictional defect of which the presumptive heirs could take advantage in a collateral proceeding, though the record showed that the mother of the child consented to the adoption, and that, on obtaining a divorce from the child's father, she had been awarded its custody.

In *Morris v. Dooley* (Ark.) *supra*, it appeared that a petition for and a decree of adoption failed to state that the child resided in the county in which the decree was rendered, though it was required by statute that the child should be a resident of that county. It was held that an heir at law was entitled to take advantage of this defect, in an action of ejectment brought by him after the death of the adopting parent.

The courts, however, have abandoned the view that the adoption statutes are to be construed strictly, as in derogation of common-law rights, since they are obviously not intended to supplement the rules of common law, but to make a complete change in the law. Consequently mere errors and irregularities in the decree of adoption, or in other parts of the record of the proceeding, are no longer considered to be jurisdictional defects, and a decree of adoption cannot be successfully attacked by a presumptive heir in a collateral proceeding, except on the ground that the court was without jurisdiction to render the decree.

Connecticut.—See *Woodward's Appeal* (1908) 81 Conn. 152, 70 Atl. 453.

Georgia.—See *Jossey v. Brown* (1904) 119 Ga. 758, 47 S. E. 350.

Hawaii.—*Paris v. Kealoha* (1898) 11 Haw. 450.

Illinois.—*Barnard v. Barnard* (1886) 119 Ill. 92, 8 N. E. 320; *Kennedy v. Borah* (1907) 226 Ill. 243, 80 N. E. 767. See also *Flannigan v. Howard* (1902) 200 Ill. 396, 59 L.R.A. 664, 93 Am. St. Rep. 201, 65 N. E. 782; *Munger v. Munger* (1907) 184 Ill. App. 512.

Indiana.—*Jones v. Leeds* (1908) 41 Ind. App. 164, 83 N. E. 526.

Kansas.—*Cubitt v. Cubitt* (1906) 74 Kan. 353, 86 Pac. 475.

Louisiana.—*Caldwell's Succession* (1905) 114 La. 195, 108 Am. St. Rep. 341, 38 So. 140.

Massachusetts.—*Sewall v. Roberts* (1874) 115 Mass. 262; *Stearns v. Allen* (1903) 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349.

Minnesota.—See the reported case (*RE REICHEL*, ante, 1016).

Mississippi.—*Adams v. Adams* (1912) 102 Miss. 259, 59 So. 84, Ann. Cas. 1914D, 235.

Montana.—*Re Pepin* (1917) 53 Mont. 240, 163 Pac. 104. See also *Re Colbert* (1911) 44 Mont. 259, 119 Pac. 791.

Nebraska.—*Ferguson v. Herr* (1902) 64 Neb. 649, 90 N. W. 625, 94 N. W. 542; *Milligan v. McLaughlin* (1913) 94 Neb. 173, 46 L.R.A. (N.S.) 1134, 142 N. W. 675.

New York.—Re Ward (1908) 59 Misc. 328, 112 N. Y. Supp. 282.

Wyoming.—Nugent v. Powell (1893) 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23.

See also *infra*, II. b. .

In *Milligan v. McLaughlin* (Neb.) *supra*, an action for partition in which the validity of an adoption proceeding was attacked, the court said: "An examination of cases in other states shows that there are two classes of decisions upon such questions: One based upon the view that, since statutes of adoption were unknown at common law, the powers conferred upon probate or county courts are of such a limited and special nature that all proceedings must be strictly construed, that no presumptions will be indulged in, that nothing can be shown outside of the record to supply omissions therein, and that the statutory requirements must be strictly followed in all respects in order to confer jurisdiction. The other class, while adhering to the view that statutory requirements as to jurisdiction must be complied with, take a more liberal view, and hold that in the exercise of the jurisdiction conferred upon them in adoption proceedings they are courts of general jurisdiction in that regard, and the same presumption with respect to the regularity of their proceedings applies as in other courts. Under the doctrine announced by this court in *Ferguson v. Herr* (1903) 64 Neb. 659, 94 N. W. 542, the latter principle of construction has been adopted in this state, and the decree of a probate court in adoption proceedings 'has all the force and effect of a judgment, being subject to collateral attack only for want of jurisdiction.'"

In *Paris v. Kealoha* (1898) 11 Haw. 450, an action to quiet title to certain tracts of land, the validity of an adoption decree was contested by persons, presumably heirs, claiming title through the adoptive parent. The court said: "The decree in this case is attacked collaterally. A collateral attack will be successful 'only upon showing a want of power.' *Van Fleet, Collateral Attack*, p. 5. Mr. Justice 16 A.L.R.—65.

Davis had the power to legalize the adoption of children, and however informal the record may seem to be, it cannot be impeached collaterally."

In *Caldwell's Succession* (1905) 114 La. 195, 108 Am. St. Rep. 341, 38 So. 140, the court said: "We cannot assume on this vague testimony that Mrs. Samuels was not fifteen years younger than her adoptive father. She presented a judgment of a court of competent jurisdiction of a sister state, fixing her status, and binding on her adoptive parent and his heirs. 1 Am. & Eng. Enc. Law, 2d ed. p. 736. If such a decree was repugnant to any law of this state, it was incumbent on plaintiffs to have alleged and proven the particular facts on which they relied to show that the enforcement of the decree would be violative of some provision of our Code or statutes relative to adoption. The deceased elected to petition the court of probate in Massachusetts, where his niece resided, for a decree permitting him to adopt her as his child and heir. The decree was rendered as prayed for. It is valid in Massachusetts, and is 'conclusive against all collateral attacks by parties and privies.' *Ibid.*"

In *Flannigan v. Howard* (1902) 200 Ill. 396, 59 L.R.A. 664, 93 Am. St. Rep. 201, 65 N. E. 782, a person adopted by the testatrix after the making of a will filed a petition for an order declaring her to be entitled to the share in the estate of the testatrix to which she would have been entitled if the former had died intestate. As to the validity of the adoption proceeding, the court said: "It is contended by defendants in error that plaintiff in error was not legally adopted by Bridget Howard. In order to sustain that claim it would be necessary to show that the county court of La Salle county never acquired jurisdiction to enter an order of adoption, and it is conceded that if the county court had jurisdiction the order cannot be collaterally attacked in this proceeding. The only objection going to the jurisdiction of that court is that the petition failed to state the place of residence of the parents of the plaintiff in error. The statute

provides that the petition shall state the name, sex, and age of the child sought to be adopted, and, if it is desired to change the name, the new name, the name and residence of the parents of the child, if known to the petitioner, and of the guardian, if any, and whether the parents, or the survivor of them, or the guardian, if any, consents to such adoption. 1 Starr & C. Stat. 1896 ed., p. 353. The petition gave the names of the parents of plaintiff in error, and alleged that they consented to her adoption by petitioner, as would appear from their written consent filed therewith. The written consent filed with the petition gave as the residence of the parents, Lostant, in the county of La Salle, state of Illinois. There must be a substantial compliance with the provisions of the statute, but the construction of the statute should not be so narrow or technical as to invalidate proceedings where every material provision has been complied with. Every purpose of stating the place of residence of the parents was fully satisfied by the statement in the written consent, which was referred to in the petition and filed with it as a part of the application. The statute was substantially complied with. The court had jurisdiction over the petitioner, the plaintiff in error, who resided with the petitioner in La Salle county, and the natural parents. All the jurisdictional facts appeared from the record of the county court, and the order is not open to collateral attack in this proceeding."

In *Ferguson v. Herr* (1902) 64 Neb. 649, 94 N. W. 542, an action of ejectment brought by the next of kin of an adoptive parent against the devisees of the adopted child's grantee, the court said: "We think that proceedings under statutes similar to ours are always regarded as judicial. *Brown v. Brown* (1885) 101 Ind. 340. And if this proceeding was judicial, it can, of course, not be collaterally impeached for any error, however gross, that may have intervened between the acquirement by the probate court of jurisdiction of parties

and subject-matter, and the rendition of the decree. This, it will be conceded, is elementary, and citation of authorities is unnecessary, unless, perhaps, it may be successfully urged that no appeal lay from the decree of the probate court; in which event, it may be suggested, an erroneous decree ought not to be binding."

In *Nugent v. Powell* (1893) 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23, the court said, in upholding the validity of an adoption order in a proceeding for the distribution of the estate of an adoptive parent: "Several cases were cited to us upon argument, in which collateral heirs attacked proceedings of this nature, and in which the courts held that, the statute being in derogation of the common-law rights of the natural heirs, it must be rigidly construed. I am unable to perceive how the rights of the natural heirs were affected by the act of adoption, because at the time of the act they had no rights whatever under the law—no one is the heir of the living. *Sewall v. Roberts* (1874) 115 Mass. 277.

In *Sewall v. Roberts* (1874) 115 Mass. 262, the right to a trust fund was contested on one side by a person who was adopted by her guardian, and on the other by those who were the heirs of the adopting father if the adoption proceeding was invalid. In holding that the adopted child was entitled to the fund, the court said: "The court had jurisdiction of the subject-matter and of the parties; and if it be conceded that in such case it should appoint a guardian ad litem, the failure to do so would not render its decree absolutely void. It would at most be an irregularity which might render it voidable by the infant at her election. . . . It was clearly for her benefit, and a stranger cannot avoid it to her injury. We are of opinion, therefore, that the adoption was valid." The case was cited and its decision in effect followed in *Stearns v. Allen* (1903) 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349, though the precise question of the right of the next of kin to object

to adoption does not appear to have been raised.

In the case of *Re Pepin* (1917) 53 Mont. 240, 163 Pac. 104, it was said: "The rule is elementary that, to avoid a judgment or other transaction for fraud, the person attempting to do so must show that he has rights which were vested at the time and were injuriously affected by it. 23 Cyc. 1068. How was Exor Pepin injured? He was not, in 1902, an heir of the living Simon Pepin, nor had he any natural or accrued right to be an heir of Simon Pepin at the latter's death. *Re Colbert* (1911) 44 Mont. 259, 119 Pac. 791; 14 Cyc. 25. He was deprived of nothing by the adoption save a remote possibility. To say that with Elizabeth out of the way he would be entitled to succeed upon the death of Simon Pepin more than twelve years after the adoption is not enough; one whose rights accrue after a judgment is rendered cannot attack the judgment."

In *Munger v. Munger* (1907) 134 Ill. App. 512, an executor appealed from a court order awarding a certain sum of money to an adopted child of the testator. As to the validity of the adoption proceeding the court said: "It is insisted by appellant that the order of adoption is invalid and void, for the reason that it fails to expressly find whether or not appellee was a foundling. A foundling is defined to be 'a new-born child, abandoned by its parents, who are unknown.' *Rapalje & Lawrence's Law Dict.* 451. The petition alleges that the order finds that the parents of the child were dead, and that she had no guardian or next of kin living in the state, capable of giving consent. The status of the child was thus sufficiently shown under the statute. It does not appear from the record that the court had not full jurisdiction to enter the order, and its validity cannot, therefore, be attacked collaterally. *Barnard v. Barnard* (1886) 119 Ill. 92, 8 N. E. 320."

Likewise, in the reported case (*RE REICHEL*, ante, 1016), it is stated obiter that an order or decree of adoption cannot be attacked collaterally by

the parties to the proceeding, their heirs, or personal representatives.

In *Barnard v. Barnard* (Ill.) supra, an action brought by one claiming to be an heir at law by adoption for a partition of the real property of the deceased, the court said: "It is contended that this order is a nullity because, first, it is not shown in the petition that the county of McLean was the county of the residence of the petitioner; and second, the consent of the father of the child is not shown, by the petition, to have been obtained to the adoption, nor is it therein shown that he was dead, nor is his name given. It is not important here to inquire—this record coming before this court collaterally—whether the county court erred simply, in decreeing as it did. The question is, Did it have jurisdiction to make any decree in the matter? If it had jurisdiction to decree in the case, the decree, until reversed, however erroneous merely, must stand. It will be observed the statute clearly gives the court power to decree as to the subject-matter, and the only question, therefore, is whether the parties required by the statute to be before the court, in order that such a decree be rendered, were in fact before the court. The presumption, in the first instance, is that the court had jurisdiction, unless it is apparent from the act itself that the court could not have had jurisdiction in any contingency, or unless the statute empowering the court to act requires the record to affirmatively show, precedent to its decree, some fact which it fails to show. There being no pretense of anything here showing affirmatively that Walter Barnard did not at the time of presenting the petition reside in McLean county, or that the complainant had a father alive who had not abandoned him at the time, it only remains to examine whether the petition affirmatively recites all the jurisdictional facts which the statute specifies shall be recited in it; for we have held no more need be recited. . . . We have seen that the statute requires that the name of the father shall be stated, and that

he consents to the adoption; but this is only in the event that he is alive and has not abandoned the child, for if he be dead, or if he be alive and has abandoned the child, it is only necessary to state the name of the mother, and that she consents to the adoption. The fact of the father's death or abandonment is not required to be affirmatively stated. It may be that good pleading requires that such a statement should be made, and that its omission would be fatal on a direct proceeding—as to which we express no opinion; yet the statute only requires, as a jurisdictional fact, that the parent be named who has the actual custody and guardianship of the child, and that it be shown that that person consents to the adoption. It is not required that it shall be stated in the petition, or otherwise affirmatively shown, that the petitioner resides in the county. In this proceeding, it will be presumed that the court heard proof of the facts which required it to decree as it did." That case was cited and followed in *Kennedy v. Borah* (1907) 226 Ill. 243, 80 N. E. 767, with the following comment: "The statute under which the proceeding was had is the same one quoted at length in the case of *Barnard v. Barnard* (Ill.) *supra*. While in that case the rule of law as to presumptions of jurisdiction in a case of this kind was perhaps not accurately stated, the question involved was correctly decided."

In *Adams v. Adams* (1912) 102 Miss. 259, 59 So. 84, Ann. Cas. 1914D, 235, an action for the possession of certain property of a decedent, the validity of an adoption decree was contested by the next of kin of the adopting parent on the ground that the decree did not show that the petition was presented to the circuit court of the county where the adopting parent resided, or that the natural father of the child consented to the adoption, or was dead, or had abandoned the child. The court said: "The only question in this cause which has given us trouble—and that has given us considerable trouble—is the point made that the court was

without jurisdiction to hear the cause and render the decree, because the petition and proceedings under § 1496 of the Code of 1880 did not contain averments set out therein. . . . The court had general jurisdiction of the subject-matter and of the parties before it, and on collateral attack it will be presumed that the petition was presented to the circuit court of the proper county. . . . There is nothing in § 1496 of the Code of 1880, providing that these averments must appear affirmatively in the record in order that jurisdiction may exist. This, it must be remembered, is a collateral attack on these proceedings, and the proceeding for the adoption of the child was a strictly judicial one. It might have been better practice, as held in *Barnard v. Barnard* (1886) 119 Ill. 92, 8 N. E. 320, to set out all the averments named in § 1496 as proper to be set out. But the mere statement in the statute that these averments should be made, without saying they should be jurisdictional, certainly does not result in destroying the jurisdiction of the court."

In *Woodward's Appeal* (1908) 81 Conn. 152, 70 Atl. 453, the rights of an adopted child in the estate of the adoptive parent were contested by persons claiming to be the heirs at law, on the ground of lack of notice of the adoption proceeding to the child's natural parents. The court said: "A further claim is made that, notwithstanding the Wisconsin court acted within its jurisdiction, yet it appears that the parents of the adopted child were living at the time of the decree, and that they had no notice, by personal service or otherwise, to appear to be heard, and therefore the decree is upon its face void, by force of the settled principle that a personal judgment cannot be enforced against a defendant who neither appeared, nor had legal notice to appear, in an action. We do not think that this principle can be applied so as to render the decree, in so far as it affects the capacity of the infant to share in the distribution of the estate of this intestate, void upon its face. A father or parent has certain legal

rights in respect to his children during minority. But these rights are not absolute rights; they may be forfeited by his own conduct; they may be modified or suspended against his will by action of the court; they may, to a certain extent, be transferred by agreement to another; but they cannot be destroyed as between himself and his child, except by force of statute. . . . If the parents of Elizabeth Burton had a right to contest the validity of this decree in so far as it deprived them of their legal parental rights, it does not follow necessarily that, after those rights have terminated with the majority of their child, the decree giving to the infant a statutory capacity of inheritance from a stranger, made in pursuance of jurisdiction conferred and in the manner prescribed by statute, must be held void because the child's parents were not served with notice to appear, and did not in fact appear, and did not in fact consent to the action of the court. We are unable to affirm, upon the case as presented, that the decree of the Wisconsin court, authorized by statute and rendered in pursuance of the requirements of the statute, giving to Elizabeth Burton the defined statutory status as an adopted child of the intestate for the purposes of inheritance and succession, is void because the parents of the child might have successfully contested the validity of the decree, in so far as it affected their legal rights as parents." See to the same effect, *Jossey v. Brown* (1904) 119 Ga. 758, 47 S. E. 350.

In *Jones v. Leeds* (1908) 41 Ind. App. 164, 83 N. E. 526, the court said: "The record in the adoption proceedings shows that the court which rendered the decree had jurisdiction, and its decree is not open to attack except in a suit for that purpose. Appellee's contention is subject to the objection that it is a collateral attack upon a decree. In *Van Fleet, Collateral Attack*, § 3, it is said: 'A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. . . .

Any proceeding provided by law for the purpose of avoiding or correcting a judgment is a direct attack which will be successful upon showing the error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing a want of power.' The vital question in this case is as to appellant's title. To show this, she produced in evidence a decree of adoption by the Howard circuit court, whereby her status as a child of Louisa W. Leeds by adoption and her right to share in the latter's estate are established. Appellees attempted to avoid and annul such status by showing that said decree was void because of the failure of said Louisa to verify the petition for adoption, thereby attempting to show that appellant has no title to the real estate in question. This is a collateral attack upon the judgment of adoption, and cannot be maintained."

In *Cubitt v. Cubitt* (1906) 74 Kan. 353, 86 Pac. 475, a suit instituted on the death of an adoptive parent for the partition of his real property, it was claimed that the adoption was illegal because the name of the natural mother of the child was inserted in the order of adoption where that of the adoptive parent should have been written. It also appeared that there was some discrepancy in the dates mentioned in the order, so that it was not clear whether the purported adoption was consummated in 1885 or 1886. In holding that these defects could not be set up as a ground for holding the adoption order to be invalid, the court said: "When parties voluntarily submit important interests to a court of competent jurisdiction for determination, and such interests are adjusted by such court, and its judgment thereon is entered upon its records, and the parties interested acquiesce in and act thereon for many years, such record should not be lightly set aside or ignored. On the contrary, such judicial proceedings should be construed, when reasonably possible, so as to preserve and protect the rights and interests

conferred thereby. *Re Evans* (1895) 106 Cal. 562, 39 Pac. 860; *Van Matre v. Sankey* (1893) 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628; *Wilson v. Otis* (1902) 71 N. H. 483, 93 Am. St. Rep. 564, 53 Atl. 439. When a judicial record, considered as a whole, clearly indicates the order or judgment which the court intended to make, then all mere formalities, irregularities, and obvious clerical omissions and mistakes will be overlooked, and the real act of the court will be recognized, upheld, and enforced according to the manifest intent thereof."

In a New York decision it has been held that the next of kin of an adoptive parent can neither before nor after his death attack the validity of the adoption. *Re Ward* (1908) 59 Misc. 328, 112 N. Y. Supp. 282, where in the court said: "Sections 66, 67, and 68 of the Domestic Relations Law clearly prescribe the only means by which the relation of parent and child, formed under this statute, can be abrogated or destroyed. There is no authority under this statute, if I correctly read it, which would enable the next of kin of the deceased to directly attack the adoption proceedings under consideration. The statute furnishes relief only to those directly involved. If a direct attack upon the adoption proceedings is not authorized by the statute, I am unable to understand on what theory a collateral attack can be sustained."

b. Estoppel.

In several cases involving a collateral attack on the validity of an adoption, it has been held that, where an adoptive parent has obtained a decree of adoption and taken the adopted child into his home, his presumptive heirs and personal representatives, as well as himself, are estopped thereafter from asserting that the adoption was illegal.

Arkansas. — *Coleman v. Coleman* (1906) 81 Ark. 7, 98 S. W. 733.

California. — *Re Camp* (1901) 131 Cal. 469, 82 Am. St. Rep. 371, 63 Pac. 736; *Re McKeag* (1903) 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039.

Illinois. — *Van Matre v. Sankey* (1893) 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628.

Indiana. — *Brown v. Brown* (1885) 101 Ind. 340.

Minnesota. — See the reported case (*RE REICHEL*, ante, 1016).

Nebraska. — *Milligan v. McLaughlin* (1913) 94 Neb. 171, 46 L.R.A.(N.S.) 1134, 142 N. W. 675.

New Hampshire. — See *Wilson v. Otis* (1902) 71 N. H. 483, 93 Am. St. Rep. 564, 53 Atl. 439.

Oregon. — Compare *Furgeson v. Jones* (1888) 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842.

Pennsylvania. — *Rollo v. Bell* (1920) 265 Pa. 503, 109 Atl. 159. See also *Peterson's Estate* (1905) 212 Pa. 453, 61 Atl. 1005.

In the case of *Re McKeag* (1903) 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039, it appeared that letters of administration were issued to an adopted child of the deceased. An application to have the letters revoked was made by the appellant, a sister of the deceased, who claimed to be one of the heirs at law. The court, after commenting on the beneficial results of the adoption statutes, said: "Recognizing these good results, courts are more and more inclined to an abandonment of the old rule of strict construction, and to place a fair and reasonable construction upon proceedings under the statute, with a view of sustaining the assumed relationship, particularly against a collateral attack by strangers to the proceedings, whose only interest is to defeat the relation which the adoptive parents always recognized and never questioned, so that they may succeed to an estate from which, by the very fact of adoption, the adoptive parents intended they should be excluded in favor of the adopted child. . . . Without, however, discussing this point further, we are satisfied that appellant, claiming under *Cora V. McKeag*, the adoptive mother, is estopped as effectually as she would be in her lifetime from questioning the validity of the adoption proceedings—certainly, at least, to the extent that any irregularities in the method of proce-

dures are invoked to disturb them. The deceased in her lifetime could not have questioned them, and appellant stands in no better right to attack them than the deceased would have had."

In the case of *Re Camp* (1901) 131 Cal. 469, 82 Am. St. Rep. 371, 63 Pac. 736, a brother of an adoptive parent made an application for letters of administration on his estate. With respect to appellant's right to object to the validity of the decree of adoption, the court said: "Whether the parents of the child, in a direct proceeding against the adopting person for the recovery of the persons of the children, would be bound by this determination of the judge, is not involved herein. It is very clear that, if an action had been brought against the decedent in his lifetime for necessities supplied for the support of the children, he would not have been permitted to show in his defense that, at the time of the proceedings for their adoption, the parents had not in fact abandoned them. He would have been estopped by his recital of their abandonment in his petition. Inasmuch as the rights of the appellant herein are derived solely through and under the decedent, he can have no greater right to question the validity of the order than would the decedent."

In *Brown v. Brown* (1885) 101 Ind. 340, it appeared that after the death of an adoptive parent his brothers and sisters sought, in a collateral proceeding, to have the adoption order declared to be invalid on the ground that the adoptive parent was, at the time of the proceeding, of unsound mind. The court said: "The judgment of the court fixes the legal status both of the adoptive parent and the child. *Paul v. Davis* (1885) 100 Ind. 422; *Humphries v. Davis* (1885) 100 Ind. 274, 50 Am. Rep. 788. A judgment of a court fixing the status of a person, rendered in a matter where it has jurisdiction and upon the notice required by law, is conclusive as against all collateral attacks by parties or their privies. . . . The unexplained delay of more than ten years prevents the maintenance of

such suits as this. It would be unjust and unwise to permit a child to discharge the duties of that relation to an adoptive father for that period of time, and then permit brothers and sisters of the adoptive father to come in and take from the child all his rights as heir. If parties desire to contest the mental capacity of a kinsman to adopt a child, they must proceed with diligence, and not delay until witnesses have died, have moved away, or have forgotten the matter. It would open the way to the most flagrant abuses to permit a judgment fixing the status of a child to be vacated after such a long lapse of time, and it would also encourage, what equity abhors, sloth and negligence."

In *Wilson v. Otis* (1902) 71 N. H. 483, 93 Am. St. Rep. 564, 53 Atl. 439, wherein an adoption decree was held to be valid on other grounds, the court said: "Whether the defendants claiming title under Otis, the original petitioner, are in a position to attack a decree granted in his favor and recognized by him as valid for many years, may not be a doubtful question (*State v. Weare* (1859) 38 N. H. 316); but it is unnecessary to decide it at this time. For reasons above suggested, the defendants are not entitled to share in the estate under a decree of a distribution." For the ground on which the decision was actually based, see *supra*, II. a.

Estoppel was also made one of the grounds for the decision in *Milligan v. McLaughlin* (1913) 94 Neb. 171, 46 L.R.A.(N.S.) 1134, 142 N. W. 675, wherein the validity of an adoption was upheld as against the natural heirs of the adoptive parent. See *supra*, II. a.

It is stated in the reported case (*RE REICHEL*, ante, 1016) that when the adoptive parents get the order or decree for which they ask, and take the adopted child into their home and treat it as their own, they are estopped from thereafter asserting that the adoption was illegal, and the estoppel extends to their heirs and personal representatives.

In *Coleman v. Coleman* (1906) 81

Ark. 7, 98 S. W. 733, the court said: "Appellant contends that the order is void and subject to collateral attack, because it does not recite that it was shown by two witnesses that the residence of the father was unknown. But the jurisdiction of the court did not, in our opinion, depend on such evidence, nor was it necessary to make such a recital in the record. Making the order of adoption without such proof would be error, and might be ground to set such order of adoption aside on petition of the father of the adopted child; but neither D. L. Coleman, on whose petition the order of adoption was made, nor anyone claiming through him, as plaintiff does, would be allowed to object to the judgment on that ground."

With respect to the estoppel of the next of kin of an adopting parent to object to the adoption, the court said in *Van Matre v. Sankey* (1893) 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628: "The courts of Pennsylvania . . . held, as we think properly, in considering this and similar contentions, that Samuel Sankey, if living, would be, and the parties now seeking to disregard that decree, claiming under and in privity with him, were, estopped from questioning the validity of the adoption. We do not find it necessary to pursue or determine that matter here. It having been determined upon direct proceeding, by the court of last resort of the state in which the decree was rendered, that the court of common pleas had jurisdiction to enter the decree, we are required to give it full faith and credit. The Pennsylvania court of common pleas, having jurisdiction of the persons of the parties and the subject-matter, as was necessarily held by the supreme court of that state, had power to adjudicate the questions involved, and its decree cannot be impeached by showing irregularity in its procedure, or that errors intervened in its rendition. . . . Jurisdiction conferred power upon the court to judicially determine the questions involved, and incorporate its determination in a decree fixing the rights of the parties—the status of each toward the other; and

it will, unless attacked for fraud, be held valid and conclusive upon the parties and their privies until reversed or set aside in the jurisdiction in which it was rendered."

A different view, however, was taken by the court in *Furgeson v. Jones* (1888) 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842. It appeared in that case that a presumptive heir conveyed her interest in the estate of a deceased adoptive parent to the other adoptive parent, and that the adoptive child brought an action of ejectment against such grantee to obtain a share in the estate. The court held that the adoption was invalid because no notice by publication or otherwise was given to the natural father of the adopted child. With respect to the question of the defendant's being estopped as a party to the adoption proceedings, the court said: "Counsel for plaintiff argue that this defendant is in no condition to make the objection of want of jurisdiction; that she consented to the act of adoption, and that she is bound by it. If this is so, it must be on the ground of estoppel. But estoppels, to be binding, must be mutual, and if Sylvester H. Jenner, who was a necessary party to this proceeding, was not bound by the decree, it is not perceived on what ground the same could be held binding on any of the other parties."

In *Rollo v. Bell* (1920) 265 Pa. 503, 109 Atl. 159, reference was made to a case decided by a Pennsylvania trial court, and based on facts substantially the same as those in the Oregon case last cited. It was held by the trial court that the surviving adoptive parent, claiming title through the next of kin of the other adoptive parent, was estopped to deny the validity of the adoption. No exception was filed or appeal taken. The action before the supreme court was between the same parties, and the question of the validity of adoption was therefore held to be settled by the prior action and judgment.

For the application of the principle of estoppel in direct proceedings to contest the validity of an adoption, see *supra*, I. W. S. R.

H. A. FERRELL, Appt.,
v.
FLETCHER WOOD.

Arkansas Supreme Court — June 27, 1921.

(— Ark. —, 232 S. W. 577.)

Homestead — nonjoinder of wife in conveyance — effect.

1. A deed of a homestead by a man in which his wife does not join is void.

[See note on this question beginning on page 1036.]

Contract—refusal to convey homestead—action for breach.

2. A man cannot be made liable in damages for breach of contract to convey his homestead, where the wife refuses to join in the conveyance, since his contract to convey under such circumstances is void.

[See 13 R. C. L. 638, 639; see note in 4 A. L. R. 1272.]

(McCulloch, Ch. J., and Smith, J., dissent.)

APPEAL by plaintiff from a judgment of the Circuit Court for St. Francis County (Jackson, J.) sustaining a demurrer to the complaint in an action brought to recover damages for alleged breach of contract to convey a homestead. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Mann & Mann, for appellant:

Had the husband abandoned his homestead before the date set for the consummation of this contract and the deeding of the property, there can be no question but that the contract could be enforced. This he could do without his wife's concurrence, and she need not join in the conveyance of an abandoned homestead.

Stewart v. Pritchard, 101 Ark. 101, 37 L.R.A. (N.S.) 807, 141 S. W. 505; Farmers Bldg. & L. Asso. v. Jones, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062; Brown v. Brown, 104 Ark. 313, 149 S. W. 330; Vestal v. Vestal, 137 Ark. 309, 209 S. W. 273.

At common law a husband could convey the homestead without the concurrence of his wife, and the fact that she did not join in the alienation of the homestead did not affect the validity of the sale.

Klenk v. Knoble, 37 Ark. 298.

Had the plaintiff agreed to sell the homestead of defendant for a certain sum of money, with the understanding that all over that amount should be his commission, this commission could be collected from defendant.

Chandler v. Gains-Ferguson Realty Co. 145 Ark. 262, 224 S. W. 484.

The husband who makes a contract

of sale without consulting his wife should be made to stand the loss sustained by the failure of his wife to ratify the contract.

Jenkins v. Harrison, 66 Ala. 345; Clark v. Bird, 158 Ala. 278, 132 Am. St. Rep. 25, 48 So. 359; Wainscott v. Haley, 185 Mo. App. 45, 171 S. W. 983; White v. Bates, 234 Ill. 276, 84 N. E. 906; Cross v. Everts, 28 Tex. 523; Krebs v. Popp, 42 Tex. Civ. App. 346, 94 S. W. 115.

Mr. C. W. Norton, for appellee:

The husband's deed of the homestead, lacking the wife's signature and acknowledgment, "is void absolutely, not relatively;" and it "is a nullity if his wife fails to join in the execution."

Pipkin v. Williams, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433; Waters v. Hanley, 120 Ark. 465, 179 S. W. 817; Branch v. Moore, 84 Ark. 462, 120 Am. St. Rep. 78, 105 S. W. 1178; Droppers v. Marshall, 203 Mich. 173, 4 A.L.R. 1272, 168 N. W. 1001; Mundy v. Shellabarger, 88 C. C. A. 445, 161 Fed. 503.

Hart, J., delivered the opinion of the court:

H. A. Ferrell made a contract in writing with Fletcher Wood to purchase the homestead of the latter. Wood's wife did not sign the contract. Upon the refusal of

Wood to carry out the contract, Ferrell instituted this suit in the circuit court against him to recover damages. The judgment of the circuit court was in favor of Wood, and Ferrell has appealed.

A majority of the court is of the opinion that the judgment of the circuit court was correct. This court has uniformly held that, under our statute, a deed or mortgage purporting to convey the homestead, by a married man, is void, unless his wife, joins in the execution of the conveyance. *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433, and *Oliver v. Routh*, 123 Ark. 189, 184 S. W. 843, and cases cited.

This court has never decided the precise question raised by the appeal. The courts are divided on the question of whether an action for damages may be maintained against a husband for a breach of contract to convey his homestead, where his wife did not sign the contract. The authorities on both sides of the question are cited, and to some extent reviewed, in a case note to 4 A.L.R., at page 1272. Courts favoring liability for a breach of such a contract say that it is not unlawful for a person to contract to sell and convey something he does not own, but expects to acquire, and that, if he unqualifiedly undertakes to do that which later he finds he cannot perform, he must respond in damages. There is a difference between such a contract and a contract to convey the homestead.

In the first instance, if the contracting party should acquire the land which he had agreed to convey to another, he could carry out his contract, and therefore should respond in damages for a failure to do so. A contract by a husband to convey his homestead is a mere nullity, unless the wife signs the contract. This court expressly held in the case of *Waters v. Hanley*, 120 Ark. 465, 179 S. W. 817, that the husband cannot make a contract to

convey the homestead which will be binding, unless his wife signs it. The court pointed out that, if such a contract would be obligatory upon the wife, the statute prohibiting the sale of the homestead without the consent of the wife could be easily evaded, and would be of no force.

Again, it is urged that to hold that the husband cannot be made to respond in damages for the breach of a contract to convey his homestead, unless signed by his wife, would have the effect to embarrass him in the sale thereof. We cannot see how the failure to make him respond in damages would embarrass him, any more than to hold that his contract to convey the homestead is not valid unless his wife signs the same. If any embarrassment is caused in either event, it is caused by the passage of the statute, and not by placing a construction on it which its language clearly imports. If a man cannot make a contract agreeing to convey his homestead that will be valid or binding, without his wife's concurrence, it is difficult to see upon what reason he should be made liable to respond in damages for a breach thereof. As said by Judge Carland in *Mundy v. Shellabarger*, 88 C. C. A. 445, 161 Fed. 503, the reason for holding that a contract to convey the homestead, without the concurrence of the wife, is null and void, and cannot be used as a basis for the recovery of damages, is clearly and forcibly stated by Judge Mitchell in *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817. We quote from his opinion as follows: "But, notwithstanding some respectable authority to the contrary, it seems to us that to hold that a person is liable in damages for the nonperformance of a contract which he is under no legal obligation to perform would be illogical, and without analogy or precedent in the law. The very proposition involves a legal inconsistency. We think that on legal principles such a contract must be held void for all purposes, and not to constitute the basis of any action against

Homestead—non-joinder of wife in conveyance—effect.

the obligor. There are also strong practical considerations in favor of this view. While it is true, as counsel suggests, that to hold the husband liable for damages would not deprive him or his family of their homestead, yet to force him to the alternative of securing his wife's signature to the conveyance, or of being mulcted in damages for not doing so, and to place the wife in the dilemma of either having to sign the deed or see her husband thus mulcted in damages, might, and naturally would, often indirectly defeat the very object of the statute. There is nothing unjust to the obligee in holding such a contract absolutely void for all purposes. He is bound to know the law, and he always has actual notice, or the means of obtaining actual notice of the fact that the land with which he is about to deal is a homestead."

But it is insisted that this rule is contrary to the principles announced in *Branch v. Moore*, 84 Ark. 462, 120 Am. St. Rep. 78, 105 S. W. 1178. That was a case where a broker sued the owner of a homestead to recover commissions for effecting a sale thereof, and the court held that it was no defense to the action that the land constituted the defendant's homestead. Upon this branch of the case we quote from the opinion as follows: "Appellant contends that the land constituted his homestead, and he could not lawfully authorize the appellee to sell it without his wife joining him in executing an instrument for that purpose; but this contention is not tenable. Appellee is not seeking to enforce any contract to sell or convey the land, or any lien thereon. The land has been sold. No party is seeking to avoid the sale. Appellee is asking only for compensation for services rendered."

There the broker was suing for services he had performed in effecting a sale of the homestead, and his contract was collateral to the contract of the husband to convey the homestead without the concurrence

of the wife. Here the breach of the contract of the husband to convey the homestead is made the basis of the suit. As above stated, if the contract is a complete nullity, it was void from its inception, and cannot be made the basis of the cause of action.

Contract—
refusal to convey homestead—
action for breach.

It follows that the judgment will be affirmed.

McCulloch, Ch. J., dissenting (July 11, 1921):

The authorities on the question involved in this case are nearly equally divided, which leaves us free to follow our own views, uninfluenced by the precedents established by other courts. Two cases which may be selected as leading ones on this subject are *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817, supporting the conclusion now reached by the majority of this court, and *White v. Bates*, 234 Ill. 276, 84 N. E. 906, announcing the contrary conclusion. I think the reasoning of the Illinois court is sound.

The statute (C. & M. Dig. § 5542) does not declare that an executory contract for the sale of a homestead is void. It merely declares that a "conveyance, mortgage, or other instrument affecting the homestead of any married man" shall not be valid "unless his wife joins in the execution of such instrument and acknowledges the same." Such a contract does not involve moral turpitude in its performance, nor does it offend against any declared public policy, though the statute fixes a limitation on the husband's right to convey the homestead. He can do so only with the consent of the wife. A conveyance of the homestead without her consent is void; but, since the statute itself does not declare invalid the husband's executory contract to sell the homestead, I fail to see the force of the contention that the contract is void because a conveyance in performance of the contract is invalid unless the

wife joins in it. It would be different, of course, if the contract was one involving moral turpitude, for no rights can accrue under a contract to do an unlawful or immoral act. Such is not the effect of a contract to sell and convey the homestead. The obligor merely undertakes, in such a contract, to sell and convey certain property in the manner prescribed by law, and, if he fails to comply, he should be held liable for all damages resulting from his breach of the contract. The effect is the same as if the contract were one to sell and convey property to which the obligor had no title at the time. Though beyond his power to perform the contract, he is liable in damages for its breach. The fact that such a contract would embarrass the wife, and cause her unwillingly to join in the conveyance of the homestead rather than to see her husband mulcted in damages, affords no sound reason for the court to declare the contract void, though it might appeal strong-

ly to the legislature on a proposal to enact such a law.

This court has heretofore decided that a contract to pay an agent's commission under a contract for sale of the homestead is valid. *Branch v. Moore*, 84 Ark. 469, 120 Am. St. Rep. 78, 105 S. W. 1178; *Chandler v. Gaines-Ferguson Realty Co.* 145 Ark. 262, 224 S. W. 484. The conclusion now announced by the majority is, I think, in conflict with those cases, for, if a contract for the sale of the homestead is void, then a contract for payment of a commission on such sale is likewise void. Both contracts should be controlled by the same principles.

I do not think it is important whether or not the wife joins in the contract to sell the homestead. She is not required to join in such a contract to make it valid. She must, in order to make such a contract effective against herself, join in the execution of the conveyance and acknowledge the same.

Smith, J., concurs.

ANNOTATION.

Action for damages against signing spouse for breach of contract to convey homestead signed by one spouse only.

Since the preparation of the note in 4 A.L.R. beginning at page 1272, no case other than the reported case (*FERRELL v. WOOD*, ante, 1033) seems to have passed on the liability for damages of a spouse who signs a contract to convey the homestead, where the other spouse, who does not sign

the contract, refuses to join in a conveyance. That case adheres to the majority rule, holding that a contract to convey a homestead is void unless it is signed by both spouses, and that therefore, when it is not so signed, no liability of the signing spouse can be predicated on its breach. *W. A. S.*

CORNELIUS DOUGHERTY, Deceased Employee.

NELLIE DOUGHERTY, Appt.

Massachusetts Supreme Judicial Court — May 25, 1921.

(— Mass. —, 131 N. E. 167.)

Workmen's compensation — sunstroke — when arises out of employment.

1. Sunstroke of an employee engaged in delivering coal does not arise out of his employment within the meaning of the Workmen's Compen-

sation Act, if there is nothing to show that he was peculiarly exposed to the danger of sunstroke by reason of the nature of his work.

[See note on this question beginning on page 1038.]

—act in course of employment.

2. An injury to an employee while doing the work he was employed to perform is received in the course of his employment within the meaning of the Workmen's Compensation Act.

[See 28 R. C. L. 797.]

—injury arising out of employment.

3. An injury arises out of the em-

ployment within the meaning of the Workmen's Compensation Act when it appears, in view of all the circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.

[See 28 R. C. L. 797.]

APPEAL by claimant from a decree of the Superior Court for Hampden County affirming a finding of the Industrial Accident Board denying compensation in a proceeding by her under the Workmen's Compensation Act to recover compensation for the death of her husband. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Thomas J. O'Connor, for appellant:

The risk of injury need not be peculiar to the employment; it is sufficient if such a risk is incidental to the employment.

McCarthy's Case, 230 Mass. 429, 119 N. E. 697; Hallett's Case, 232 Mass. 49, 121 N. E. 503; O'Brien's Case, 228 Mass. 380, 117 N. E. 619; McCarthy's Case, 232 Mass. 557, 123 N. E. 87.

Messrs. Graves & Moran for appellees.

Crosby, J., delivered the opinion of the court:

The undisputed facts in this case show that the employee was a teamster in the employ of the Union Coal & Wood Company. On August 1, 1917, about 3 o'clock in the afternoon, after having delivered a load of coal, he drove into his employer's yard and complained to one Finn, the treasurer of the company, that he did not feel well and that he was not perspiring; he was ordered to put up his team and go home; about half an hour later it was reported that he was lying in his employer's barn and was unconscious; he was removed to a hospital, and died several hours later, his death being due to heat prostration. The day in question was extremely hot; the temperature registered between 98 and 99 degrees in the afternoon.

It is plain that the sunstroke

which resulted in the death of the employee was suffered while he was doing the work he was employed to perform; therefore the injury was received in the course of his employment.

Workmen's compensation—act in course of employment.

The question remains whether the injury arose out of the employment within the meaning of the Workmen's Compensation Act (Stat. 1911, chap. 751, as amended by Stat. 1912, chap. 571). An injury arises out of the employment when it appears, in view of all the circumstances, that there is a causal connection between the conditions under which the work

—injury arising out of employment.

is required to be performed and the resulting injury. The first interpretation by this court of the Workmen's Compensation Act, in this connection, is found in McNicol's Case, 215 Mass. 497, at page 499, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, where it is said: "If the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But

it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood." *Hewitt's Case*, 225 Mass. 1, L.R.A. 1917B, 249, 113 N. E. 572; *Donahue's Case*, 226 Mass. 595, L.R.A. 1918A, 215, 116 N. E. 226, 14 N. C. C. A. 491; *Warner v. Couchman*, 4 B. W. C. C. 32.

See *McManaman's Case*, 224 Mass. 554, 113 N. E. 287; *Mooradjian's Case*, 229 Mass. 521, 118 N. E. 951.

In the case at bar a member of the industrial accident board found that, upon all the evidence, the claimant "has not satisfied the burden of proving that the heat prostration which caused the death of her decedent was occasioned by, or causally related to, a personal injury which arose out of and in the course of his employment." This finding was affirmed and adopted by the board on review which found

that "it has not been shown that the employee was subjected by reason of his employment to materially greater danger of heat prostration than other outdoor workers on the days in question."

There was no evidence to show that the employee, while engaged in delivering coal on the day of his death, was peculiarly exposed to the danger of sunstroke

—sunstroke—
when arises out
of employment.

by reason of the nature of his work; the hazard of injury from that cause would not seem to have been different from that to which persons in general in that locality, who worked in the open were exposed. It cannot be said as matter of law that the findings of the board were without evidence to support them. The case at bar is plainly distinguishable in its facts from *McManaman's Case*, supra, *O'Brien's Case*, 228 Mass. 380, 117 N. E. 619, *McCarthy's Case*, 230 Mass. 429, 119 N. E. 697, and *McCarthy's Case*, 231 Mass. 259, 120 N. E. 852, where a different result was reached. The entry must be decree affirmed.

ANNOTATION.

Workmen's compensation: injury or death due to elements.

The above question is covered in the annotation in 13 A.L.R. 974, to which this annotation is supplementary.

Injuries from freezing.

(Supplementing annotation in 13 A.L.R. 975.)

In *Savage v. Pontiac* (1921) — Mich. —, 183 N. W. 798, it was held that there was no accident, or accidental injury, within the meaning of the Michigan Workmen's Compensation Act, where, because of a high wind, water sprayed back on a fireman, who was fighting a fire on a severe winter day, and froze on his neck in a layer 1 inch thick, which, according to expert testimony, caused pressure on the spinal cord and injury resulting in death. The court said that it had been unable to find a case under any statute similar to the Michigan act pro-

viding for compensation for "accidental injuries," where compensation had been awarded an employee for an injury received in the course of his employment through purely natural causes, where the employee was no more subject to the injury than others similarly employed. The majority of the court in this case relied upon the decision in *Landers v. Muskegon* (1917) 196 Mich. 750, L.R.A. 1918A, 218, 163 N. W. 43, where it was held that pneumonia contracted by a member of the fire department, from becoming wet in the performance of his duties in winter, did not result from an accident within the meaning of the Compensation Act. *Wiest, J.*, in a dissenting opinion, said: "I cannot agree with the conclusion reached by Mr. Justice Stone in this case. If it can be said that the fastening of the

ice upon the neck and the consequent injury to the spine, were no more than an incident likely to happen to a fireman in severely cold weather while pursuing his employment, then I am ready to concede that it was no accident within the meaning of our Compensation Act. The injury to the spine was occasioned by a most extraordinary mishap. We may accept the postulate that in the eye of the law there is no accident in the absence of violence, casualty, or vis major, and yet bring this case within the rule. There is evidence supporting the finding that the ice fastened to the neck of the deceased caused a hurt to his spine, and thereby occasioned his death. If the deceased had hurt his spine in exerting himself at the fire, it would have been an accident. The ice upon his neck exercised external violence, and injured his spine, and caused his death, according to the opinion of one medical witness. This traumatic violence takes the case out of the holdings cited by my brother. I am of the opinion that, under the evidence, the board properly determined that the deceased met with an accident within the meaning of our law, and the award should be affirmed."

Injuries from heat stroke or sunstroke.

(Supplementing annotation in 13 A.L.R. 979.)

It will be observed that in the re-

ported case (*DOUGHERTY'S CASE*, ante, 1036) an injury to an employee by sunstroke, sustained while the employee was doing the work he was employed to perform in delivering coal, was held to have been received in the course of his employment; but it was held that it did not arise out of his employment within the meaning of the Compensation Act, there being nothing to show that he was peculiarly exposed to the danger of sunstroke by reason of the nature of his work.

In *Matis v. Schaeffer* (1921) 270 Pa. 141, 113 Atl. 64, where one employed as a laborer in a coal yard, and also at times on the employer's farm, suffered a sunstroke while working on the farm, it was held that he was acting in the course of his employment, and that the Workmen's Compensation Act covered cases of injury or death from sunstroke.

And in *Murray v. H. P. Cummings Constr. Co.* (1921) 197 App. Div. 903, 188 N. Y. Supp. 193, it was held that the injury was an accidental one arising out of and in the course of the employment, where an employee suffered a cerebral hemorrhage and paralysis while working in a gravel pit when the temperature was exceedingly high, and the radiation of the heat from the surrounding sand and gravel intensified the heat to an unusual degree, and there was no breeze blowing.

J. T. W.

FLYNN BROWN, Plff. in Err.,

v.

COMMONWEALTH OF VIRGINIA.

Virginia Supreme Court of Appeals—June 29, 1921.

(— Va. —, 107 S. E. 809.)

Criminal law — bystander as principal in second degree.

1. A mere bystander is not guilty as principal in the second degree for commission of a crime, if he did not in any way procure, incite, or encourage the act done by the actual perpetrator.

[See note on this question beginning on page 1043.]

Homicide — shooting with intent to kill — principal in second degree.

2. One who goes with companions

to another's house with the intention of fighting him may be found to be guilty, as principal in the second de-

gree, of unlawfully shooting such person with intent to maim and kill him, if during the altercation his companion shoots him, although he did not know that his companion was armed.

Definition — principal in second degree.

3. A principal in the second degree is one not the perpetrator, but present, aiding and abetting the act done,

or keeping watch or guard at some convenient distance.

[See 1 R. C. L. 134.]

Evidence — circumstances — aiding crime.

4. Whether or not one aids or abets another in the commission of a crime may be determined by circumstances as well as by direct evidence.

[See 1 R. C. L. 143.]

ERROR to the Corporation Court of the city of Norfolk to review a judgment convicting defendant under two indictments, of unlawfully, maliciously, and feloniously shooting another with intent to maim, disfigure, disable, and kill, and of simple assault. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. William McK. Woodhouse, for plaintiff in error:

Defendant cannot be held as aiding and abetting in the shooting, as a principal in the second degree.

Mitchell v. Com. 33 Gratt. 845; Horton v. Com. 99 Va. 848, 38 S. E. 184; Reynolds v. Com. 33 Gratt. 834; Kemp v. Com. 80 Va. 443; State v. Hildreth, 31 N. C. (9 Ired. L.) 429, 51 Am. Dec. 364; 1 Bishop, Crim. Law, § 440.

Messrs. John R. Saunders, Attorney General, J. D. Hank, Jr., Assistant Attorney General, and Leon M. Bazile, for the Commonwealth:

The evidence is sufficient to support the conviction of the accused.

Martin v. State, 89 Ala. 115, 18 Am. St. Rep. 91, 8 So. 23; Peden v. State, 61 Miss. 267; People v. Vasquez, 49 Cal. 560; State v. Johnson, 7 Or. 210; Mitchell v. Com. 33 Gratt. 845.

Kelly, P., delivered the opinion of the court:

Flynn Brown was indicted and tried under two indictments, one charging him with unlawfully, maliciously, and feloniously shooting Leroy White, with intent to maim, disfigure, disable, and kill, and the other charging him with likewise shooting Hampton Taylor. These two charges against him were, by consent, heard together. The jury found him guilty of a felony upon the first indictment, fixing his punishment at confinement in the penitentiary for one year, and also found him guilty of a simple assault upon the second indictment, fixing his punishment at confinement in jail for thirty days. The trial court

overruled a motion for a new trial, and sentenced the defendant in accordance with the verdicts.

The sole error assigned is that the verdicts were not supported by the evidence.

The defendant did not do the shooting, but the commonwealth contended below, and contends here, that he was present, aiding and abetting the crime, and that therefore he was guilty as a principal in the second degree.

From the standpoint of the commonwealth, the evidence either showed, or materially tended to show, the following facts: On the 21st of June, 1920, about 1 o'clock P. M., the defendant, who was intoxicated, went to the house of Leroy White (a house of bad repute) and asked if a certain girl named Lucy was there. An altercation arose between Brown and White, which resulted in White's pushing or throwing Brown out of the door and into the street so violently that he fell to the ground. After getting up he said to White, "When I come back, you will not stay here any longer," and then went away. Some hours later, and after the defendant had somewhat recovered from his intoxication, "he got to thinking," as he said, "about how badly White had treated him, and got very hot," and determined to go back "to get satisfaction about the way he was treated, and if he found out that he was in the right, he was going to

fight White about it." He left home alone, and on the way to White's house met up with his brother, Moses Brown, and his nephew, James Brown. They asked where he was going, and when he informed them of the occasion and purpose of his mission, they offered to go with him. It does not appear that he was armed, or that he knew his brother was armed, and he had no gun, and said he did not know his brother had one. The party arrived at White's house about 5 o'clock P. M. White was sitting at the window near the door. No one else was in the room except a girl. The defendant looked through the window and said to Moses and James Brown, "There is the s—— of a b—— now," and knocked at the door. White came to the door, and the defendant immediately seized and pulled him into the street. James Brown said, "Punch the s—— of a b—— in the mouth," and also said, "Kill him," or "Kill the s—— of a b——;" and Moses Brown fired two shots, one while the defendant had hold of White, which did not take effect on White, but struck Hampton Taylor, an innocent bystander, and one after White had broken away and was going up the stairway in his house. The second shot struck White in the back. Moses Brown then made his escape, going over a fence, which he was assisted in getting over by the defendant, Flynn Brown.

This narrative of occurrences is, in some important particulars, at variance with the testimony on behalf of the defendant, but is fully warranted by that portion of the evidence which the jury evidently accepted as true. It was their province to settle the conflicts in testimony.

We have no difficulty in holding that the jury was justified in finding the defendant guilty as a principal in the second degree.

"A principal in the second degree
16 A.L.R.—66.

is one not the perpetrator, but present, aiding and abetting the act done, or keeping watch or guard at some convenient distance." Minor's Synopsis Crim. Law, p. 11. See also Horton v. Com. 99 Va. 848, 38 S. E. 184.

"Every person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks, or signs, or who in any way, or by any means, countenances or approves the same, is, in law, assumed to be an aider and abetter, and is liable as principal." Plaintiff's instruction No. 1 in Daingerfield v. Thompson, 33 Gratt. 136, 148, 36 Am. Rep. 783, approved by this court as the law.

Mere presence when a crime is committed is, of course, not sufficient to render one guilty as an aider or abetter.

There must be something to show that the person present, and so charged, in some way procured, or incited, or encouraged the act done by the actual perpetrator. Kemp v. Com. 80 Va. 443, 450. But whether a person does in fact aid or abet another in the commission of a crime is a question which may be determined by circumstances as well

Definition—
principal in
second degree.

Criminal law—
bystander as
principal in
second degree.

Evidence—
circumstances—
aiding crime.

as by direct evidence. In this case, Moses Brown, the acknowledged principal in the first degree, would not have been present at all, but for the fact that he had learned from Flynn Brown of the unlawful mission on which the latter, the real aggressor, was going to the place. They both undoubtedly went there with a common unlawful purpose, for which the defendant was primarily responsible. The fight would have been unlawful, even if he had first sought an explanation, and had attacked White only after satisfying himself that he had been unjustly treated; but his testimony that he only intended to make the attack if he found out he was in the right is discredited by the commonwealth's

Homicide—
shooting with
intent to kill—
principal in
second degree.

evidence, tending to show that he assaulted White immediately and without asking any questions. Furthermore, the fact that the shooting began, according to the commonwealth's evidence, almost simultaneously with Flynn Brown's assault upon White, and the further fact that, as soon as the second shot was fired Moses Brown was assisted by Flynn Brown in getting over the fence to make his escape, are very significant circumstances, when viewed in the light of the previous concert of action by these two men in coming to White's house to demand satisfaction.

It may be conceded that there is no sufficient evidence to show that it was a part of the original plan or design of these parties to shoot White. Such a concession does not avail anything to the defendant. What actually occurred was not an improbable consequence of the fight which they clearly intended to provoke. When two or more persons go to the home of a third party to whip him, they know he will, in all reasonable probability, use force in resisting the attack, and that bloodshed is likely to result on one or both sides.

In 1 Wharton's Criminal Law, 11th ed. § 258, pp. 329, 330, it is said: "All those who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable, in the nature of things, a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. . . . Hence, it is not necessary that the crime should be a part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose."

See also *Martin v. State*, 89 Ala. 115, 120, 18 Am. St. Rep. 91, 8 So. 23; *Peden v. State*, 61 Miss. 267, 270; *People v. Vasquez*, 49 Cal. 560, 563; *State v. Darling*, 216 Mo. 450,

23 L.R.A.(N.S.) 273, 129 Am. St. Rep. 526, 115 S. W. 1002; 13 R. C. L. p. 730, § 31.

In *Peden v. State*, 61 Miss. 267, 270, where several persons went to a man's house with the common purpose of whipping him, and one of the party struck him with a spade, inflicting a fatal injury, it was held that the other members of the party were responsible for the act and properly convicted of murder, although the evidence tended to show that the death of the deceased was not a part of the original plan. The court said: "The fatal blow was struck by Amos Davis, one of the party, with a spade. The evidence suggests that the death of Walker was not contemplated by the parties at the outset, and that their purpose was bounded by the flogging of Walker. A number of persons having conspired together to do the unlawful act of beating Walker, the law makes no distinction between them, and each is responsible for the act of any of the party in the prosecution of the design, and, if death happened in the prosecution of such design, all are guilty of murder, if the person who caused the death is. It matters not that the purpose to kill Walker was not entertained by all or by any at the outset."

In *State v. Darling*, 216 Mo. 450, 23 L.R.A.(N.S.) 273, 129 Am. St. Rep. 526, 115 S. W. 1002, the defendant accompanied his brother, to be present when the latter whipped the deceased. It did not appear that the defendant knew his brother had, or intended to use, any weapons. When the attack was made, however, the brother used a piece of iron, and inflicted fatal injuries. The court reviewed the authorities on the subject somewhat fully, and in the course of the opinion said: "As said by the Alabama supreme court [*Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179, 7 Am. Crim. Rep. 443], the defendant, knowing of this purpose [to assault and whip the deceased, without any agreement or limita-

tion affecting the method to be used in whipping him] and going along to assist in it, could expect nothing else than that the deceased would naturally oppose force to such unlawful design upon his person, as the experience of mankind shows that very few men would tamely submit to such an outrage and indignity, and a natural and probable consequence to such an encounter would be homicide, either of the deceased, or of one of them. And the law will hold him responsible for the act of his brother. Most of the adjudicated cases hold that he would be guilty of murder in such a case, and he has no cause to complain that the court limited his offense to manslaughter."

Kemp v. Com. *supra*, and Reynolds v. Com. 33 Gratt. 834, are relied upon by the defendant, but they do not support his defense.

In Kemp's Case, this court approved the following quotation from 1 Bishop, Crim. Law, § 634: "From the proposition that mere presence at the commission of a crime does not render a person guilty, it results that if two or more are lawfully together, and one does a criminal thing without the concurrence of the others, they are not thereby involved in guilt. But, however lawful the original coming together, the after conduct may satisfy a jury that all are guilty of what is done."

In the case at bar, however, "the original coming together" was unlawful; and, furthermore, "the aft-

er conduct" of the defendant in immediately assisting Moses Brown to escape tended to show that both were guilty of the shooting.

The following further extract from the opinion in Kemp's Case shows that case to have been essentially different from this one: "In all the evidence in this case (and there is no conflict of evidence in any respect), there is not a circumstance disclosed tending in the least to show any agreement or formed design between the prisoner, Kemp, and the man, Whitehurst, who did the killing, nor between him and any other person or persons, nor that he in any manner aided or abetted in or assented to, the felonious act of Whitehurst, the sole perpetrator thereof; nor was there a moment of time in which there could have been an agreement between the real perpetrator and the prisoner. Nor is there an intimation of any agreement or design on the part of the prisoner to commit any other unlawful purpose. The testimony establishes nothing except the mere presence. The meeting of the parties who were present at this tragedy was purely accidental."

In the Reynolds Case, *supra*, there was no evidence of a prearranged plan to attack the deceased.

The trial court was right in refusing to set aside the verdicts, and the sentences passed upon the defendants are affirmed.

ANNOTATION.

Principal in second degree, or aider and abetter in case of felonious assault.

In general.

Formerly one who did not commit an act of violence toward the assaulted person, but who was present at, and aided or abetted in, a felonious assault, was criminally liable therefor as a principal in the second degree. Raiford v. State (1877) 59 Ala. 106, dictum.

A statute abolishing the distinction between principals in the first

and second degree ordinarily does not affect the criminal liability of a principal in the second degree, but only his punishment. Thus, in Raiford v. State (Ala.) *supra*, a prosecution for an assault with intent to commit murder, the court, after explaining that a statute had abolished the distinction between a principal in the first and a principal in the second degree, and between principals and ac-

cessories before the fact, said: "Under the testimony in this record, if the defendant is guilty, the degree of his guilt is what was known at the common law as a principal in the second degree. The charge asked fairly specified the ingredients of that grade of offense, with some of the elements of an accessory before the fact. We think this charge should have been given."

Although in most of the recent cases a person present at, and aiding and abetting in, the commission of a felonious assault, but not guilty of actual violence toward the person assaulted, is not designated as a principal in the second degree, he is, apparently without exception, held to be criminally responsible for the assault.

Alabama.—*Cabbell v. State* (1871) 46 Ala. 195; *Raiford v. State*, *supra*; *Tanner v. State* (1890) 92 Ala. 1, 9 So. 613; *Jolly v. State* (1891) 94 Ala. 19, 10 So. 606; *Hicks v. State* (1898) 123 Ala. 15, 26 So. 337; *Harmon v. State* (1910) 166 Ala. 28, 52 So. 348; *Smith v. State* (1913) 8 Ala. App. 187, 62 So. 575.

Arkansas.—*Woolbright v. State* (1916) 124 Ark. 197, 187 S. W. 166.

Delaware.—*State v. Jackson* (1912) 3 Boyce, 279, 82 Atl. 824.

Georgia.—*Spencer v. State* (1886) 77 Ga. 155, 4 Am. St. Rep. 74, 3 S. E. 661; *Bohannon v. State* (1892) 89 Ga. 451, 15 S. E. 534; *Garrett v. State* (1892) 89 Ga. 446, 15 S. E. 533.

Illinois.—*Hanna v. People* (1877) 86 Ill. 243; *Hamilton v. People* (1885) 113 Ill. 34, 55 Am. Rep. 396; *McMahon v. People* (1901) 189 Ill. 223, 59 N. E. 584.

Missouri.—*State v. Hickam* (1888) 95 Mo. 322, 6 Am. St. Rep. 54, 8 S. W. 252; *State v. Gooch* (1891) 105 Mo. 392, 16 S. W. 892; *State v. Melvin* (1902) 166 Mo. 565, 66 S. W. 534.

New York.—*People v. Eichner* (1915) 168 App. Div. 200, 154 N. Y. Supp. 44, 33 N. Y. Crim. Rep. 322.

North Carolina.—*State v. Morris* (1824) 10 N. C. (3 Hawks) 388; *State v. Chastain* (1889) 104 N. C. 900, 10 S. E. 519; *State v. Knotts* (1914) 168 N. C. 173, 83 S. E. 972.

Pennsylvania.—*Com. v. Weiland* (1867) 1 Brewst. 312.

South Carolina.—*State v. White* (1903) 67 S. C. 320, 45 S. E. 210.

Texas.—*Henry v. State* (1899) — *Tex. Crim. Rep.* —, 49 S. W. 96, reversed on other grounds on rehearing (1899) — *Tex. Crim. Rep.* —, 50 S. W. 399; *Smith v. State* (1911) 61 *Tex. Crim. Rep.* 349, 135 S. W. 152; *Soria v. State* (1918) 83 *Tex. Crim. Rep.* 343, 203 S. W. 57. See also *Lyons v. State* (1892) 30 *Tex. App.* 642, 18 S. W. 416.

Vermont.—*State v. Taylor* (1896) 70 Vt. 1, 42 L.R.A. 673, 67 *Am. St. Rep.* 648, 39 *Atl.* 447.

Virginia.—See the reported case (*BROWN v. COM.* ante, 1039).

Washington.—*State v. Klein* (1898) 19 *Wash.* 368, 53 *Pac.* 364.

Wisconsin.—See *Bianchi v. State* (1919) 169 *Wis.* 75, 171 N. W. 639.

In *State v. Gooch* (1891) 105 Mo. 392, 16 S. W. 892, the following instruction was held to be proper: "The jury are instructed that, in order to convict all of the defendants in this case, it is not necessary that the jury should believe that each and all of the defendants actually assaulted or struck S. P. Boyer with a club, or that they even took hold of him, or even touched his person; but if the jury believe from the evidence, beyond a reasonable doubt, that any of the defendants actually assaulted and struck S. P. Boyer with a club, knocking him senseless and endangering his life, with the intention to kill him or do him great bodily harm, and further find that the other defendants, or any of them, were present, aiding, abetting, encouraging, or ready, if necessary, to aid, assist, or encourage the defendant or defendants actually making such assault, if it became necessary to do so, then the defendant or defendants so doing, or so present, are equally guilty with the one actually making such assault, and the jury should so find."

So, in *State v. Jackson* (1912) 3 Boyce (Del.) 279, 82 Atl. 824, a *nisi prius* case, the following instruction was given to the jury: "If you find that one of the prisoners assaulted Drejko, and that the other did not as-

sault him, but was then and there present, aiding, abetting, or counseling the one who committed the act, he who so aided is deemed in law an accomplice and equally criminal with his principal, and should be found guilty of the same offense, whether that be guilty of assault with intent to murder, or guilty of assault only."

With reference to the words "aid and abet," as used in a definition of a principal in the second degree, the court said in *Raiford v. State* (1877) 59 Ala. 106: "They comprehend all assistance rendered by acts, words of encouragement or support, or presence, actual or constructive, to render assistance, should it become necessary. No particular acts are necessary. If encouragement be given to commit the felony, or if, giving due weight to all the testimony, the jury are convinced beyond a reasonable doubt that the defendant was present with a view to render aid, should it become necessary, then that ingredient of the offense is made out. And if, the foregoing fact being found, Walter Raiford committed the alleged assault under circumstances to render his act an assault with intent to commit murder under the statute, then the jury would have been justified in finding the defendant guilty."

It has been held that a person was guilty of an assault with intent to murder who was present at an altercation between two persons and handed a pistol to one of them, with which the latter shot and wounded his antagonist. *Harmon v. State* (1910) 166 Ala. 28, 52 So. 348.

The mere facts, however, that one is present at an altercation, and knows that other persons are making an unlawful assault with the intent to commit a homicide, are not sufficient to make him guilty as a principal in the assault. *Cabbell v. State* (1871) 46 Ala. 195; *Smith v. State* (1911) 61 Tex. Crim. Rep. 349, 135 S. W. 152. See to the same effect *Soria v. State* (1918) 83 Tex. Crim. Rep. 343, 208 S. W. 57.

Thus, a person who does not commit a felonious assault in person is not liable therefor, where the only

evidence to connect him with a common design to commit the crime consists of words spoken by him at or near the scene of the assault, unless the words are spoken to or in the hearing of persons engaged in carrying out the design. *Cabbell v. State* (Ala.) supra.

On the other hand, one need not be actually present as an ear or an eye witness of the transaction in order to be criminally liable as one who aids and abets the commission of a felonious assault. He is constructively present, aiding and abetting, if, with the intention of giving assistance, he is in a position to give it if it is required. *Raiford v. State* (Ala.) supra; *State v. Chastain* (1889) 104 N. C. 900, 10 S. E. 519.

In the case last cited, a prosecution for assault with intent to kill by shooting at the prosecuting witness, it was held that if one of the two defendants, who were brothers, was stationed 150 yards behind the one who did the actual shooting, and was within sight of him and armed with a rifle, and if he was there with the knowledge that his brother was to commit the assault, and his purpose was to afford aid and assistance to his brother if hard pressed, he was aiding and abetting him, and liable as a principal.

One is none the less an aider and abetter in a felonious assault because he retires from the scene of the assault after instigating and encouraging it at its inception. *State v. Morris* (1824) 10 N. C. (3 Hawks) 388; *State v. Knotts* (1914) 168 N. C. 173, 83 S. E. 972.

Intent and malice.

While intent and malice are essential to a felonious assault, it is sufficient for the conviction of one aiding and abetting in such an assault if he entertains the felonious and malicious intent in person, or if he aids and abets the assault with knowledge that the perpetrator thereof is actuated by such an intent. *Tanner v. State* (1890) 92 Ala. 1, 9 So. 613; *Jolly v. State* (1891) 94 Ala. 19, 10 So. 606; *Hicks v. State* (1898) 123 Ala. 15,

26 So. 337; *Woolbright v. State* (1916) 124 Ark. 197, 187 S. W. 166; *State v. Hickam* (1888) 95 Mo. 322, 6 Am. St. Rep. 54, 8 S. W. 252; *State v. White* (1903) 67 S. C. 320, 45 S. E. 210; *Henry v. State* (1899) — Tex. Crim. Rep. —, 49 S. W. 96, reversed on other grounds on rehearing in (1899) — Tex. Crim. Rep. —, 50 S. W. 399. See also *Lyons v. State* (1892) 30 Tex. App. 642, 18 So. 416.

Thus, in *Jolly v. State* (1891) 94 Ala. 19, 10 So. 606, a prosecution for an assault with intent to commit murder, the court said: "If Joe Jolly was the assailant, and the defendant knew that the assault was made with intent to murder, and was present as an accomplice to encourage, aid, or assist in its execution, it was not necessary to show that the defendant himself entertained the intent or malice against Powell."

In *Henry v. State* (1899) — Tex. Crim. Rep. —, 49 S. W. 96, reversed on other grounds on rehearing in (1899) — Tex. Crim. Rep. —, 50 S. W. 399, the court said: "There is nothing in the charge, so far as we have been able to discover, by which the jury could infer that they should convict appellant, unless he aided Chapman for the purpose either of killing Kemper or committing an aggravated assault and battery upon him. His guilt is made to hinge, throughout the entire charge, upon his aiding and acting with Chapman in making this assault; and the jury were specially charged, if he did not enter into this intent, they could not convict him. This charge, to say the least of it, was very favorable to defendant, for he may, under our law have furnished the weapon to Chapman with the intent that Chapman should kill him, whether Chapman intended to kill him; or not, and yet be guilty of assault with intent to murder. But here the court limited the jury to his entering into Chapman's intent. He could, by an instruction, have authorized a conviction upon his own intent in furnishing said stick of wood, if the jury believed it was furnished for the purpose of killing Kemper."

In *Lyons v. State* (1892) 30 Tex.

App. 642, 18 S. W. 416, the material facts and the conclusion of the court were stated in the opinion as follows: "In this case a serious bodily injury was inflicted upon Scott. If defendant knew that Thornburn was engaged in the infliction of this injury, and aided and encouraged him in the commission thereof, he would be responsible for the natural and reasonable consequences, and if death had ensued would be guilty of the homicide; but if Thornburn intended to kill Scott, but this intention was not known to defendant, death not resulting, but serious bodily injury, the latter would be responsible, not for the secret intention of Thornburn, but for the reasonable consequences, viz., the infliction of serious bodily injury, and hence his crime would be aggravated assault and battery. Does the proof show with reasonable certainty that defendant knew that Thornburn intended to kill Scott? It does not. Does it show that he saw Thornburn when he struck Scott with the gun? This is doubtful. Conceding that he did see Thornburn strike, or in the act of striking, is there any evidence that he aided or encouraged him to strike Scott with the gun? There is none, for the evidence renders it certain that at the time defendant was struggling with Clarence Scott to prevent him from using a gun. We agree with counsel for appellant that the evidence is insufficient to sustain the verdict for assault with intent to murder."

In *Hicks v. State* (1898) 123 Ala. 15, 26 So. 337, the following instruction was held to be correct: "Whether James Hicks fired into the house or not, if you believe beyond a reasonable doubt from the evidence that he was one of the party some of whom did fire into the house of Job Jones with the intent to murder him, and that was his purpose in going there, then you are authorized to find James Hicks guilty, whether he fired one of the shots or not."

Moreover, it is pointed out in the reported case (*BROWN v. COM.* ante. 1039) that one may be guilty of an assault with intent to kill as a principal

in the second degree, although he is not a party to any understanding or design to commit that specific offense; that if he engages in an unlawful undertaking he is responsible as a principal in the second degree for an assault with intent to kill committed in his presence by another party to the unlawful undertaking or design, where the assault committed is not an improbable consequence of trying to carry out the unlawful design. The following cases are to the same effect: *Hanna v. People* (1877) 86 Ill. 243; *Hamilton v. People* (1885) 113 Ill. 34, 55 Am. Rep. 396; *McMahon v. People* (1901) 189 Ill. 222, 59 N. E. 584. See also *Garrett v. State* (1892) 89 Ga. 446, 15 S. E. 533; *Bohannon v. State* (1892) 89 Ga. 451, 15 S. E. 534. Compare *Spencer v. State* (1886) 77 Ga. 155, 4 Am. St. Rep. 74, 3 S. E. 661; *State v. Taylor* (1896) 70 Vt. 1, 42 L.R.A. 673, 67 Am. St. Rep. 648, 39 Atl. 447.

In *Hanna v. People* (Ill.) *supra*, the court said: "The instruction given on behalf of the people is not subject to the criticism made upon it. It states correctly that if defendant and those indicted with him had a common design to do an unlawful act, then, in contemplation of law, whatever act any one of them did in furtherance of the original design is the act of all, and all are equally guilty of whatever crime was committed."

A fortiori, where two or more persons act in concert in resisting a lawful arrest, and one of them, with the consent and approbation of the other or others, attempts to kill one of the persons engaged in making the arrest, by using a weapon likely to produce death, all of the persons resisting the arrest are guilty as principals in an assault with intent to murder. *Garrett v. State* (1892) 89 Ga. 446, 15 S. E. 533; *Bohannon v. State* (1892) 89 Ga. 451, 15 S. E. 534.

A distinction, however, has been made between a common purpose to resist a legal arrest and a common

understanding to do whatever may be necessary to avoid the arrest. *State v. Taylor* (1896) 70 Vt. 1, 42 L.R.A. 673, 67 Am. St. Rep. 648, 39 Atl. 447. In that case the court said: "The court charged in substance that if the four persons whom the officers were attempting to arrest were acting together with a common purpose of resisting arrest, and any one of the four shot an officer in the execution of that design and with an intent to kill, and the other three were present assisting in the assault, all would be guilty of an assault with that intent. Assuming that the charge as a whole was sufficient to require the finding of an actual intent to take life on the part of one, it will be seen that the liability of the others for an assault with intent to take life is made to depend solely upon the illegality of the resistance. It is doubtless true that if all were combined for an unlawful resistance to the officers, and an officer had been killed by one of their number, all would have been guilty of the killing. But no one was killed; and the liability of the actual assailant, other than for a simple assault, depended upon the existence of a specific intent to kill. We think the jury could not be permitted to return a verdict of guilty of an assault with intent to murder against all, on the mere finding of a common purpose to resist arrest. It would doubtless be different if it were found that they acted upon a common understanding that they would do whatever might be necessary to avoid arrest."

Similarly, it has been held that a common purpose, formed suddenly in an emergency, to defend even with too much force and violence, would not render one participant liable for an assault with intent to kill committed by another in his presence, after the defense had been accomplished and while the original assailant was retreating. *Spencer v. State* (1886) 77 Ga. 155, 4 Am. St. Rep. 74, 3 S. E. 661.

W. S. R.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plff. in Err.,
v.
AARON JONES.

Oklahoma Supreme Court—May 4, 1920.

(78 Okla. 204, 190 Pac. 385.)

Railroads — duty to watch for persons on tracks.

1. It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person who was killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track where people may be expected upon the track in considerable numbers, as where the roadbed is constantly used by pedestrians. At such places the railway company is bound to anticipate the presence of persons upon the track, to keep a reasonable lookout for them, to give warning signals such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery.

[See note on this question beginning on page 1054.]

Negligence — when cause of action arises.

2. To constitute "actionable negligence," where the wrong is not wilful and intentional, three essential elements are necessary: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff proximately resulting from such failure.

[See 20 R. C. L. 7.]

Trial — jury — difference of opinion.

3. Where the evidence on the primary negligence of the defendant is such that reasonable and intelligent men might differ as to the facts and

inferences to be drawn therefrom, the case is one for the jury.

[See 20 R. C. L. 169.]

— question for jury — contributory negligence.

4. Under art. 23, § 6, of the state Constitution, the defense of contributory negligence is at all times a question of fact for the jury, and the court should not instruct the jury that a certain fact or circumstance or a given state of facts or circumstances do or do not constitute contributory negligence.

[See 14 R. C. L. 747.]

Appeal — instructions — absence of error.

5. Instructions examined, and found that no material or prejudicial error has been committed therein.

Headnotes by JOHNSON, J.

ERROR to the District Court for Oklahoma County (Hayson, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. F. Evans, R. A. Kleinschmidt, and Fred E. Suits, for plaintiff in error:

Plaintiff was a trespasser, and the defendant would not be liable for in-

juries sustained by him, in the absence of wilfulness, wantonness, or gross negligence.

Chicago, R. I. & P. R. Co. v. Stone.
34 Okla. 364, L.R.A.1915A, 142, 12;

Pac. 1120; Gulf, C. & S. F. R. Co. v. Dees, 44 Okla. 118, L.R.A.1918E, 396, 143 Pac. 852; 2 Thomp. Neg. § 1722; Richards v. Chicago, St. P. & K. C. R. Co. 81 Iowa, 423, 47 N. W. 63; Kirtley v. Chicago, M. & St. P. R. Co. 65 Fed. 386; Cleveland, C. C. & St. L. R. Co. v. Tartt, 12 C. C. A. 618, 24 U. S. App. 489, 64 Fed. 823; Ward v. Southern P. Co. 25 Or. 433, 23 L.R.A. 715, 36 Pac. 166; Hasting v. Southern R. Co. 5 L.R.A.(N.S.) 775, 74 C. C. A. 398, 143 Fed. 260; Spain v. St. Louis & S. F. R. Co. — Mo. App. —, 190 S. W. 358; Sweat v. Louisville & N. R. Co. 178 Ky. 825, 200 S. W. 14; Southern R. Co. v. Clark, 32 Ky. L. Rep. 69, 13 L.R.A. (N.S.) 1071, 105 S. W. 384; Westbrook v. Kansas City M. & B. R. Co. 170 Ala. 574, 34 L.R.A.(N.S.) 469, 54 So. 231, 2 N. C. C. A. 338; Gulf, C. & S. F. R. Co. v. Dees, 44 Okla. 118, L.R.A. 1918E, 396, 143 Pac. 852.

The fact that an injury occurs carries with it no presumption of negligence; it is an affirmative fact for the injured party to establish that defendant has been guilty of negligence.

St. Louis & S. F. R. Co. v. Fick, 47 Okla. 530, 149 Pac. 1126; St. Louis & S. F. R. Co. v. Rushing, 31 Okla. 231, 120 Pac. 973.

Defendant was entitled to an instruction embodying its defense of contributory negligence positively and adapted to the particular facts of the case.

Spain v. St. Louis & S. F. R. Co. — Mo. App. —, 190 S. W. 358; Chicago, R. I. & P. R. Co. v. Barton, 59 Okla. 109, 159 Pac. 250.

There is no evidence of any causal connection between the violation of the city ordinance and plaintiff's injury, and the blocking of Robinson street for more than five minutes cannot be said to be the proximate cause of the injury sustained by the plaintiff.

De la Pena v. International & G. N. R. Co. 32 Tex. Civ. App. 241, 74 S. W. 58; Texas & P. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162; Curtis v. St. Louis & S. F. R. Co. 96 Ark. 394, 34 L.R.A.(N.S.) 466, 131 S. W. 947, Ann. Cas. 1912B, 685; Lusk v. Pugh, — Okla., —, 159 Pac. 855.

Messrs. Twyford & Smith, for defendant in error:

It was a question of fact for the jury, under proper instructions, to determine the exact status of the plaintiff.

Wilhelm v. Missouri O. & G. R. Co. 52 Okla. 317, L.R.A.1916C, 1029, 152 Pac. 1088; Midland Valley R. Co. v. Toomer, 62 Okla. 272, L.R.A.1917D, 1127, 162 Pac. 1127; Chicago, R. I. & P. R. Co. v. Austin, 63 Okla. 169, L.R.A. 1917D, 666, 163 Pac. 517; Ft. Smith & W. R. Co. v. Jones, 63 Okla. 228, 163 Pac. 1110; St. Louis & S. F. R. Co. v. Stacy, 77 Okla. 165, 171 Pac. 870; Whitehead Coal Min. Co. v. Pinkston, — Okla., —, 175 Pac. 364; Lusk v. Haley, 75 Okla. 206, 181 Pac. 727; Missouri, K. & T. R. Co. v. Wolf, 76 Okla. 195, 184 Pac. 765; Brundage v. Southern P. Co. 89 Or. 483, 174 Pac. 1139; 2 Thomp. Neg. § 1726.

It is the duty of the court to define contributory negligence, showing the elements, and leaving the question to the jury.

Chicago, R. I. & P. R. Co. v. Barton, 59 Okla. 109, 159 Pac. 253; Scott v. Seaboard Air Line R. Co. 67 S. C. 136, 45 S. E. 129; Okmulgee Window Glass Co. v. Bright, — Okla., —, 183 Pac. 898.

The question of proximate cause was a question of fact for the jury.

St. Louis & S. F. R. Co. v. Darnell, 42 Okla. 394, 141 Pac. 785.

Johnson, J., delivered the opinion of the court:

This suit was commenced by the defendant in error, hereinafter referred to as plaintiff, against the plaintiff in error, hereinafter referred to as defendant, in the district court of Oklahoma county on January 16, 1918, for the recovery of damages in the sum of \$3,000, and, upon a trial thereof to the court and jury, resulted in a verdict in favor of the plaintiff in the sum of \$1,500. The defendant filed a timely motion for a new trial, which was overruled by the court and a judgment rendered upon the verdict of the jury, to reverse which this proceeding in error was regularly commenced in this court by petition in error filed by the plaintiff in error on June 9, 1919, with case-made attached. The assignments of error are: "(1) Error in overruling the defendant's demurrer to the plaintiff's evidence; (2) in overruling defendant's request for a peremptory instruction; (3) ver-

dict is not sustained by sufficient evidence; (4) is contrary to law; (5) excessive damages appearing to have been given under the influence of passion and prejudice; (6) in admitting certain evidence over objection of the defendant; (7) in refusing to admit certain evidence offered by defendant; (8) errors of law occurring at the trial and accepted by the defendant; (9) error of the court in giving to the jury instructions Nos. 1 to 8, inclusive; (10) refusing to give defendant's requested instructions Nos. 1 to 12, inclusive; (11) in overruling defendant's motion for a new trial."

Counsel for defendant in error discuss in their brief the first four assignments of error, wherein they say: "These assignments of error present the questions (1) of the sufficiency of the plaintiff's evidence to warrant the submission of the case to the jury, and (2) whether, under all the evidence, plaintiff is entitled to recover."

And we think a consideration of these propositions is sufficient to dispose of this appeal.

The allegations in the plaintiff's petition and his evidence in support thereof, in substance, showed about the following situation:

The plaintiff lived south of what is known as the Robinson street and Frisco crossing within Oklahoma City, and Robinson is the only street open between Capitol Hill and the city proper. This was a very busy and much-used crossing. The plaintiff had lived near and used the same very frequently, as often as twice a day, for a number of years. That the crossing was blocked by the railway company very often. That the crossing was blocked in violation of the five-minute city ordinance, and it was customary for pedestrians to go west around the blockade, and the railway company's watchman at times "motioned them around," and, in going around, a worn and well-beaten path was made. According to the plaintiff this path had been in use for a number of years, and it had

been the custom to go around the blocked crossing during that time. Witness Schott said that he had been using the crossing four or five years, and that it was blocked often during that time; that there was a path there in use by those going around; and that the flagman did nothing to prevent the use of the path. According to witness Hodges, the flagman "would tell the people to go around the train when blocked." He lived there six years and used the crossing every day, and there was a path there used by pedestrians going around the blocked crossing, and "the flagman motioned them to go around," and the crossing was blocked from five to twenty-five minutes many times. The path was west of the crossing and used by the persons going around, and the path then led diagonally across the several tracks back to Robinson street. The plaintiff on the date of the injury went to the crossing, found it blocked, and waited seven or eight minutes, and then followed the path west and north, and while in the path on one of the tracks was struck by a moving car from the west, and no warning of any kind was given him and no employee was on the end of the moving car.

Q. As I understand you, you came up to this train and it was blocked down there, and then you went west two car lengths and then you went around the train following this path, and while you were following that path some train bumped and hit you from the west?

A. Yes.

Q. But you do not know that it was a Frisco train?

Dr. Lankford testified that the plaintiff had a permanent crooked neck caused from ankylosis, caused by the injury.

The defendant, as a defense, alleged that the plaintiff was a trespasser in the yards of the defendant at the time, and the defendant owed him no duty except not to injure him wilfully and wantonly, and to

exercise ordinary care to prevent injuring him after discovering his peril.

We have carefully examined the record and read the briefs of counsel, and we think this case comes clearly within the rule announced by this court in the case of *Missouri, K. & T. R. Co. v. Wolf*, 76 Okla. 195, 184 Pac. 765, which is stated in paragraph 3 of the syllabus, as follows: "It is a sound and wholesome rule of law, humane and conservative of human life, that, without regard to the question whether the person killed or injured in the particular case was or

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was not a trespasser or a bare licensee upon the track of the railway company, the company is bound to exercise special care and watchfulness at any point upon its track where people may be expected upon the track in considerable numbers, as where the roadbed is constantly used by pedestrians. At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery." *Wilhelm v. Missouri O. & G. R. Co.* 52 Okla. 317, L.R.A. 1916C, 1029, 152 Pac. 1088; *St. Louis & S. F. R. Co. v. Hodge*, 53 Okla. 427, 157 Pac. 60; *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 7 Am. Neg. Cas. 405.

The record presents no reversible error. The defendant's witnesses, several in number, flatly contradict

the plaintiff and his witnesses as to there being a well-beaten path at the points located by the plaintiff's evidence, and the custom that prevailed of pedestrians following that path around cars standing across the street and that the defendant's watchmen at the crossing motioned them around. The law is well settled in this jurisdiction that under such circumstances it was a question of fact for the jury to determine, under proper instructions from the court, the questions of primary negligence of the defendant as well as the contributory negligence of the plaintiff.

**Trial—jury—
difference of
opinion.**

**—question for
jury—con-
tributory negli-
gence.**

The questions were properly submitted to the jury under instructions which correctly stated the law that was applicable, and under the rules of this court the verdict is conclusive upon this court and will not be disturbed. *Littlejohn v. Midland Valley R. Co.* 47 Okla. 204, 148 Pac. 120; *New York Plate Glass Ins. Co. v. Katz*, 51 Okla. 713, 152 Pac. 353; *Chicago, R. I. & P. R. Co. v. Felder*, 56 Okla. 220, 155 Pac. 529; *Chicago, R. I. & P. R. Co. v. Schands*, 57 Okla. 688, 157 Pac. 349.

**Appeal—instruc-
tions—absence
of error.**

The judgment of the trial court is affirmed.

Rainey, Vice Ch. J., and Harrison, Pitchford, McNeill, Higgins, and Bailey, JJ., concur.

NOTE.

The duty and liability of a railroad company to one passing around a train which is blocking the crossing is the subject of the annotation following *RABE v. CHESAPEAKE & O. R. Co.* post, 1054.

ANNA RABE, Appt.,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY et al.

Kentucky Court of Appeals—January 21, 1921.

(190 Ky. 255, 227 S. W. 166.)

Railroads — injury to one attempting to pass around train — liability.

A traveler upon a highway who, upon reaching a railroad crossing, finds it blocked by a standing train, attempts to pass around the train by going on the company's property, cannot hold it liable for injury due to stepping in a hole on the right of way, since as a licensee he must take the property as he finds it.

[See note on this question beginning on page 1054.]

APPEAL by plaintiff from a judgment of the Common Law and Equity Division of the Circuit Court for Kenton County, sustaining a demurrer to the petition and dismissing an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. John H. Klette and Stephens L. Blakely, for appellant:

Defendant is liable to plaintiff for the injuries sustained because of its unlawful obstruction of the crossing.

83 Cyc. pp. 931, 1056; Eads v. Louisville & N. R. Co. 19 Ky. L. Rep. 1138, 42 S. W. 1135; Central of Georgia R. Co. v. Owen, 121 Ga. 221, 48 S. E. 916; St. Louis Southwestern R. Co. v. Poole, — Tex. Civ. App. —, 135 S. W. 641; Midland Valley R. Co. v. Shores, 40 Okla. 75, 49 L.R.A.(N.S.) 814, 136 Pac. 157; Smith v. Savannah, F. & W. R. Co. 84 Ga. 698, 11 S. E. 455; Evansville & T. H. R. Co. v. Carvener, 113 Ind. 51, 14 N. E. 738; Murray v. South California R. Co. 44 S. C. L. (10 Rich.) 227, 70 Am. Dec. 219; Brown v. Hannibal & St. J. R. Co. 50 Mo. 461, 11 Am. Rep. 420, 12 Am. Neg. Cas. 198.

Messrs. Galvin & Galvin for appellees.

Quin, J., delivered the opinion of the court:

Alleging appellees obstructed Twelfth street, a public way in the city of Covington, for an unreasonable length of time, to wit, about fifteen minutes, and that, in endeavoring to go around the train so blocking said crossing, appellant stepped into a hole on the company's

right of way, and was thereby injured, she instituted this action to recover damages for the injuries so sustained. In an amendment filed after a demurrer to the petition had been sustained, it was alleged the accident happened at 4 o'clock in the afternoon while appellant was on her way to a hospital, and that she attempted to go around the train because unable to wait longer. In thus crossing the track appellant says she was using the only possible means of getting across Twelfth street from one side of the right of way to the other; that Twelfth street is a much-traveled thoroughfare and was frequently obstructed by appellee's trains, and because of this fact it was customary for the public to pass around the trains as she did on the occasion stated, a fact and custom well known to appellees.

A demurrer to the petition as thus amended was sustained, the petition dismissed, and it is to reverse said judgment that the present appeal has been taken.

Treating appellant as a licensee, the inquiry arises: What duty did appellees owe her?

The accident did not occur on the crossing, but to the north thereof, while appellant was attempting to pass behind the train.

Generally speaking, a railroad, in the operation of its engine and cars, owes to a licensee the duty of giving warning of the approach of its trains, to operate same at a reasonable rate of speed, and to maintain a lookout. This should be the full extent of its duty to a licensee. The company is not required to safeguard every place of possible danger on its right of way. The licensee must take the property as he

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pass around
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finds it, since the owner is only liable to a licensee for injuries resulting from wilful acts.

Bales v. Louisville & N. R. Co. 179 Ky. 207, 200 S. W. 471.

There is quite a difference between the company's positive and affirmative acts in the operation of its trains and the mere passive or negative acts growing out of the failure to protect a licensee from defects on its premises. This is well illustrated by the opinion in *Louisville & N. R. Co. v. Hobbs*, 155 Ky. 130, 47 L.R.A.(N.S.) 1149, 159 S. W. 682, wherein a directed verdict was held proper under facts similar to those presented by this record. In that case the court said:

"The licensor who has on his premises a stationary object [turntable] that might inflict injury upon a careless or inattentive licensee who came in contact with it, or who had on his premises an excavation or pit used in connection with his business, into which a thoughtless licensee might fall, is not to be held to the same degree of care or burdened with the same duty as the licensor who uses in his business a dangerous, movable agency like an engine or cars, the immediate presence of which the licensee cannot many times know of in the absence of notice or warning; and it is well that a distinction should be made in the particular named between the

duty and liability of a railroad company in the movement of its trains to licensees and its duty toward them in other respects not connected with the operation of its trains or any other movable agency."

Plaintiff, who attempted to cross a railroad platform for his own convenience as a short cut from one street to another, was held in *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133, to be a mere licensee, and not entitled to recover for an injury received by falling into a hole in such platform, although the railroad had passively permitted the plaintiff and the public generally to so use it.

As said in *Pollock on Torts*, § 426: "In the language of continental jurisprudence there is no question of culpa between a gratuitous licensee and the licensor, as regards the safe condition of the property to which the license applies. Nothing short of *dolus* will make the licensor liable."

The above text is approved in *Elliot on Railroads*, wherein the author (§ 1250) says the licensee takes his license subject to its concomitant perils. In this same connection, see *Indian Ref. Co. v. Mobley*, 134 Ky. 822, 24 L.R.A.(N.S.) 497, 121 S. W. 657.

From the foregoing it follows that appellant has not shown herself entitled to recover. She was compelled to take the premises as she found them. As to her, appellees were under no obligation to keep their right of way in a suitable condition for the use she sought to make of it at the time of her injury.

That the blocking of the crossing necessitated the use of the tracks at another point will not avail her. It was so held in *Jones v. Illinois C. R. Co.* 31 Ky. L. Rep. 825, 13 L.R.A.(N.S.) 1066, 104 S. W. 258, where a recovery was denied one injured while attempting to cross under a train standing on a crossing,

though said crossing was in general use by the public, was frequently blocked, and persons using it often found it necessary in crossing to go through or under the cars. To same effect is *Southern R. Co. v. Clark*,

32 Ky. L. Rep. 69, 13 L.R.A.(N.S.) 1071, 105 S. W. 384.

The lower court did not err in sustaining the demurrer to the petition as amended.

The judgment is affirmed.

ANNOTATION.

Duty and liability of railroad company to one passing around train which is blocking crossing.

I. Generally, 1054.

II. Proximate cause of injury, 1056.

III. Particular acts of negligence, 1056.

IV. Contributory negligence, 1057.

I. Generally.

Where a person traveling on a highway finds a railroad crossing obstructed by a train, it is ordinarily held that, in attempting to pass around the train, he is not a trespasser on the property of the railroad company, and the degree of care which is required of the company for his protection is a question of fact for the jury.

Florida.—*Johnson v. Atlantic Coast Line R. Co.* (1910) 59 Fla. 302, 138 Am. St. Rep. 126, 51 So. 851, 20 Ann. Cas. 1093 (injury by movement of obstructing train).

Georgia.—*Smith v. Savannah, F. & W. R. Co.* (1890) 84 Ga. 698, 11 S. E. 455 (injury by another train); *Savannah, F. & W. R. Co. v. Hatcher* (1902) 115 Ga. 379, 41 S. E. 606 (injury by another train); *Central of Georgia R. Co. v. Owens* (1904) 121 Ga. 220, 48 S. E. 916 (injury from ditch on right of way).

Illinois.—*Mayer v. Chicago & A. R. Co.* (1896) 64 Ill. App. 309, later appeal in (1904) 112 Ill. App. 149 (injury by another train); *Chicago Junction R. Co. v. McGrath* (1903) 107 Ill. App. 100, affirmed in (1903) 203 Ill. 511, 68 N. E. 69 (same); *Balsewicz v. Chicago, B. & Q. R. Co.* (1909) 240 Ill. 238, 88 N. E. 734 (same). Compare *Chicago, R. I. & P. R. Co. v. Bednorz* (1895) 57 Ill. App. 309.

Indiana.—*Chicago & E. R. Co. v. Hunter* (1916) 65 Ind. App. 158, 113 N. E. 772 (injury by another train).

Kansas.—*Atchison, T. & S. F. R.*

Co. v. Cross (1897) 58 Kan. 424, 49 Pac. 599, 3 Am. Neg. Rep. 26 (injury by obstructing train).

Missouri.—*Brown v. Hannibal & St. J. R. Co.* (1872) 50 Mo. 461, 11 Am. Rep. 420, 12 Am. Neg. Cas. 198 (injury by obstructing train); *Waite v. Chicago, R. I. & P. R. Co.* (1912) 168 Mo. App. 160, 153 S. W. 66 (injury by another train). Compare *Stillson v. Hannibal & St. J. R. Co.* (1878) 67 Mo. 671.

New York.—*Kurt v. Lake Shore & M. S. R. Co.* (1908) 127 App. Div. 838, 111 N. Y. Supp. 859, affirmed in (1909) 194 N. Y. 598, 88 N. E. 1122 (injury by another train).

Texas.—*Houston Belt & Terminal R. Co. v. Price* (1917) — Tex. Civ. App. —, 192 S. W. 359 (injury by obstructing train).

In **ST. LOUIS, SAN FRANCISCO R. Co. v. JONES** (reported herewith) ante, 1048, the court says in effect that the company is bound in such circumstances to anticipate presence of pedestrians upon its tracks, and is bound to exercise special care for their protection without regard to the question whether they are trespassers or bare licensees.

It appeared in *Smith v. Savannah, F. & W. R. Co.* (1890) 84 Ga. 698, 11 S. E. 455, that a boy about ten years old traveling on the highway found his passage obstructed by a train standing on a crossing. After waiting some time for the train to move, he went across the tracks, through the defendant's yard, where he was injured. The court said: "The company had no right whatever to obstruct the highway for any length of time. But the occupation of its track

by moving cars in the due course of its business would be no obstruction. Nor would the mere casual stopping of the train or the cars on the crossing amount to an obstruction, if they were not suffered to remain a needless or unreasonable length of time. But for them to stand upon the track so as to hinder the use of the highway needlessly and unreasonably would be an obstruction. And after the plaintiff had waited a reasonable time for the crossing to be opened and it was not done, he had a right, if his occasion to go home was urgent, to deviate from the highway, and, if necessary, pass around the obstruction over the company's inclosed premises. In so doing he would not be a trespasser, but would be in the exercise of a public right as a passenger upon the highway, suddenly hindered from proceeding by coming in contact with a public nuisance on his route. . . . The particular means or measures of precaution which either party should have used under the circumstances would be for determination by the jury."

In *Chicago, R. I. & P. R. Co. v. Bednorz* (1895) 57 Ill. App. 309, it was held that a person who attempts to pass around a train standing at a highway crossing is a trespasser on the right of way, to whom no duty is owed except to refrain from wilful or wanton injury to him. That case, however, must be considered as overruled by subsequent decisions. In *Mayer v. Chicago & A. R. Co.* (1896) 63 Ill. App. 309, a child who passed around a train which obstructed a street crossing was held not to be a trespasser, on the ground that it could not be readily determined at the place of the accident where the street ended and the right of way began. On a second trial it was shown that the situation in this respect was clear, and that the injured person was familiar with the crossing. On a second appeal in (1904) 112 Ill. App. 149) it was held that the extremely cold weather warranted an attempt to pass around the train though it involved going on the right of way. In *Chicago Junction R. Co. v. Mc-*

Grath (1903) 107 Ill. App. 100, affirmed in (1903) 203 Ill. 511, 68 N. E. 69, it was squarely decided in accordance with the general rule that a person attempting to pass around a train which obstructs a crossing is not, as a matter of law, a trespasser.

So, in *Balsewicz v. Chicago, B. & Q. R. Co.* (1909) 240 Ill. 238, 88 N. E. 734, it was said: "The place where the deceased was struck was outside the limits of the street and on the right of way of the appellant. The evidence most favorable to appellee is that it was 3 feet west of the street. It is insisted that the deceased was therefore a trespasser, and the appellant owed him no other duty except not to wantonly injure him. When the deceased found the street blocked by cars he was not bound to wait until appellant removed them. By passing around the end of the train he was not deprived of the right to have appellant use care not to injure him. He was not injured by the train he went around, and was returning toward the street when the switchman tried to catch him. The fact that, in using the street crossing for the purpose of reaching the other side of the track, he had stepped slightly to one side, so that he was actually struck a few feet outside of the line of the street, did not relieve the appellant of exercising toward him the same degree of care as if he had remained within the limits of the street."

In *Brown v. Hannibal & St. J. R. Co.* (1872) 50 Mo. 461, 11 Am. Rep. 420, 12 Am. Neg. Cas. 198, the court stated the facts and its conclusion as follows: "The crossing was obstructed by the defendant's train, and the plaintiff therefore, to pursue her journey, turned away and crossed at another place where people were accustomed to cross, but it does not appear that they had any license therefor. The defendant had a right to stop its trains for a reasonable time, but when the train did stop and obstructed the crossing for the purpose of unloading cars, as was the case here, were travelers always obliged to wait before they could continue their business till the cars were

unloaded? While the railroad is the absolute owner of its track, and has the right to its free and unmolested use, still it is not absolved from the exercise of ordinary care and diligence to prevent injury to others when they happen on the track under the circumstances in which the plaintiff was placed. As the crossing was obstructed by the act of the defendant and persons were in the habit of going over the private way, we think that the agents and servants of the defendant were bound to take notice of those facts and use precautions commensurate with them." A different result was reached in the later case of *Stillson v. Hannibal & St. J. R. Co.* (1878) 67 Mo. 671; but the decision in that case was based on the fact that the attempt was made to pass around the train by a hazardous route, a space 22 inches wide between the obstructing train and another train.

In the reported case *RABE v. CHESAPEAKE & O. R. Co.*, ante, 1052), it is held that a person passing around a train which obstructs a crossing is a mere licensee, to whom the railroad company owes no duty to keep its right of way in a safe condition for travel, and that there is no liability for an injury caused by stepping into a hole in the right of way. This holding finds implied support in the cases cited in the following subdivision of this note, to the point that in such a case the unlawful obstruction of the crossing is not the proximate cause of the injury.

II. Proximate cause of injury.

Where a traveler finding a crossing unlawfully obstructed by a railroad train goes off the crossing in an attempt to pass around the obstruction, and is injured by reason of the roughness of the ground, the obstruction is not the proximate cause of the injury. *Enochs v. Pittsburgh, C. C. & St. L. R. Co.* (1896) 145 Ind. 635, 44 N. E. 658; *Jackson v. Nashville, C. & St. L. R. Co.* (1884) 13 Lea (Tenn.) 491, 49 Am. Rep. 663; *Kelly v. Texas & P. R. Co.* (1904) 97 Tex. 619, 80 S. W. 1197; *De la Pena v. International*

& G. N. R. Co. (1903) 32 Tex. Civ. App. 241, 74 S. W. 58. A different view was taken in *Southern R. Co. v. Floyd* (1911) 99 Miss. 519, 55 So. 287, where in the court said: "The learned counsel for appellant earnestly insists that the obstruction of the highway did not more than furnish the condition or give rise to the occasion by which the injury was made possible. If counsel's position is correct, the instruction was improperly given, and defendant railroad should have had a peremptory instruction. We think, however, from the record in this case, that the injury sustained by plaintiff is directly traceable to the obstruction of the highway by the defendant railroad company. It is manifest that the railroad company blocked the highway, and if this negligence had not been committed by it the appellee would not have attempted to go this circuitous route, and this injury would not have befallen him. We think the blocking of the highway was the proximate cause of the injury." So, in *Central of Georgia R. Co. v. Owens* (1904) 121 Ga. 220, 48 S. E. 916, the unlawful obstruction of a highway was deemed to be the proximate cause of an injury to one who, in attempting to pass around, fell into a ditch and broke his leg.

III. Particular acts of negligence.

The precautions which must be observed by a railroad company to avoid injury to a person passing around a train which obstructs a highway crossing were stated in *Smith v. Savannah, F. & W. R. Co.* (1890) 84 Ga. 698, 11 S. E. 455, as follows:

"Supposing the plaintiff to be justified in leaving the highway, and passing through the company's grounds, he would be entitled to such diligence from the company's servants using these grounds at the time as the circumstances would render reasonable and practicable. We think it was properly left to the jury to determine what acts of diligence on their part were appropriate. Although the servants did not know of his presence, yet, if he was driven from the highway by an obstruction placed and left there

by the company, the jury might conclude that they or the company should have anticipated his presence. The reasonableness of such anticipation would be a question for the jury, under all the circumstances; and if, in their opinion, his presence should have been foreseen as probable, the rule of diligence would have been the same as if it had been actually known. If, on the contrary, it would be unreasonable to expect that this route would be taken by anyone stopped or delayed by the obstruction, then the plaintiff would be entitled to no more diligence than was usually exercised at that place in switching and handling trains or cars, as the company's servants were doing on this occasion. Nor would mere negligence on the part of the servants subject the company to liability, unless the plaintiff exercised due care on his part, considering his age, intelligence, and the facts surrounding him, to avoid being injured; that is, if the exercise of such care would have prevented the injury. The particular means or measures of precaution which either party should have used under the circumstances would be for determination by the jury. For instance, if ordinary and reasonable diligence required ringing the bell on the engine while the train was backing, the bell should have been rung; and, if the plaintiff was sufficiently intelligent, heedful, and conscious of danger to make it incumbent upon him to look and listen, he should have done his part in this respect, in so far as was reasonable."

In *Houston Belt & Terminal R. Co. v. Price* (1917) — Tex. Civ. App. —, 192 S. W. 359, it was held that the unlawful blocking of a crossing with cars, and the moving of the cars without warning, constituted negligence sufficient to sustain a recovery by one injured while attempting to pass around the obstruction.

In *Atchison, T. & S. F. R. Co. v. Cross* (1897) 58 Kan. 424, 49 Pac. 599, 3 Am. Neg. Rep. 26, failure to give warning of the movement of a train which obstructed a crossing was held to be negligence as to a person at-

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tempting to pass around the obstruction.

In *Waite v. Chicago, R. I. & P. R. Co.* (1912) 168 Mo. App. 160, 153 S. W. 66, it was held that in moving trains past a train which obstructs a crossing a lookout must be kept for persons attempting to go around that train. See to the same effect, *Texas & N. O. R. Co. v. Brouillette* (1910) 59 Tex. Civ. App. 337, 126 S. W. 287.

In *Chicago & E. R. Co. v. Hunter* (1916) 65 Ind. App. 158, 113 N. E. 772, it appeared that a person passing around a train which obstructed a street crossing was killed by a train on another track. A finding that it was negligence not to give signals of the approach of the latter train was sustained. See to the same effect, *Savannah, F. & W. R. Co. v. Hatcher* (1902) 115 Ga. 379, 41 S. E. 606; *Kurt v. Lake Shore & M. S. R. Co.* (1908) 127 App. Div. 838, 111 N. Y. Supp. 859, affirmed in (1909) 194 N. Y. 598, 88 N. E. 1122.

In *Chicago Junction R. Co. v. McGrath* (1903) 203 Ill. 511, 68 N. E. 69, it was held to be negligence to make a "flying switch," whereby cars were moved rapidly over a crossing which was obstructed by another train and a person passing around that train was injured.

IV. Contributory negligence.

It has been held that one who goes around a train, which is blocking the highway, by passing over the tracks, is bound to use care in so doing, and must look and listen for other trains: failing to do so, he will be held guilty of contributory negligence. *Martin v. Little Rock & Ft. S. R. Co.* (1896) 62 Ark. 156, 34 S. W. 545. In that case it appeared that the plaintiff, finding his way blocked by a train standing across the highway, went to the head of the train, crossed over in front of it, and, in walking back, stepped on another track without looking to see if a train was coming, and was struck by a passing train. He was partly deaf. The court held that he was guilty of contributory negligence as a matter of law in failing to look for the approaching train.

In *Stillson v. Hannibal & St. J. R. Co.* (1878) 67 Mo. 671, it appeared that a street was blocked by standing trains so as to make it impossible to cross. Somewhere down the tracks, and away from the crossing, there was a narrow space between two trains, through which a little girl attempted to pass in the presence of her father, and with his permission or acquiescence, and was injured. It was held that she and the father were guilty of negligence, and no recovery could be had for her injury.

But whether a person passing around a train which obstructed a crossing, who did not detect the approach of cars which were being switched on a parallel track, was guilty of contributory negligence, has been held to be for the jury. *Chicago Junction R. Co. v. McGrath* (1903) 203 Ill. 511, 68 N. E. 69.

In *Balsewicz v. Chicago, B. & Q. R. Co.* (1909) 240 Ill. 238, 88 N. E. 784, the court stated the facts and its conclusion as follows: "There was evidence in support of the plaintiff's claim which tended to show that the deceased found the switch engine and cars standing across the street; that the gates were not down; that, without knowledge of the approach of the passenger train, he started to walk around the end of the engine, and in so doing passed from the west line of the street a few feet on appellant's right of way; that as he came around the engine he was running in a north-easterly direction toward the street and the railroad main track; that he was called to and the switchman with the switch engine tried to catch him; that the deceased jerked loose and ran upon the track in front of the train; that his body was thrown 60 feet from

where it was struck, and that the train was running 40 miles an hour. There was also evidence that the switch engine started west just as the deceased was crossing in front of it, and its bell was ringing. The distance between the track on which the switch engine stood and the track on which the deceased was struck was 18 feet. The engine starting just as he crossed in front of it; the noise of its bell; the shouting of the towerman, which he could not understand; the effort of the switchman to seize him, and his effort to jerk loose and escape what he might have regarded as an intended assault,—would all tend to his confusion, and might cause him momentarily to overlook his danger. Whether his actions, under the circumstances, were such as were consistent with reasonable care, was a question of fact which it was proper to submit to the jury."

Whether a man who, returning home at night, finds a crossing obstructed by a freight train, is guilty of contributory negligence in endeavoring to go around the end of the train in the dark, is for the jury. *Southern R. Co. v. Floyd* (1911) 99 Miss. 519, 55 So. 287.

Likewise, whether the injured person took the safest route to pass around an obstructing train, or was guilty of contributory negligence in failing to do so, is for the jury. *Chicago & E. R. Co. v. Hunter* (1916) 65 Ind. App. 158, 118 N. E. 772.

In *ST. LOUIS-SAN FRANCISCO R. Co. v. JONES* (reported herewith) ante, 1048, the question of contributory negligence was held to be for the jury under the constitutional provision that the defense of contributory negligence is at all times a question of fact for the jury.

T. J. K.

CITY OF NEW YORK, Appt.,

v.

NEW YORK & SOUTH BROOKLYN FERRY & STEAM TRANSPORTATION COMPANY, Respt.

New York Court of Appeals — April 19, 1921.

(231 N. Y. 18, 131 N. E. 554.)

Covenant — breach — easement in possession.

1. An easement evidenced by contract, possession, and improvements, although claimed under a grant not valid because not attested as required by statute, is sufficient to constitute a breach of covenant against encumbrances in a sale of the fee.

[See note on this question beginning on page 1066.]

Corporation — continued existence after dissolution — satisfaction of liability.

2. A statute continuing the existence of a dissolved corporation for the purpose of satisfying its debts and obligations includes a liability for breach of covenant in sale of real estate.

— what is encumbrance.

3. Liability of a corporation for breach of a covenant against encumbrances in a conveyance of real estate, which consists of the right to compensation for termination of an easement in the property, is an obligation existing at dissolution of the corporation, although it is not established by judgment until afterwards.

Damages — breach of covenant — servitude.

4. The damages for breach of covenant against encumbrances in a conveyance of real estate, consisting of a right of compensation for termination

of an easement in the property, may be measured by the moneys reasonably expended in freeing the land and extinguishing the burden.

[See 7 R. C. L. 1181.]

Evidence — damages for breach of covenant — payments after action brought.

5. Payments made to free land from a servitude are not inadmissible as evidence of damages for breach of covenant, because made after action brought to recover for the breach.

Vendor and purchaser — grant without attestation — effect.

6. A grant of an easement not attested as required by statute does not take effect even against a purchaser with notice.

Covenant — effect of knowledge of encumbrances.

7. A covenant against encumbrance is good even against those known to the grantee.

[See 7 R. C. L. 1135, 1136.]

(McLaughlin, Crane, and Andrews, JJ., dissent.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County in favor of defendant in an action brought to recover damages for alleged breach of a covenant against encumbrances in a conveyance of real estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John F. O'Brien and Josiah A. Stover, with Mr. John P. O'Brien, for appellant.

Mr. George Zabriskie, for respondent:

The corporation named as defendant was dissolved in March, 1908, and

when this action was commenced in February, 1917, it was, and is, totally extinct and incapable of being sued.

Re Stewart, 39 Misc. 275, 79 N. Y. Supp. 525, 86 App. Div. 627, 83 N. Y. Supp. 1117, 177 N. Y. 558, 69 N. E. 1131; Martyne v. American Union F.

Ins. Co. 216 N. Y. 183, 110 N. E. 502; *People v. Ballard*, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54.

The plaintiff's demand was not an existing debt or obligation of the defendant at the time of its dissolution.

Delavergne v. Norris, 7 Johns. 358, 5 Am. Dec. 281; *Hall v. Dean*, 13 Johns. 105; *McGuckin v. Milbank*, 152 N. Y. 297, 46 N. E. 490; *Stearn v. Hesdorfer*, 9 Misc. 134, 29 N. Y. Supp. 34; *Van Slyck v. Kimball*, 8 Johns. 198; *Stanard v. Eldridge*, 16 Johns. 254; *De Forest v. Leete*, 16 Johns. 122; *Chace v. Hinman*, 8 Wend. 452, 24 Am. Dec. 39; *Aberdeen v. Blackmar*, 6 Hill. 324; *Halsey v. Reed*, 9 Paige, 446; *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359; *Trinity Church v. Higgins*, 48 N. Y. 532; *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Re Hanlin*, 133 Wis. 140, 17 L.R.A. (N.S.) 1189, 126 Am. St. Rep. 938, 113 N. W. 411; *Bendernagle v. Cocks*, 19 Wend. 207; *Turner v. Hadden*, 62 Barb. 480; *Gedney v. Gedney*, 160 N. Y. 471, 55 N. W. 1; *Stuyvesant v. New York*, 11 Paige, 414; *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369.

The execution of the instrument of August 22, 1892, is not attested by any subscribing witness.

Hollenback v. Fleming, 6 Hill. 303; *Henry v. Bishop*, 2 Wend. 575; *People ex rel. Long Island R. Co. v. Railroad Comrs.* 75 App. Div. 106, 77 N. Y. Supp. 380; *Bank of Dillon v. Murchison*, 129 C. C. A. 499, 213 Fed. 147; *Kelly v. Calhoun*, 95 U. S. 710, 24 L. ed. 544.

As the agreement of August 22, 1892, was neither acknowledged nor subscribed by a witness, the situation is directly within the scope of the statute, and the subsequent deed from defendant to the city conveyed the premises free from any encumbrance created by that instrument.

Chamberlain v. Spargur, 86 N. Y. 603; *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. 739; *Dunn v. Dunn*, 151 App. Div. 800, 136 N. Y. Supp. 282.

Cardozo, J., delivered the opinion of the court:

The defendant owned and operated a ferry between the boroughs of Manhattan and Brooklyn, in the city of New York. By agreement, dated August 22, 1892, it gave to the Brooklyn City Railroad Company the use of a space, 100 feet square,

for a car stand and for switching purposes at its Brooklyn terminal. The grantee undertook to move and rebuild the ferry house to another part of the land, and carried out its undertaking at a cost of \$83,545.38. The grantor reserved the right, upon notice of six months, and upon payment to the grantee of the cost of moving and rebuilding, to terminate the grant.

The situation stood unchanged until June, 1906, when the city of New York began proceedings to condemn and appropriate the terminal for the improvement of the water front. Commissioners of estimate were appointed. The defendant, without waiting for their award, transferred the terminal to the city in December, 1906, by voluntary sale. The price, \$750,000, was paid by the city for a conveyance with full covenants.

The defendant, having parted with its ferry and distributed its assets, determined to dissolve. Dissolution was effected in March, 1908, by consent of the directors and stockholders without the action of the court. Laws 1900, chap. 760; formerly § 57 of the Stock Corporation Law; now § 221 of the General Corp. Law; Consol. Laws, chap. 23. Litigation between the railroad company and the city was even then in progress. The railroad company made claim to compensation as the holder of an easement. The city, contesting the claim, asserted that the easement had been cut off by the conveyance, and that the right of action for damages was not a charge upon the res. The controversy ended, after many years of litigation, by the recognition of the claimant's title. *Re New York*, 76 Misc. 358, 134 N. Y. Supp. 985, 150 App. Div. 908, 134 N. Y. Supp. 985, 206 N. Y. 655, 99 N. E. 1104, decided June 29, 1912. On January 25, 1913, the city paid to the railroad company \$91,482.19 (\$83,545.38, with accrued interest) as the price of the extinction of an easement then a burden upon the land.

This action is brought to recover

damages for breach of the defendant's covenant that "the said premises" were "free from encumbrances" at the time of the conveyance. The statute under which the defendant was dissolved continues the corporate existence "for the purpose of paying, satisfying, and discharging any existing debts or obligations," and provides that, "for the purpose of enforcing such debts or obligations," the corporation may sue and be sued "until its business and affairs are fully adjusted and wound up." Laws 1900, chap. 760; then § 57 of the Stock Corp. Law; now § 221 of the Gen. Corp. Law. Judgment has gone against the plaintiff on the ground that no debt or obligation existed when the defendant was dissolved.

We think that "debts or obligations," within the purview of this

Corporation—
continued exist-
ence after disso-
lution—satisfac-
tion of liability.

statute, are as broad as "liabilities." No doubt they have a narrower meaning at

some times and in some contexts. *Munzinger v. United Press*, 52 App. Div. 338, 65 N. Y. Supp. 194. Justice and reason, and the analogy of kindred statutes, must fix the limits of extension. *Jacobs v. Monaton, Realty Invest. Corp.* 212 N. Y. 48, 54, 105 N. E. 968. The legislature did not mean that a privilege to dissolve at the pleasure of the stockholders should become a privilege at the like pleasure to change the course of distribution. This statute speaks of the payment and enforcement of "debts or obligations." Another, applicable to corporations of the same class, says that dissolution shall not affect the remedy for "liabilities" previously incurred. *Business Corporations Law*, § 5; *Consol. Laws*, chap. 4. Another says that the directors, in the event of dissolution, shall be chargeable as trustees for "creditors." *Gen. Corp. Law*, § 35. These statutes and others like them (*Gen. Corp. Law*, §§ 191, 261, 156) are to be construed together (*Marstaller v. Mills*, 143 N. Y. 398, 38 N. E. 370).

In varying phraseology, they embody the same thought. "Liabilities" are to be paid (*Marstaller v. Mills*, supra; *Shayne v. Evening Post Pub. Co.* 168 N. Y. 70, 55 L.R.A. 777, 85 Am. St. Rep. 654, 61 N. E. 115), and the liquidator is to pay them. It makes no difference whether they have their origin in contract or in tort. *Marstaller v. Mills*, and *Shayne v. Evening Post Pub. Co.* supra. It makes no difference whether the liquidator is court or corporation, receiver or director. Distribution does not vary with the title of the statute.

The defendant's liability is not only a "debt or obligation;" it is a debt or obligation that existed when the corporation was dissolved. This is ^{—what is} ~~an~~ encumbrance. not the case of a

mere money encumbrance, which leaves possession undisturbed. *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281; *McGuckin v. Milbank*, 152 N. Y. 297, 46 N. E. 490; *Rawle, Covenants for Title*, §§ 190, 191; 3 *Sedgw. Damages*, 9th ed. §§ 968, 970. The remedies then open we need not now consider. This is the case of an encumbrance that in itself is an eviction (*Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224, 3 N. E. 675; *Harrington v. Bean*, 89 Me. 470, 36 Atl. 986), the encumbrancer already in possession, with encroaching sheds and switches. No rule of law limits the covenantee in such conditions to an award that is merely nominal. *Huyck v. Andrews*, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; *Rawle, Covenants for Title and Sedgw. Damages*, supra.

The damages may be measured by the difference between the value of the land without the servitude and with it. *Huyck v. Andrews*, and *Harrington v. Bean*, supra; *Harlow v. Thomas*, 15 Pick. 66, 69; *Richmond v. Ames*, 164 Mass. 467, 476, 41 N. E. 671; *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 25, 3 L.R.A. (N.S.) 98, 112 Am. St. Rep. 296, 76 N. E. 449. They may be

measured by the moneys reasonably expended by the owner in freeing the land and extinguishing the burden.

**Damages—
breach of
covenant—
servitude.**

Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; *Bailey v. Agawam Nat. Bank*, supra; 3 Sedgw. Damages, §§ 967, 979; *McGuckin v. Milbank*, supra.

Such payments are not inadmissible as evidence of damage be-

**Evidence—
damages for
breach of
covenant—
payments after
action brought.**

cause made after action brought. *Brooks v. Moody*, 20 Pick. 474; *Johnson v. Collins*, 116 Mass. 392, 394; *Tibbetts v. Leeson*, 148 Mass. 102, 104, 18 N. E. 679; *Mosely v. Hunter*, 15 Mo. 322, 330; *Potter v. Taylor*, 6 Vt. 676. They do not change the cause of action. *Tibbetts v. Leeson*, supra. *Child v. Stenning*, L. R. 11 Ch. Div. 82, 85, 48 L. J. Ch. N. S. 392, 40 L. T. N. S. 302, 27 Week. Rep. 462. They are merely means and methods for the ascertainment of the loss. Dissolution or bankruptcy does, indeed, draw a dividing line as the result of accidents of time between claims capable of being proved, and those required to be rejected. The principle of division, however, is not the fact of liquidation. The principle of division is the existence of a present right to liquidate. *Business Corporations Law*, § 5; *Martstaller v. Mills*, supra; and cf. *Wood v. Fisk*, 215 N. Y. 233, 240, 109 N. E. 177; *Williams v. United States Fidelity & G. Co.* 236 U. S. 549, 556, 59 L. ed. 713, 35 Sup. Ct. Rep. 289.

We hold, therefore, that the defendant is still liable to suit. Whether the distribution of its assets in advance of dissolution may make a judgment, if recovered, futile, we do not now consider. Upon the record now before us, that question is not here. The collection of the judgment must wait upon its entry. If the defendant is right this action would have to fail, though the assets were still intact and in the possession of the liquidator. The fund in that view is to

be reserved for claims already liquidated. The law, as we read it, does not discriminate so partially in behalf of favored classes.

Immunity from suit failing, the defendant contests the merits. A grant in fee or of a freehold estate "does not take effect as against a subsequent purchaser," even though a purchaser with notice (*Nellis v. Munson*, 108 N. Y. 453, 15 N. E. 739; *Chamberlain v. Spargur*, 86 N. Y. 603), unless the grant is acknowledged, or unless "its execution and delivery" are "attested by at least one witness" (*Real Property Law*, § 243; *Consol. Laws*, chap. 50). The grant of this easement was neither acknowledged nor attested. The secretaries of the two corporations

"signed their names as part of the execution of the instrument," each for his own principal, "and not to attest an execution already completed." *Defell v. White*, L. R. 2 C. P. 144, 36 L. J. C. P. N. S. 25, 12 Jur. N. S. 902, 15 L. T. N. S. 211, 15 Week. Rep. 68; *Doe v. Chambers*, 4 Ad. & El. 410, 111 Eng. Reprint, 841, 6 Nev. & M. 539, 1 Harr. & W. 749, 5 L. J. K. B. N. S. 123. Delivery, as well as signature, must be attested, to satisfy the statute. *Real Prop. Law*, § 243. Since the grant is imperfect, and the city a subsequent purchaser, the easement, it is said, was extinguished by the purchase; the encumbrance is illusory; the breach of covenant unreal.

We think the equities arising from contract, possession, and improvement are not so easily destroyed. The statute nullifies the instrument of transfer considered as a formal grant, but it does not nullify rights and interests which would be maintained and protected irrespective of a grant. The railroad was not outlawed in taking an imperfect deed. Its plight is surely no worse than if it had taken no deed at all, but had gone into possession under an oral

**Vendor and
purchaser—
grant without
attestation—
effect.**

**Covenant—
breach—
easement in
possession.**

agreement that it would receive a deed thereafter. Its entry was accompanied by valuable improvements, the moving and rebuilding of the ferry house, upon the faith of the defendant's covenant and in performance of its own. In equity, its rights were equivalent to those of ownership. *Young v. Overbaugh*, 145 N. Y. 158, 160, 30 N. E. 712; *Messiah Home v. Rogers*, 212 N. Y. 315, 106 N. E. 59; *McCauley v. Hessen*, 202 N. Y. 24, 95 N. E. 32; *Woolley v. Stewart*, 222 N. Y. 347, 118 N. E. 847. No purchaser with notice would be suffered to ignore them. The imperfect deed might be disregarded, but not the equities behind it. We find nothing to the contrary in *Chamberlain v. Spargur*, and *Nellis v. Munson*, supra. All that they decide is the effect of notice when restricted to the deed, and nothing else. The question is distinctly reserved in *Nellis v. Munson*, 108 N. Y. 461, 462, 15 N. E. 739, whether different effect may not be given to notice of extrinsic equities. That question is now here. Possession and improvements are effective against subsequent purchasers if the possessor of the land is there without a deed. We find it inconceivable that they should be ineffective, in like circumstances of notice, when he is there with an imperfect deed.

There remains one other question, suggested, not by counsel, but by members of the court. A covenant against encumbrances must be restricted, it is said, to encumbrances unknown to the grantee

when accepting the conveyance. Such is not the law as our decisions have declared it. *Callanan v. Keenan*, 224 N. Y. 503, 508, 121 N. E. 376; *Pryor v. Buffalo*, 197 N. Y. 123, 136, 90 N. E. 423; *Huyck v. Andrews*, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581. The value of covenants of title would be seriously impaired if their operation could be limited by notice, actual or constructive, of the presence of a hostile right. *Huyck*

v. Andrews, supra, at page 90 of 113 N. Y., 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581. The claim is offset by its negation. The covenant is an assurance that what is asserted by the claimant to be a right is in truth a delusion or a pretense. The city took the defendant at its word. It contested the hostile claim. It carried the controversy to this court in the effort to prevail, 206 N. Y. 655, 99 N. E. 1104. Now, worsted in the fight, it falls back on the assurance of indemnity. We think the promise must be redeemed.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Hiscock, Ch. J., and Hogan and Pound, JJ., concur with Cardozo, J.

McLaughlin, J., dissenting:

This action was brought to recover damages for the alleged breach of a covenant against encumbrances contained in a deed of conveyance from the defendant to the plaintiff. The material allegations of the complaint are that the defendant, a domestic corporation, on December 21, 1906, in consideration of \$750,000, conveyed to the plaintiff certain lands in the city of New York; that by the deed of conveyance the defendant covenanted that the lands conveyed were free from encumbrances; that at the time of the delivery of the deed the lands were not free from encumbrances, but were subject to the lien of a lease made August 22, 1892, between the defendant and the Brooklyn City Railroad Company; that in condemnation proceedings subsequently taken by the plaintiff it was determined the interest of the railroad company in said lands was \$83,545.33, with interest, which amount the plaintiff was obliged to and did pay, and for which sum judgment was demanded,—an action at law and nothing else. The answer denied the allegation that there had been a breach of the covenant against encumbrances, and set up certain affirmative defenses,

—effect of
knowledge of
encumbrances.

which, in the view I take of the question presented by the appeal, it is unnecessary to consider. At the trial a verdict was directed for the defendant, dismissing the complaint. Judgment was entered to this effect, which was affirmed by the appellate division, one of the justices dissenting, and an appeal to this court followed.

The sole question presented by the appeal is whether the evidence adduced at the trial showed there had been a breach of the covenant as alleged in the complaint, or the jury would have been justified in so finding. A careful consideration of the record has satisfied me that the evidence did not establish such breach, and the jury would not have been justified in finding to the contrary. This was the position, among others, taken by the defendant at the trial and on the argument of the appeal. The appellant, however, contends that the agreement between the defendant and the Brooklyn City Railroad Company, dated August 22, 1896, which was in force when the deed was delivered, constituted an encumbrance. Whether this contention be well founded necessitates a brief reference to the agreement.

The agreement, in substance, grants to the railroad company a limited right of way on a parcel of land 100 feet square for the purpose of storing cars thereon and for switching purposes, and specifically provides that "the said use shall be as follows, to wit: The party of the first part shall have the privilege of laying its tracks upon said last-described plot of land, and of using the same for a car stand for its passenger cars and as a switching place for its passenger cars and for the general purpose of securing convenient transit or passage for its passengers between the cars and ferry house. . . ."

According to the terms of the instrument the privilege thus granted could be terminated in two ways: (a) By the railroad company discontinuing carrying passengers to

this point; (b) by the ferry company giving to the railroad company six months' written notice of an intention to terminate, and by paying to it the amount expended in removing the ferry house from the 100-foot plot to a new site. (The amount thus paid was stipulated by the ferry company and the railroad company at the time the ferry house was moved, or shortly thereafter, to be \$83,545.38," and that was the amount, with interest, the city had to pay to the railroad company in the condemnation proceeding.) The right acquired under the agreement by the railroad company was in the nature of an easement running with the land. It was a grant in fee or of a freehold estate. Real Property Law (Consol. Laws, chap. 50) § 33; *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. 739. It could only be extinguished by the happening of one or both of the events stated. The deed from the defendant to the city was dated December 21, 1906. It was duly acknowledged, and could have been recorded immediately after delivery. The agreement between the railroad company and the ferry company was not acknowledged, nor its execution attested by a subscribing witness. This is conceded in the prevailing opinion, and the authorities there cited fully sustain this conclusion. The city, therefore, as between it and the ferry company, notwithstanding the agreement, obtained a title free from encumbrances. The Real Property Law provides:

"§ 243. Grant of Fee or Freehold. —A grant in fee or of a freehold estate, must be subscribed by the person from whom the estate or interest conveyed is intended to pass, or by his lawful agent. If not duly acknowledged before its delivery, according to the provisions of this chapter, its execution and delivery must be attested by at least one witness, or, if not so attested, it does not take effect as against a subsequent purchaser or encumbrancer until so acknowledged."

In *Chamberlain v. Spargur*, 86 N. Y. 603, 607, an action was brought to set aside conveyances and leases under which defendants claimed, as clouds upon plaintiff's title. The original owner of the lands subscribed, but did not acknowledge, a deed thereof under which the plaintiff claimed. Such owner subsequently executed deeds and leases, properly acknowledged, under which defendant claimed. It was held that the defendant had good title, and the complaint was dismissed. Judgment to this effect was affirmed by this court. Judge Finch, who delivered the opinion of the court, said: "The grantor who has signed a deed, unattested and unacknowledged, is left with the power of effectively conveying by a land deed properly executed. The party who has taken the imperfect instrument does so at his peril, and with eyes open to the consequence. The grantor may, nevertheless, convey, and it matters not upon what consideration or for what purpose. That concerns him alone. The contrary construction would make the unattested and unacknowledged deed quite as good as the perfect and regular one, while the latter remained unrecorded. Each alike would yield only to the rights of the innocent purchaser, obeying the requirements of the law. . . . We have thus no difficulty in construing the statute literally and just as it reads."

In *Nellis v. Munson*, *supra*, an action was brought to restrain the defendant from interfering with a pipe laid across his premises to conduct water to the plaintiff's premises. The easement had been created by an agreement, not then witnessed or acknowledged. After making the agreement the owner of the premises contracted to sell the same, excepting the privilege given to the plaintiff; but she conveyed the premises by a warranty deed without mentioning the plaintiff's easement. After the conveyance the grant of the easement was acknowledged by the grantor. Subse-

quently the premises were conveyed to the defendant by warranty deed containing no mention of the easement, but the defendant knew of plaintiff's rights and the existence of the pipe before he purchased. This court, reversing a judgment in favor of plaintiff, said: "We are therefore of the opinion that the easement conveyed was an estate in fee, and required for its conveyance a deed, executed in the manner prescribed by the statute, to affect the right of a subsequent purchaser. We are much impressed with the apparent equities of the plaintiff's claim, in view of the fact that the subsequent grantees of the servient estate took title with notice of the easement claimed by the plaintiff, but we see no way of escaping the effect of the plain words of the statute." 108 N. Y. 461.

In *Dunn v. Dunn*, 151 App. Div. 800, 804, 136 N. Y. Supp. 282, the execution and delivery of an earlier deed were never attested by a witness. It was, however, after the latter deed had been executed and recorded, and the court held: "It was therefore invalid as against Jennie F. Dunn, the said subsequent grantee. It was invalid even though Jennie F. Dunn had actual notice of the prior deed, and even though she was not a purchaser in good faith and for value."

It is quite immaterial, and, beside, the question that the city, in accepting the conveyance from the ferry company in December, 1906, had notice and actual knowledge of the right or easement granted to the railroad company by the agreement of 1892. The effect of the later conveyance was to invest in the city the *entire fee* of the premises conveyed, free and clear of the easement created in favor of the railroad company by the earlier instrument. It follows, therefore, that the premises were conveyed without encumbrances.

But it is said, not by counsel, "that the equities arising from contract, possession, and improve-

ment," cannot, because there is no breach of the covenant against encumbrances, be similarly disposed of; that while "the statute nullifies the instrument as a formal grant, . . . it does not nullify rights and interests which would be maintained and protected irrespective of the grant;" that in equity the rights of the railroad were equivalent to those of ownership, and a purchaser with notice would not be permitted to ignore them.

There are, as it seems to me, two answers to the suggestions thus made: (1) The action, as we have seen, is one at law. The plaintiff must stand or fall upon the platform he has constructed. He cannot leave that and go to another. Having brought the action at law, he must recover upon that theory or not at all. This is the issue raised by the pleadings. It is the theory upon which the action was tried and the appeal argued. (2) A recovery upon that ground is contrary to the rule laid down in *Chamberlain v. Spargur*, and *Nellis v. Munson*, supra. It may be that the railroad company would have had a right of action against the ferry company for the destruction of its rights under the agreement, but even so the situation is in no wise changed. The fact remains that the city got a good conveyance of the entire title, free from encumbrances. It therefore had no right of action against the ferry company upon the theory that the railroad company

had some equities which had been destroyed by the conveyance. The city in fact knew as much about the rights of the railroad company as the ferry company did. It had been served by the railroad company with a written notice of its claim and the amount thereof, prior to the time the conveyance was made. Indeed, it had been served with a copy of the agreement, and it knew precisely what the railroad had and what it claimed before the deed was delivered. Under such circumstances it is difficult to see how it is in a position to ask a court of equity to exercise its powers to relieve it from what it had to pay the ferry company in the condemnation proceeding. That award was made upon the theory that the city, by the conveyance to it, took the place of the ferry company, and the right of the railroad company could not be wiped out until it had been paid for the improvements which it had put upon the property. *Re New York*, 76 Misc. 358, 134 N. Y. Supp. 985, affirmed on opinion below in 150 App. Div. 908, 134 N. Y. Supp. 569, affirmed in 206 N. Y. 655, 99 N. E. 1104.

The foregoing views render it unnecessary to pass upon the other questions raised by the appeal.

I therefore dissent, and vote to affirm the judgment appealed from.

Crane and Andrews, JJ., concur with McLaughlin, J.

Petition for rehearing denied.

ANNOTATION.

Equitable or incipient easement as breach of covenant against encumbrances.

Generally, as to unfounded outstanding claims to or against real property as breach of covenants of deed, see annotation in 5 A.L.R. 1084.

The decision in the reported case (*NEW YORK v. NEW YORK & S. B. FERRY & S. TRANSP. CO.* ante, 1059) to the effect that the equitable easement under consideration therein constituted a breach of a covenant against encumbrances, finds some support in

Mackintosh v. Stewart (1913) 181 Ala. 328, 61 So. 956, wherein it was held that a covenant against encumbrances done or suffered by the grantor was violated by an adverse possession which had not yet ripened into title. The court argued as follows:

"Since adverse possession, enduring for the statutory period of limitation, will ripen into title, no sufficient reason appears why such possession

should not be regarded as an actual estate or interest, and therefore as an encumbrance upon the title, from the moment of its commencement. . . . An adverse possession held at the time of a conveyance is a charge upon the property—at all events, an ejectment is necessary to dispossess the wrongful holder. Its presence is therefore a breach of the covenant for an indefeasible fee.”

But a contrary conclusion was reached in the somewhat similar case of *Wilkins v. Irvine* (1877) 33 Ohio St. 138. In this case the grantor had granted a third person the right to enter the land and lay water pipes therein, and to enter for the purpose of maintaining and repairing the same, but the grant had not been sealed and acknowledged so as to give it the qualities of a deed, in consequence of which it was held that the grant amounted to a license only, so that it did not create such an encumbrance as would disable the owner from making a good and sufficient deed. The court, among other things, said:

“An interest in, or permanent encumbrance upon, land in this state, can only arise from some of the modes provided for or recognized in law. If it exists in this case, the encumbrance was created by a writing without seal and unacknowledged and unaccompanied by actual possession. The statute, S. & C. § 6458, provides ‘that when any man . . . shall execute, within this state, any deed, mortgage, or other instrument, by which any lands, tenements, or hereditaments shall be conveyed or otherwise encumbered in law, such deed, mortgage, or other instrument of writing shall be signed, sealed, etc., and such signing and sealing shall be acknowledged by such grantor or maker in the presence of two witnesses, who shall attest such signing, etc.’ The writing claimed in the cross petition to create upon the land a permanent encumbrance in favor of the Rolling Mill Company is at most a license to enter upon the land for a specific purpose. It has none of the characteristics and sanctions provided by the statute creating

an encumbrance that could possibly impart to the instrument a quality to run with the land. It gave the Cleveland Rolling Mill Company no dominion over the land, nor did it create, in its favor, an easement in the land. If its terms had been violated by Brooks or his grantees, the jurisdiction of a court of equity could not have been successfully invoked to enforce a specific performance. The remedy, if any it had, would have been an action for damages. A license to do a particular thing, does not, in any degree, trench upon the policy of the statutes requiring that contracts respecting the title to land shall be by deed or other written instrument under seal. They amount to no more than an excuse for the act, which would otherwise be a trespass. A permanent right to enter upon and hold another’s land, for a particular purpose, without his consent, is an important interest, which should pass only in the mode and by the instrumentalities provided by law. The written license executed by Brooks to the Cleveland Rolling Mill Company, being without any of the characteristics of a deed, does not create such an encumbrance upon this land, as to create an equity in favor of the defendant, Wilkins, which will authorize a rescission of the contract.” But it further appeared in this case, which was not the fact in the reported case (*NEW YORK v. NEW YORK & S. B. FERRY & S. TRANSP. Co. ante*, 1059), that the grantee had no notice of equities in respect of the easement for pipes, and, upon this phase of the question, the court said:

“The statute already referred to (*Swan & C. 467*), after providing for the recording of all other deeds and instruments of writing for the conveyance or encumbrance of any lands, etc., then provides: ‘And if such deed or instrument shall not be so recorded within the time herein prescribed, the same shall be deemed fraudulent, so far as relates to any subsequent bona fide purchaser having at the time of making such purchase no knowledge of the existence of such former deed or other instrument of

writing.' The instrument in writing under which it is claimed this encumbrance arises never was recorded, and is not an instrument authorized to be recorded. Wilkins purchased the land ignorant of the existence of such license, and without knowledge that the Cleveland Rolling Mill Company occupied any portion of the land by pipes secreted in the ground, or otherwise. His relation to the Rolling Mill Company, and any supposed rights it may have from or under the license, is that of an innocent purchaser without notice, and he is therefore protected. Whatever might be the rights and liabilities of the original parties to the writing, the secret claim of the Rolling Mill Company can in no way affect the rights of Irvine or Wilkins. The policy of the law is that titles to land, when affected by written instruments, shall appear upon the appropriate record, so that all may be informed who hold encumbrances, their character, and where the title reposes or is vested.

But is this secret license mode of encumbrance to be sustained? If so, encumbrances might frequently be found to exist, against which no vigilance could guard, no diligence protect. Our records would cease to be reliable guides. To avoid all uncertainty, to notify all wishing information in regard to land titles, our registry laws were created, and their purpose cannot be defeated by claims of the character we are considering. No notice to Wilkins of the claimed encumbrance can be implied, because the writing was not recorded, and the pipes were hidden from view in the ground. The Cleveland Rolling Mill Company had no visible open possession of any portion of the land. At best, it had, under the license, a bare right to enter to repair the pipes when such need occurred. Hence, Wilkins is an innocent purchaser, and in relation to him there is no such encumbrance on the land as will effect the title Irvine has tendered him."

G. J. C.

CHARLES J. READ, Admr., etc., of Ephraim S. Read, Deceased,

v.

C. A. WEBSTER et al.

Vermont Supreme Court—May 14, 1921.

(— Vt. —, 113 Atl. 814.)

Easement — Implied reservation of flowage rights.

1. The owner of a mill reserves by implication, as against his grant of the land flowed by the pond with full covenants of warranty, a right to continue such flowage, where it has existed for many years and is necessary to the continued use of the mill.

[See note on this question beginning on page 1074.]

— severance of estate — reservation to grantor — necessity.

2. There can be no reservation of a visible easement in favor of a grantor with full covenants of warranty, severing a tract by granting a portion on which a burden has been placed in favor of the other, unless the easement claimed is one of strict necessity.

[See 9 R. C. L. 763.]

Damages — mitigation — profit from mill pond.

3. The profit derived from cutting ice on a mill pond cannot be used to

mitigate the damages to be allowed for wrongful flowage of the land by the millowner.

[See 26 R. C. L. 975.]

Evidence — hearsay — statement as to height of dam.

4. A witness testifying to the height at which a milldam had been maintained cannot be asked on cross-examination if he had not heard that a certain mark indicated the height at which dams could be maintained, since such evidence would be mere hearsay.

Damages—flowage—injury to road.
5. Upon the question of damages to be allowed for wrongful flowage of land, evidence is admissible as to injuries by the water to a farm road be-

fore the action was brought, even though all the effects of the flowage were not apparent at that time.

[See 8 R. C. L. 539.]

EXCEPTIONS by defendants to rulings of the Franklin County Court (Moulton, J.) made during the trial of an action brought to recover damages for the alleged unlawful flooding of land owned by plaintiff's intestate by means of a dam maintained by defendants, which resulted in a verdict for plaintiff. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Elmer Johnson and E. A. Ayers for defendants.

Messrs. W. H. Fairchild, Fred L. Webster, and D. W. Steele, for plaintiff:

The law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly; it cannot be established by intendment or presumption.

Polsom v. Ingram, 22 S. C. 541.

The offer upon which the question asked the witness Read in relation to injury to his farm road was based, and upon which it was admitted, gives it the correct limitation.

Goodrich v. Dorset Marble Co. 60 Vt. 280, 13 Atl. 636.

In an action for flooding lands, the defendant cannot be allowed for benefit, if any, caused by the flowing.

Gerrish v. New Market Mfg. Co. 30 N. H. 478; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355.

Taylor, J., delivered the opinion of the court:

The plaintiff, as administrator of Ephraim S. Read's estate, brings this action in tort for the unlawful flooding of land owned by his intestate in his lifetime, by means of a dam maintained by the defendants on Black creek, in the town of Fairfield. The trial was by jury, with verdict and judgment for the plaintiff. The defendants own a sawmill and mill privilege, and the dam in question furnishes the power for their mill. They acquired title to the mill and privilege January 2, 1902, from the estate of R. S. Read. It did not appear when the mill was first built, but a dam of some character had been maintained and the mill operated for a period of time beyond the memory

of old men. From the time R. S. Read acquired the property in 1864 until his death in 1900 he operated the mill every year, and maintained a dam across the creek continuously. The operations were continued by the defendants from the time of their purchase in 1902 to the time of the trial.

The land which the plaintiff claims to have been damaged by the flooding is part of a farm which lies on either side of Black creek, and about 40 rods above the defendants' mill property. This farm was formerly owned by R. S. Read and was conveyed by him to Ephraim Read, a brother, in March, 1866, by a deed of warranty in common form with the usual covenants. The deed contained no express reservation of flowage rights in the land conveyed. Prior to the time of this conveyance, and since 1864, R. S. Read owned both the farm and the sawmill and mill privilege. The distance from the dam to the upper boundary of the plaintiff's land following the creek is about three fourths of a mile, and the natural fall of the water along that portion of the creek is slight. In the year 1915 or 1916, the defendants made repairs on their dam, leaving the top about on a level with a certain iron pin in the ledge at one end of the dam. The plaintiff claimed, and his evidence tended to show, that in making such repairs the dam was raised approximately 12 inches above the height at which it had previously been maintained by the defendants and their grantor for more than thirty years; and that

the raising of the dam set the water of the creek back upon his meadow land, causing the damage complained of.

It will be well to notice at this point the respective claims of the parties. The defendants claimed that they had a right to maintain the dam to the height of the iron pin, and to flood plaintiff's meadows to the extent a dam of that height would flood them, and their evidence tended to show that the dam had been so maintained for many years. The plaintiff admitted in his complaint the right of the defendants to obstruct the stream by a dam as an appurtenance to their mill privilege, if rightfully maintained; but based his right of recovery upon the claim that the raising of the dam at the time it was repaired was without right. He claimed that the deed of the farm to his intestate left no right in R. S. Read to flow the meadows, but, as matter of law, released the farm from any flowage rights that may have then existed in favor of the mill privilege; and that a prescriptive right to maintain the dam at the height at which it has been maintained since it was repaired had not been acquired by the defendants or their grantor. The plaintiff made no claim that the defendants or their grantor had lost any right they may have had to flood the meadows by a dam at the height of the iron pin, by reason of any adverse use by the plaintiff or his intestate of the flooded areas for a period of fifteen years. The defendants' evidence tended to show that it would be necessary to lower the dam 6 or 7 feet from its present height to reach a point where it would not interfere with the natural flow of the stream through plaintiff's land. The plaintiff did not claim that the defendants' right to maintain the dam was so limited that it should not interfere with the natural flow of water through his farm, nor that the dam, as maintained prior to the time the repairs were made, was against his right, or resulted injuriously to his land.

It will be seen that the claims and evidence of the parties presented the questions whether the damage complained of was due to any increase in the height of the dam at the time it was repaired, and, if so, whether the defendants had a right to maintain the dam at its present height, the plaintiff claiming that only a right by prescription could possibly have been acquired, and the defendants insisting both upon a prescription right and upon an easement reserved by implication.

The defendants requested the court to charge on the subject of an implied reservation. The requests, which, for present purposes, we deem it unnecessary to detail, were severally denied, and the court instructed the jury that the right to maintain the dam at the height of the pin and the incidental right to flow plaintiff's land could not be claimed by the defendants "by virtue of any deed or grant to them, but they are claimed by them by what is called prescription."

In excepting to the refusal of the court to charge as requested, and to the charge as given on that subject, defendants insisted in substance that there was evidence in the case fairly tending to show that, at the time R. S. Read executed the deed to his brother in 1866, he was in the enjoyment, as an appurtenance to the mill privilege, of the right to flow the meadows to the extent that they are now flooded by maintaining the dam to the height of the iron pin; that the mill privilege prior to and at the time of the conveyance of the farm would have been practically valueless without this flowage; and that, in these circumstances, the right to flow the meadows being so essential to the mill privilege, the law will presume the reservation of the privilege by implication on the ground of necessity. This raised the question argued here, whether there was evidence tending to show a state of facts from which the law will imply a reservation in the deed

to Ephraim Read of a right of flowage in the granted premises. A fair test would be whether on the evidence Ephraim Read could have maintained this action at any time before his grantor had acquired a prescription right of flowage.

The circumstances under which a reservation will be implied of a right in premises granted by a deed with full covenants of warranty against encumbrance are pointed out in *Harwood v. Benton*, 32 Vt. 724; *Wiswell v. Minogue*, 57 Vt. 616; *Willey v. Thwing*, 68 Vt. 128, 34 Atl. 428; *Dee v. King*, 73 Vt. 375, 50 Atl. 1109; *Howley v. Chaffee*, 88 Vt. 468, L.R.A.1915D, 1010, 93 Atl. 120; *Poronto v. Sinnott*, 89 Vt. 479, 95 Atl. 647. The principle involved is what is sometimes spoken of as the doctrine of "visible servitudes," or of "quasi easements." It arises when the owner of entire premises has permanently altered the quality of the two parts of his heritage, imposing a burden upon one for the benefit of the other. While he retains both portions, no question of easement or encumbrance can arise. But when the premises are severed without express grant or reservation of the benefit annexed to one portion at the expense of the other, it becomes important to determine whether the parties intended that the premises granted should be conveyed with the rights or burdens as they existed at the time of the conveyance. The underlying principle is that the conveyance of a thing imports a grant of it as it actually exists at the time the conveyance is made, unless the contrary intention is manifested in the grant. *Feitler v. Dobbins*, 263 Ill. 78, 104 N. E. 1088. But such is the nature of a conveyance by a deed containing full covenants of warranty, and without

Easement—
severance of
estate—reser-
vation to grantor
—necessity.

any express reservation, that there can be no reservation by implication, unless the easement claimed is one of strict necessity. *Howley v. Chaffee*, 88 Vt. 468, L.R.A.1915D,

1010, 93 Atl. 120. The meaning of this term is discussed in *Dee v. King*, 73 Vt. 375, 50 Atl. 1109, but we do not need to dwell upon that point, for there can be no doubt as to the character of the necessity in the case at bar. The evidence tended to show that the mill privilege retained by R. S. Read would have been valueless without the right to set the waters of the creek back onto the granted premises. Manifestly, the easement relied upon was one of strict necessity, for no substitute could be provided for the mill pond which the easement afforded.

However, necessity alone does not create the easement, but is a circumstance resorted to to ascertain the real intention of the parties. Upon the severance of the heritage, a reservation may be implied of those benefits in the land granted which the owner has enjoyed during the unity. In such case, when the other elements are present, the implication of a reservation arises from the necessity of the easement to the reasonable use and enjoyment of the land reserved (*Willey v. Thwing*, 68 Vt. 128, 34 Atl. 428); that is to say, when there could be no other reasonable mode of enjoying the premises retained without the easement (*Starrett v. Baudler*, 181 Iowa, 965, L.R.A.1918B, 528, 165 N. W. 216; 9 R. C. L. 765). The parties are presumed to contract in reference to the condition of the property at the time of the grant. *Martin v. Murphy*, 221 Ill. 632, 77 N. E. 1126; *Kane v. Templin*, 158 Iowa, 24, 138 N. W. 901. The existence of an easement by implication, then, depends upon the circumstances shown by the evidence as they were at that time. *Lipsky v. Heller*, 199 Mass. 310, 85 N. E. 453; *Fitzell v. Philadelphia*, 211 Pa. 1, 60 Atl. 323; *Bailey v. Hennessey*, 112 Wash. 45, 191 Pac. 803. The essential elements of an easement reserved by implication are: (1) Unity and subsequent separation of title; (2) obvious benefit to the dominant and burden to the servi-

ent portion of the premises existing at the time of the conveyance; (3) use of the premises by the common owner in their altered condition long enough before the conveyance to show that the change was intended to be permanent; and (4) such a necessity for the easement as we have indicated above. It is sometimes said that to imply the reservation of an easement it must be apparent, continuous, and necessary, referring, of course, to the time of the conveyance. There would seem to be no doubt that the defendants' evidence tended to establish all the elements of an implied reservation in

—implied
reservation of
flowage rights.

R. S. Read's deed to plaintiff's intestate of the right to flow the land in question by a dam maintained at its present height. The principal controversy in the evidence was as to the height of the dam as it existed in 1866, and at different times thereafter: but there was evidence fairly tending to show that it is no higher now than it was when R. S. Read conveyed the farm to his brother. One witness sixty-six years of age, who had always lived on a farm bordering on the creek above the plaintiff's, also flooded by the mill pond, and was thoroughly acquainted with the conditions along the creek, testified that he had never observed any difference in the height of the water as compared with what it had been since the dam was repaired. Other witnesses testified that the dam was at the height of the iron pin at varying times covering a period of forty years. The sufficiency of the evidence to establish the essential facts was for the jury. No claim is made that the defendants or their grantor have lost any rights in respect of the dam by abandonment or adverse possession; so their present rights depend upon those retained by R. S. Read at the time of the conveyance of the farm, coupled with such additional rights, if any, as may since have been acquired by adverse possession.

The situation is very much like that in *Harwood v. Benton*, supra, which is our leading case on the subject of implied reservations. There one Safford originally owned a mill and an artificial but ancient mill pond, with the surrounding land. He subsequently granted a parcel of the surrounding land, but not bounded on the pond, to the plaintiff's grantor by a warranty deed, with no express reservation of any right of flowage, and afterwards conveyed the mill and water privilege to the defendants' grantor. The controversy involved the right of the defendants to restore the dam, which had fallen into decay, to its claimed original height, notwithstanding the consequent damage to the plaintiff. The county court charged the jury in effect as the jury were instructed in the case at bar, and refused a request to charge similar to the requests that were here denied. In reversing the judgment for errors in the charge, this court held that, by his deed to the plaintiff's grantor, Safford did not part with the right to flow such land as he had formerly done; and that the subsequent exercise of such right by himself and his grantees of the mill was not a breach of his covenant against encumbrances, and not the ground of an action by the plaintiff, unless the right had been lost by the plaintiff's adverse use. Judge Barrett, speaking for the court, calls attention to the fact that the owner of land may change the qualities of its several parts at will, and benefit one part by burdening another; and that an easement or an encumbrance could not exist while the title was in the common owner. He observes that the land in question, with the stream, and the use of it as a mill privilege, constituted an entire estate; that the use of the mill privilege and the effect of it impressed a condition upon the adjacent soil; and that what was conveyed was the land in its condition as affected by the existing dam. The essential facts of the case and the conclusion reached

therefrom are stated thus: "Safford had long owned and kept up the dam and mill, during which time he was also the owner of the lands surrounding and bordering upon said mill pond and mill, including the parcel which the plaintiff now owns and occupies as a house lot and garden. He had thus subjected those bordering and adjacent lands to the use and convenience of the mill privilege and mills; and, being thus subjected, he conveyed the parcel of them now owned by the plaintiff. This condition of the estate was obvious, and had been continuous, and was of a character showing that it was designed to continue thereafter, as it has in fact done. This, then, was a palpable and impressed condition, made upon the property by the voluntary act of the owner; and we think that, without any stipulation in the deed upon the subject, the true view of the law is that the grantee took the land which he purchased in that impressed condition, with a continuance of the servitude of that parcel to the convenience and beneficial use of the mill."

It will be seen that all the essential elements of an easement reserved by implication referred to above were present, though express reference is not made to the element of necessity. The case was reviewed in *Howley v. Chaffee*, 88 Vt. 468, 477, L.R.A.1915D, 1010, 93 Atl. 120, where attention is called to the fact that the decision was upon proper grounds as to this element of the reservation. It is at once apparent, without detailing the evidence further, that the defendants were entitled to go to the jury on their claim of right to maintain the dam at its present height, because of an implied reservation, and were not confined, as the court charged, to such rights as had subsequently been acquired by prescription. The plaintiff argues that there is no evidence that it is strictly necessary that the dam should be maintained above the height at which he conceded the defendants are entitled to maintain it; or, in other words,

16 A.L.R.—68.

that there is no showing of strict necessity for the single foot of head. But that is not the question. He challenged any right of the defendants to maintain the dam, growing out of an implied reservation. Their reserved right, if any, would be limited to the height of the dam at the time of the conveyance, and could neither be enlarged because of subsequent necessity nor cut down by a claim that some part of it was not indispensable; so the important question on this branch of the case is the height of the dam as it was at the time of the conveyance. It is asserted that the defendants elected to rest their defense upon the claim of prescription right; but not so, as the record discloses. Throughout the trial they consistently maintained the position upon which they now rely, although the court adopted the plaintiff's view of the matter, and ruled accordingly. As the exception to the charge requires a reversal, we do not find it necessary to examine the requests to charge in detail.

The defendants excepted to the exclusion of certain questions asked the plaintiff in cross-examination, intended to elicit the fact that the plaintiff made large profits by cutting ice from the mill pond on his land, which he could not have done had the dam been kept at a lower level; and excepted to the charge because the jury were not instructed that the plaintiff was entitled to recover only the net damages, after making allowances for the benefit thus derived from flooding his land. In

Damages—
mitigation—
profit from
mill pond.

this there was no error. In general, compensatory damages cannot be mitigated. 38 Cyc. 1140. Thus, benefit to the owner of land damaged by a trespass cannot be shown to mitigate actual damages. One cannot thrust benefits upon the landowner by a wrongful act, and then set up the benefits in reduction of the damages caused thereby. *Pinney v. Winstead*, 83 Conn. 411,

76 Atl. 994, 20 Ann. Cas. 923; Hurley v. Jones, 165 Pa. 34, 30 Atl. 499; Williams v. Hathaway, 21 R. I. 566, 45 Atl. 578; Leigh v. Garysburg Mfg. Co. 132 N. C. 167, 43 S. E. 632; Loomis v. Green, 7 Me. 386; Turner v. Rising Sun & L. Turnp. Co. 71 Ind. 547.

One of plaintiff's witnesses had testified in direct examination that he worked at the mill at different times during a period of about forty years, had helped repair the dam, and that it was maintained 12 or 14 inches below the iron pin. He was asked in cross-examination if he ever learned that the pin was connected with the height of the dam; if he wasn't told the pin determined the height of the dam; and if he ever heard who put the pin into the ledge. The questions were properly excluded, as calling for hearsay evidence. The witness had testified only to the presence of the pin, which was not in dispute, and to the height of the dam with reference thereto. What he had been told as to the relation

Evidence—
hearsay—state-
ment as to
height of dam.

of the pin to the height of the dam would have no legitimate tendency to

test his truthfulness, which was advanced as a justification for the inquiries.

Against the objection that the plaintiff could not recover for damages done since the suit was brought, the plaintiff was permitted to testify under exception, respecting a farm road across the meadows, that "the water is set back there until it is nothing but a quagmire."

In view of other testimony respecting the condition of this road, prejudicial error could not be said to appear. But, if entitled to recover, plaintiff's damages would include the **Damages—flowage—injury to road.** injury to the farm

road occasioned by the defendants' unlawful acts committed before the commencement of the suit, and all the effects of the flowage before the suit was brought, both to the land for tillage purposes and to the road, though they may not have been apparent at that time. It was the province of the jury to determine this question, and it was submitted to them in a manner not excepted to, leaving the defendants without cause of complaint. See Goodrich v. Dorset Marble Co. 60 Vt. 280, 13 Atl. 636.

Other exceptions are argued that present questions not likely to arise on a retrial, and so do not require attention.

Reversed and remanded.

ANNOTATION.

Implied easement or servitude of flowage on severance of tract.

It is not intended to include ditches, raceways, or drains, nor, in general, cases of the construction of deeds describing easements of water, nor cases of rights of flowage of lands of a third person.

The theory of easements created by severance of tract of land with apparent benefit existing depends upon intention. Such easements of flowage are usually simple in grant, but they are troublesome in reservation.

Division of decedents' estates.

In some ways the simplest form of the question of implied easements of flowage occurs in the division, by will

or otherwise, of the estates of decedents.

Where, on the death of the builder of a mill and dam, his land was sold at administrator's sale in two parcels on the same day, the mill tract to the defendant's grantors and the other land to the plaintiff, the defendant was held entitled to flow the plaintiff's land by a dam of the same height as that maintained by the testator. Baker v. McGuire (1874) 53 Ga. 245; see on further appeal (1876) 57 Ga. 109.

Where a person died intestate, seized of a tract of land on which

there was a gristmill then in operation, and, on a division of land amongst his heirs, the mill was on the part allotted to one person, and the dam, or a part of it, covered a portion of the land allotted to another, it was held that the former had the right to use the mill and dam in the same way and to the same extent as they had been used by the intestate in his lifetime. *Kilgour v. Ashcom* (1820) 5 Harr. & J. (Md.) 82, where the injury complained of was overflowing lands.

In *Schuler v. Weise* (1881) 9 Mo. App. 585, where the ancestor dug a ditch diverting a spring from its natural course so as to cause it to flow over another part of his farm and make a pond, it was held that, by the devise of the different portions of this farm in severalty, he created dominant and servient tenements as to this water flow as it existed at his death, and that the devisee acquiring the spring was not liable to the devisee on whose tract the artificial pond was formed, for keeping open the ditch and keeping up the status quo on his land.

In *Lee v. Woodward* (1816) 4 N. C. (Term. Rep. 100), where a testator devised to one of his sons his mill and plantation where he then lived, and to the other of the sons, among other things, a certain entry, to 340 acres of land, which included 46 acres covered by the mill pond, and the plaintiff, claiming under the devise of the 340 acres, brought suit for overflowing it against the devisee of the mill, it was held that, as between the two sons, the devise of the mill pond was implied in the devise of the mill; but the opinion is not clear as to whether it is intended to mean that the devisee of the mill had an easement to flow the 46 acres, or whether he took them in fee.

Where a person owned lands on both sides of a creek which frequently overflowed its banks, and he built a dike along the south side of it to protect his low grounds on that side, thus causing the creek to overflow the lands on the north side still more, and at his death the lands on one side of

the creek were allotted to one of his children and the lands on the other side to another, no allusion to the dike being made in the report of the commissioners, it was held that the person taking the part upon which the dike was constructed was entitled to it as it was when the testator died, and to have his lands protected thereby, and that the person owning the other side had no right to build a dike on his side which would destroy the original dike and overflow the grounds on that side, and that equity would interfere to prevent the building of such a dike. *Burwell v. Hobson* (1855) 12 Gratt. (Va.) 322, 65 Am. Dec. 247.

Implied grants.

There are a number of cases holding that the grant of a mill includes the right to flood the grantor's land for the use of the mill, the same as is done at the time of the conveyance.

Illinois.—*Hadden v. Shoutz* (1854) 15 Ill. 581; *Jarvis v. Seele Mill Co.* (1898) 173 Ill. 192, 64 Am. St. Rep. 107, 50 N. E. 1044.

Maine.—*Rackley v. Sprague* (1840) 17 Me. 281 (arguendo); *Baker v. Bessey* (1882) 73 Me. 472, 40 Am. Rep. 377.

Nebraska.—*Johnson v. Sherman County Irrig. Water Power & Improv. Co.* (1904) 71 Neb. 452, 98 N. W. 1096 (arguendo).

New Hampshire.—*Dunklee v. Wilton R. Co.* (1852) 24 N. H. 489 (arguendo).

New York.—*Oakley v. Stanley* (1830) 5 Wend. 523.

North Carolina.—*Kestler v. Verble* (1859) 52 N. C. (7 Jones, L.) 185; *Latta v. Catawba Electric & Power Co.* (1907) 146 N. C. 285, 59 S. E. 1028 (arguendo).

Wisconsin.—*Sabine v. Johnson* (1874) 35 Wis. 185 (arguendo).

Thus, where one owned a tract of land whereon there was a mill, and afterwards sold a part of the land, including the mill, it was held that an easement in the lands unsold passed to the purchaser, entitling him to flood them to the same extent as they were at the time of his purchasing the

mill. *Kestler v. Verble* (1859) (N. C.) *supra*.

"It is settled by decisions of this court that, if one sell land on which a mill is located, an easement will pass with it, as appurtenant, to pond water above the mill, to the same extent as was done at the time of the conveyance." *Latta v. Catawba Electric & Power Co.* (1907) 146 N. C. 285, 59 S. E. 1028, *supra* (arguendo).

"It is well settled that if a person own a milldam and water power, and also lands flowed by means of such dam, and he first convey to A the milldam and water power, and afterwards convey to B the lands so flowed, neither the grantor nor B can maintain an action to recover damages for such flowing, for the reason that the right to flow such lands to the extent they were flowed when the mill property was conveyed passed by the conveyance, as appurtenant thereto." *Sabine v. Johnson* (1874) 35 Wis. 185, *supra* (arguendo).

In *Rackley v. Sprague* (1840) 17 Me. 281, *supra*, the court said, arguendo: "The grant of the undivided half of the sawmill and gristmill carried also the use of the head of water necessary to their enjoyment, with all incidents and appurtenances, as far as the right to convey to this extent existed in the grantor. If, then, this grant could not be beneficially enjoyed, without causing the water to flow back upon other lands of the grantor, a right to do this passed to the extent to which it had been flowed before the grant, by which all privies in estate, under the grantor, would be bound."

"A conveyance of a mill, or of land on which a mill is situate, carries with it, as incidents of the mill, the right to raise the mill pond, and to flow the lands above as high as the dam has been usually kept up, and to maintain the dam and flume which are necessary to support the water at that height . . . in the manner in which they have been kept and used immediately previous to the conveyance, so far, at least, as the grantor has a right to convey such privileges." *Dunklee v. Wilton R. Co.* (1852) 24 N. H. 489, *supra* (arguendo).

While it is not intended, in general, to include cases of mere backwater in the beds of streams where one of two mills is sold, reference should be made to a case mainly, if not entirely, of that character in *Oakley v. Stanley* (1830) 5 Wend. (N. Y.) 523, *supra*, where the terms of the conveyance do not appear, but wherein it was held that "the right to overflow the adjoining premises of the grantor to the extent necessary to the profitable enjoyment of the privilege purchased, and in the manner in which it existed and had been used previous to the grant, passed to the grantee as necessarily appurtenant to the premises conveyed."

And where the defendant placed his dam on a piece of land which was not included in the mill lands as specifically described in a mortgage given by him to the plaintiff's grantor, and this dam and the race connected with it furnished the water to the mill, it was held that the defendant could not let out the water from his dam to the plaintiff's detriment. *Curtis v. Norton* (1885) 58 Mich. 411, 25 N. W. 327.

In *Baker v. Bessey* (1882) 73 Me. 472, 40 Am. Rep. 377, *supra*, it was held that the right to flow land by the upper dam was included in a sheriff's deed of "mill and dams, with the appurtenances," where the court stated the facts as follows: "It appears that there are two dams across the stream, one at the mill, and the other about half a mile above the mill, and within a mile from the pond; that the lower dam flows only up to the upper dam; that the upper dam holds back the principal head of water used at the mill, and caused the flowage which the demandants complained of; that the same person was the owner of the mill and both dams, and that for many years the dams have been used in conjunction with each other; and it may be inferred, we think, from the evidence, that either structure would be of very little value or consequence without the other."

Where a deed conveyed by metes and bounds several acres of land on which was a mill and dam, "together with all and singular the heredita-

ments and appurtenances thereunto belonging or in any wise appertaining," and where at the time of the conveyance, and for a long time before, the dam flowed the water of the creek back upon a portion of the tract not conveyed, which the grantor also owned at the time of the conveyance, and where the right to flow the water back above the line of the land conveyed was necessary to the enjoyment of the mill as such, such right passed by the grant as appurtenant to the premises conveyed. *Hadden v. Shoutz* (1854) 15 Ill. 581, *supra*, where the court distinguished the case of *Wilcoxon v. McGhee* (1851) 12 Ill. 381, 54 Am. Dec. 409, as holding that where a settler built a mill upon the public lands, and by his dam flowed the water back upon adjoining lands, by purchasing from the government the tract upon which the mill was situated, he did not acquire the right to continue to inundate the adjoining government land which he did not purchase.

(Where lands belonging to the owner of a mill are overflowed by the water of the mill pond, a conveyance of the mill, with the waters and water-courses, etc., gives a right to the grantee to continue to overflow lands of the grantor which are not conveyed, to the same extent that they were overflowed by the waters of the mill pond at the time of the conveyance. *Le Roy v. Platt* (1833) 4 Paige (N. Y.) 77.)

(If, at the time of the conveyance of a dam, mills, land, and privileges and appurtenances, "the grantor was the owner of all the land flowed, we think that, both upon principle and authority, the grantee acquired a right to continue the dam so as to raise the same head of water as the grantor had been accustomed to raise previous to the grant, provided that was necessary for the useful operation of the mill." *Hathorn v. Stinson* (1833) 10 Me. 224, 25 Am. Dec. 228.)

In *Jarvis v. Seele Mill Co.* (1898) 173 Ill. 192, 64 Am. St. Rep. 107, 50 N. E. 1044, *supra*, where a mill property and adjoining land overflowed by the mill pond were severed by foreclosure proceedings, it was held that the ease-

ment, consisting of the right to overflow the land, passed as a necessary appurtenance of the mill property, although the mill property was conveyed by metes and bounds without the word "appurtenances."

In *Johnson v. Sherman County Irrig. Water Power & Improv. Co.* (1904) 71 Neb. 452, 98 N. W. 1096, the court said *arguendo*: "Having created the pond for use of the mill, and then purchased the land it covers, while the fee in the land would not pass by sale of the mill and site, yet the easement of right of flowage, we think, would pass as an appurtenance to the mill property," in a mortgage given before the mortgagee acquired the fee of the land covered by the pond.

But a conveyance of metes and bounds, by an owner of a tract of land, without any mention of a mill, dam, or water privilege of any kind, though the purchaser had previously constructed a mill and dam thereon which flowed other lands of the grantor, does not convey the right of flooding such lands, there being no evidence that the grantor had notice of the existence of the mill or dam when the deed was executed. *Tabor v. Bradley* (1858) 18 N. Y. 109, 72 Am. Dec. 498. (This was wild land of the Holland Land Company. See, in this connection, *Wilcoxon v. McGhee* (1851) 12 Ill. 381, 54 Am. Dec. 409, referred to *supra*.)

It was held in *Lampman v. Milks* (1860) 21 N. Y. 505, that where the owner of land across which a stream flows has diverted it through an artificial channel so as to relieve a portion of it formerly overflowed, which he then conveys, neither he nor his grantees of the residue can return the stream to its ancient bed to the damage of the first grantee.

Implied reservations.

The cases upon implied reservations are not to be reconciled.

In *Burr v. Mills* (1839) 21 Wend. (N. Y.) 290, it was held that where the owner of land conveys away a portion of his premises, a part of which, at the time of the conveyance, is flowed by a milldam belonging to him,

and makes no reservation of the right to continue to flow the land, he loses the right, and cannot set up an implied reservation.

And in *Preble v. Reed* (1840) 17 Me. 169, the court said: "It is where the owner sells the dam and mills, retaining the lands, that he conveys as an essential part of them the right to flow; not where he retains the mills and chooses to sell the land without reserving the right."

In *Wells v. Garbutt* (1892) 132 N. Y. 430, 30 N. E. 978, the court laid down the rule that "where the owner of two parcels of land conveys one by an absolute and unqualified deed, . . . an easement will be implied in favor of the land retained by the grantor and against the land conveyed to his grantee, only in case the burden is apparent, continuous, and strictly necessary for the enjoyment of the former." In that case the owner of mills, dam, and pond, having mortgaged part of the land covered by the mill pond when full without reserving the right of flowage, it was held there was no right of flowage as against the plaintiff, who claimed under foreclosure of the mortgage, it not being expressly found that there was any apparent overflow at the time when the mortgage, or the deed, was given, or that the mortgagee or the grantee had any notice of the facts when either instrument was accepted, and it not appearing, unless by implication, that any standing water was visible at the date of the mortgage, or that there was then any visible sign indicating "to a person reasonably familiar with the subject, upon an inspection of the premises," that water had stood there in the past, the dam not being in use at the date of the deed, as it had been partly swept away by a freshet, and both the mortgage and the deed being given at a season of the year when the water of streams was ordinarily low. It was held, further, that even if the alleged easement was apparent and continuous, it was not of strict necessity, the court observing that it did "not appear that the water power of defendant would be materially diminished if he were

not permitted to overflow the lands in question." *Wells v. Garbutt* (N. Y.) supra. In this case the opinion gives the impression of seizing every technical pretext against the reservation. The general situation had existed for about twenty-eight years at the time of the mortgage and for about sixty years at the time of the foreclosure.

On the other hand, there are a number of cases of implied reservation of the right to continue to flood a part of lands after they have been sold.

In *Fremont, E. & M. Valley R. Co. v. Gayton* (1903) 67 Neb. 263, 93 N. W. 163, it was held that where a railroad company constructs its road across its own land, and in so doing erects embankments and bridges, and digs ditches and borrow pits, by reason whereof surface water is or may be collected and discharged upon a particular portion of the tract, subsequent grantees of that portion cannot maintain an action against the company by reason of the maintenance of such embankments, bridges, ditches, and borrow pits in their original condition, which was obvious and permanent.

In *Znamanacek v. Jelinek* (1903) 69 Neb. 110, 111 Am. St. Rep. 533, 95 N. W. 28, it was held that where the owner of two adjoining tracts of land constructs a dam of a permanent character across a stream on one tract, which causes the water to overflow a portion of the other tract; upon a sale of such other tract to one having knowledge of the existence of such dam and its character, in the absence of evidence of a contrary intent, there arises an implied contract that the mutual benefits and servitudes, as regards such dam, shall remain in statu quo.

Where a person owning a mill and an artificial mill pond, with the surrounding land, granted a parcel of such surrounding land, not bounded on the pond, by warranty deed, with no expressed reservation therein of any right to flow the same, and afterwards conveyed his mill and water privilege to another, it was held that by his former deed the grantor did not part with the right to flow

such land as he had formerly done, the condition being obvious, and that the subsequent exercise of such right by himself and his grantee was not a breach of his covenant against encumbrances, and was not a ground of an action in favor of the second purchaser. *Harwood v. Benton* (1860) 32 Vt. 724.

In the reported case (*READ v. WEBSTER*, ante, 1068) it was held that the grantor of lands partly flooded by his milldam reserved by implication the right to continue to flood them, such right being obvious, necessary, and of long continuance at the time of the grant.

In *Bennett v. Booth* (1912), 70 W. Va. 264, 39 L.R.A.(N.S.) 618, 73 S. E. 909, it was held that if an owner of land erect a milldam upon it for the purpose of operating a gristmill, and thereafter convey a portion of the land, including a part of the mill pond, there is an implied reservation of an easement upon the land granted,

as appurtenant to the gristmill. The court said: "When a landowner has created a servitude upon one portion of his land for the benefit of another portion, and conveys the servient part, there is an implied reservation of the easement, if it is essential to the use and enjoyment of the land reserved, and such right passes with the dominant estate, as appurtenant thereto. Nor does the existence of such an easement constitute a breach of the covenant of general warranty, if the easement is so open and apparent that the contracting parties are presumed to have contracted with reference to the condition in which the land then was, and it is not to be supposed that the purchaser agreed to pay any more for the land than he thought it was worth with the burden on it. Such a burden has been held not to constitute a breach of covenant against encumbrances." *Bennett v. Booth* (W. Va.) supra.

B. B. B.

F. G. ALEXANDER, Appt.,

v.

BIRMINGHAM TRUST & SAVINGS COMPANY.

Alabama Supreme Court — May 12, 1921.

(— Ala. —, 89 So. 66.)

Garnishment — proceeds of draft forwarded for collection.

1. The proceeds in the hands of a collecting bank of a draft deposited in bank for collection, and credited to the account of the depositor, with power to charge it back if not paid, are subject to garnishment by a creditor of the depositor, and it is immaterial that the depositor is indebted to his bank in excess of the amount of the draft.

[See note on this question beginning on page 1084.]

—sufficiency of notice to garnishee.

2. A bank to which a draft against bill of lading is sent for collection, which forwards the proceeds after being served with a writ of garnishment in a suit against the drawer, cannot escape liability on the ground that it did not know that the proceeds belonged to the drawer, because the

draft was drawn to the order of its correspondent bank, where the draft showed on its face that it was by one in the business of handling the goods against which it was drawn, and was not payable until the goods arrived at destination, while the direction as to collection showed that he retained control over the collection.

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County (Boyd, J.), discharging the garnishee bank in an action brought

to subject to the satisfaction of plaintiff's claim the proceeds of a draft for the purchase price of flour sold by defendant, in the hands of the garnishee bank for collection. *Reversed.*

The facts are stated in the opinion of the court.

The certificate of deposit is as follows:

Deposited in the First National Bank, Subject to Conditions Below, by Fisher Flouring Mills Co. Seattle, Wash., March 15, 1917. Specify banks upon which checks are drawn.

	Dollars.	Cents.
Gold coin
Currency
Silver
Checks on
Dft. 1778. G. W. Hopson & Son, Birmingham, Ala.	2633	84

In receiving checks or other items on deposit payable elsewhere than in Seattle, this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may be charged back to the depositor's account. Checks on this bank will be credited conditionally. If not found good at the close of business they will be charged back to the depositors and the latter notified of the fact. In making this deposit, the depositor hereby assents to the foregoing conditions.

Messrs. Rudolph & Smith, for appellant:

The service of the writ of garnishment on it brought the garnishee into court, and operated to create a lien in favor of plaintiff, and to intercept any property or funds of the defendant which might be held by appellee as such garnishee during the pendency of the garnishment proceedings; and any payment or other disposition made of such funds by the garnisher after such service was at its own peril, and constituted no defense to its liability to plaintiff.

White v. Simpson, 107 Ala. 386, 18 So. 151; Lady Ensley Furnace Co. v. Rogan, 95 Ala. 594, 11 So. 188; Ely v. Blacker, 112 Ala. 311, 20 So. 570.

The draft drawn by defendant Mills Company, and collected by the garnishee after the service of the writ, being for collection only, was and remained the property of such defendant, and its proceeds in the hands of the garnishee were subject to the garnishment herein.

Stones River Nat. Bank v. Lerman Mill Co. 9 Ala. App. 322, 63 So. 776; Morris v. Alabama Carbon Co. 139 Ala. 620, 36 So. 764; Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bank, 46 Wash. 23, 123 Am. St. Rep. 912, 89 Pac. 157; 5 Cyc. 493.

The garnishee, having disposed of the proceeds of the draft so drawn by defendant after service of the writ of garnishment, had sufficient notice of the liability of such funds to the garnishment, and such disposition did not relieve it of its liability to plaintiff.

Freeman's Nat. Bank v. National Tube Works, 151 Mass. 413, 8 L.R.A. 42, 21 Am. St. Rep. 461, 24 N. E. 779; Dow v. Taylor, 71 Vt. 337, 76 Am. St. Rep. 775, 45 Atl. 220; Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984; Ann. Cas. 1913A, 1317; 4 Cyc. 835; Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389; Garrett v. Mayfield Woolen Mills, 153 Ala. 602, 44 So. 1026; 3 R. C. L. 637; 1 Dan. Neg. Inst. 6th ed. § 340.

Mr. Shuford B. Smyer, for appellee:

The proceeds of the draft drawn by defendant Mills Company were the property of the First National Bank of Seattle, and not of the defendant, and were not subject to garnishment.

Farmers' Exch. Bank v. Greil Bros. Co. 17 Ala. App. 287, 84 So. 427; People's Bank v. Jefferson County Sav. Bank, 106 Ala. 524, 54 Am. St. Rep. 59, 17 So. 728.

Even though the draft drawn by the defendant remained its property, the garnishee, having no notice of such ownership, was protected in paying over the proceeds thereof to the payer of the draft, and can set up said payment as a defense against liability to plaintiff in this cause.

Gardner, J., delivered the opinion of the court:

Appellant sued out an attachment against the Fisher Flouring Mills

Company (hereinafter referred to as the Fisher Company), a nonresident corporation, and had the same executed by service of garnishment upon the Birmingham Trust & Savings Company, and sought to subject to the satisfaction of his claim the proceeds of a certain draft drawn by said Fisher Company on Hopson & Sons, payable to the First National Bank of Seattle. The draft so drawn was for the purchase price of a car of flour sold by the Fisher Company to Hopson & Son, to be shipped to Macon, Georgia, and was deposited by the former in said First National Bank, with bill of lading attached. The First National Bank forwarded the draft, with bill of lading attached, to the Birmingham Trust & Savings Company for collection. The bill of lading shows the flour was consigned by the Fisher Company to itself, with order, "Notify Hopson & Son," and the draft was payable upon arrival of the car at Macon, Georgia.

The first question presented for consideration is whether or not the defendant Fisher Flouring Mills Company, under the evidence in this case, could have maintained debt or indebitatus assumpsit against the Birmingham Trust & Savings Company for the funds here sought to be subjected. This is the test.

A detailed discussion of the evidence is deemed unnecessary, as a sufficient outline thereof will appear in the statement of the case. Suffice it to say it very clearly appears, and that—as we understand it—practically without dispute, that the draft in question was made payable to the First National Bank for the purpose of collection on account of the drawer. Indeed, there is no pretense that said bank became the purchaser of the draft. The Fisher Company was its customer, and while, upon presentation of the draft with bill of lading attached to said bank, credit was given to the Fisher Company for the amount thereof, yet this was made expressly conditional by the contract of the parties, as appears from the deposit

slip set out in the report of the case. This deposit slip expressly stated that the bank assumes no responsibility on account of any of its collecting agents, it only being liable for the proceeds or actual funds of solvent credits which have come into its possession; and that, under these conditions, the items previously credited may be charged back to the depositor's account, and any checks of payment to be credited conditionally.

So far as the question here concerned is involved, we consider the case of *Stones River Nat. Bank v. Lerman Mill. Co.* 9 Ala. App. 322, 63 So. 776, reviewed and approved by this court in *Ex parte Stones River Nat. Bank*, 185 Ala. 673, 64 So. 1019, is

Garnishment—
proceeds of draft
forwarded for
collection.

decisive of this appeal. The holding in that case (9 Ala. App. 322) is well expressed in the second headnote as follows: "Where the drawer of a draft indorsed it to the bank when depositing it for collection, and the bank credited the drawer with the amount on his deposit account, the bank did not thereby become the purchaser of the draft, since its liability was not absolute, but conditioned upon the collection of the draft; hence, the proceeds of the draft in the hands of another bank, to which it was sent for collection, belonged to the drawer, for which he could maintain assumpsit, and as such was subject to garnishment by his creditor."

The opinion quotes from the case of *Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 408, 24 So. 389, and likewise distinguishes *Tishomingo Sav. Inst. v. Johnson*, 146 Ala. 691, 40 So. 503.

In the *Stones River Nat. Bank Case*, supra, the claimant bank occupied the position of the First National Bank in the instant case, and the draft had been forwarded to the Farmers & Merchants Bank for collection, as in this case it had been forwarded to the Birmingham Trust & Savings Bank. Likewise it appears that the deposit was condi-

tional, as here, and it was held that such an assumption of a conditional liability did not render the claimant bank in fact a purchaser of the draft, though formally it might appear so. As pointed out in the opinion, the case would have been different had the claimant bank actually purchased the draft, or had by agreement credited the amount of it on a debt owed the claimant by the defendants.

The deposit was conditional, with no pretense of purchase, and the mere fact that the drawer of the draft was at the time indebted to the First National Bank in an amount in excess thereof could have no material bearing upon the result in the absence of any agreement or understanding of any credit to be given on account thereof, or any pretense on the part of the bank that such credit was to be given or expected. Indeed, the language used on the deposit slip clearly indicates to the contrary. The First National Bank, therefore, was but the agent of the Fisher Company in the collection of the draft. *Stones River Nat. Bank v. Lerman Mill. Co. supra*; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524, 54 Am. St. Rep. 59, 17 So. 728; *Eufaula Grocery Co. v. Missouri Nat. Bank*, *supra*; *Cosmos Cotton Co. v. First Nat. Bank*, 171 Ala. 392, 32 L.R.A. (N.S.) 1173, 54 So. 621, Ann. Cas. 1913B, 42; *Alpine Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218; *Washington Brick, Lime & Mfg. Co. v. Traders' Nat. Bank*, 46 Wash. 23, 123 Am. St. Rep. 912, 89 Pac. 157.

We have considered the case of *Farmers' Exch. Bank v. Greil Bros. Co.* 17 Ala. App. 287, 84 So. 427, cited by counsel for appellee, reviewed by this court in *Farmers' Mut. Ins. Asso. v. Smith*, 203 Ala. 697, 84 So. 924, and do not find that authority to militate against the conclusion here reached. Therefore, although upon its face it might appear that the First National Bank held the legal title to the draft, yet, upon the undisputed proof, the

Fisher Company remained the beneficial owner thereof, and could have maintained an action of debt for the recovery of the proceeds. *Morris v. Alabama Carbon Co.* 139 Ala. 620, 36 So. 764.

Indeed, we entertain no doubt, as stated by counsel in brief, that the trial court so concluded upon these facts, but his judgment discharging the garnishee was rested upon the theory that it had paid out the money without sufficient notice that the Fisher Company had any claim thereto. We cannot agree to this conclusion from the evidence here presented. Two writs of garnishment were served on this bank on April 7, 1917, in this identical cause, the first at 8:55 o'clock in the morning, and the other during the afternoon of the same day,—both being served on the assistant cashier. At the time the first writ was served, the draft had not been collected, but was collected within two or three hours thereafter. At the time of the service of the second writ, the collection had been made, and the proceeds forwarded to the National Park Bank, New York, for the credit of the First National Bank of Seattle, pursuant to instructions, but so forwarded by check placed in the mail, and only a very short time prior to this second writ. The Birmingham bank had this draft in its possession several days prior to the service of the garnishment writ: It was drawn by Fisher Flouring Mills Company, and, while it was payable to the First National Bank, it was only payable on the arrival of the car of flour at Macon, Georgia. Attached to the draft was an invoice and a bill of lading for the car of flour, shipped by the Fisher Company to itself, with order "Notify Hopson & Son," the drawee. Across the face of the draft was written in large, underscored letters, "Present through Birmingham Trust & Savings Bank, Birmingham, Alabama," thus seemingly indicating that the drawer reserved some control or

direction over the manner of its collection.

The name of the drawer suggested that it was in the flour business, and the garnishee bank must, of course, be held to know that one of the most important functions of a bank is to make collections for its customers. The draft, as previously stated, was payable only upon the arrival of the car of flour at Macon, Georgia, shipped from the distant state of Washington. The garnishee, upon being served with the first writ, must have been put upon notice thereby that the plaintiff, at least, was insisting that the proceeds belonged to the Fisher Company, and that the issuance of the writ was not merely an idle ceremony. But the bank did nothing more than to merely file on the same day a general answer denying indebtedness. Another writ was served between 3 and 4 o'clock of that same day, and the evidence of the assistant cashier would indicate that he understood the purpose of the writ; for when asked as to the time of its service, he replied that there was "a notation on the garnishment writ that it was mailed that afternoon between 3 and 4 P. M." Notwithstanding the service of the two writs, no inquiry whatever was made by the bank; and, notwithstanding the fact that a check for the proceeds had doubtless less than an hour previously been placed in the mail, yet no effort was made to intercept the mail, or stop the payment of the check, which no doubt could easily have been done. As said by this court in *White v. Simpson*, 107 Ala. 386, 18 So. 151: "The service of a garnishment creates a lien on the debt or demand due or owing from the garnishee,—a lien which is inchoate, but is incapable of impairment by any arrangement or transaction between the defendant and the garnishee, or by any act of either."

And again, in *Ely v. Blacker*, 112

Ala. 311, 20 So. 570: "In legal contemplation, the garnishee stands indifferent between the plaintiff in judgment and the defendant. It is nothing to him whether the one or the other is entitled to the fund in his hands. His only concern is to pay it to that one who shall be adjudged entitled to it. He has no right to intercept or intervene in any way in the contest between them, but he must stand still until that contest is determined between them alone, and then pay to the successful party. If, instead of this plain and safe course, he pays to either party before the contest is decided, he does so at his own risk and in his own wrong."

We are of the opinion the facts and circumstances indicate sufficient notice to the Birmingham Trust & Savings Company to place it on inquiry as to the ownership of the proceeds of this draft, and that ordinary prudence re-

—sufficiency of
notice to
garnishee.

quired that they should hold the same subject to the court proceedings, and suggesting the First National Bank as claimant thereof. The garnishee stands indifferent, and this was the plain and safe course they should have pursued. Disregard of the garnishment writs was its own wrong, and at its own risk.

The conclusion is reached that the court below erred in discharging the garnishee, but should have held that the contention of the plaintiff was sustained, and, after determining the amount of liability of the garnishee, continued the garnishment, ordering that the funds await the result of the principal suit. *Warren v. Matthews*, 96 Ala. 183, 11 So. 285.

The judgment will be reversed, and the cause remanded, to be proceeded with in accordance with these views.

Anderson, Ch. J., and Sayre and Miller, JJ., concur.

ANNOTATION.

Title to commercial paper deposited by the customer of a bank to his account.

The earlier cases on this question are discussed in the note in 11 A.L.R., at pages 1043 et seq.

Rule where there is no agreement that paper is taken for collection; doctrine that title remains in the depositor; in general.

See earlier cases on this question in earlier note, at pages 1054 et seq.

It is held in *First Nat. Bank v. Munding* (1921) — Okla. —, 200 Pac. 158, that title does not pass to the bank where the drawer of a draft deposits it in the bank with which he is transacting his banking business, and receives credit in his checking account for the amount of the draft, subject to the right of the bank to charge the draft back to him if not paid, and with the agreement that the bank will charge him interest on the amount of the draft until the money is received; such a transaction amounts to a receipt by the bank for collection.

See the reported case (*ALEXANDER v. BIRMINGHAM TRUST & SAV. Co.* ante, 1079).

Rule where there is no agreement that paper is taken for collection; doctrine that title passes to the bank; in general.

The earlier cases on this question are discussed in the earlier note, at pages 1060 et seq.

The majority rule, as stated in § IV. b, of the earlier note, at page 1060, that where there is no definite understanding between the depositor and the bank as to the ownership of paper, but the paper is indorsed by an unrestricted indorsement, and deposited in the usual course of business with the bank, which gives credit to the depositor for the amount thereof, with the right to draw thereon, title passes to the bank, has been adhered to in the following cases, decided since the date of that note. *Provident Nat. Bank v. Cairo Flour Co.* (1921) — Tex. Civ. App. —, 226 S.

W. 499. In *Farmers' State Bank v. A. F. Hardie & Co.* (1921) — Tex. Civ. App. —, 230 S. W. 524, the court held that when a draft was delivered by the owner to his bank, which thereupon gave him unqualified credit therefor, the bank became the owner of the draft. On facts somewhat similar to those in *Provident Nat. Bank v. Cairo Flour Co.* supra, finding was made by the trial court in *Commercial Nat. Bank v. Heid Bros.* (1921) — Tex. Civ. App. —, 226 S. W. 806, that the title remained in the depositor, but the case was disposed of in the appellate court on other grounds.

That title passed to the bank is held in the case of a check drawn on the bank with which it is deposited, in *Cohen v. First Nat. Bank* (1921) — Ariz. —, 15 A.L.R. 701, 198 Pac. 122.

Where a draft with bill of lading attached is deposited by the drawer with his bank as so much cash, and the bank thereupon credits him with the amount, which he at once checks against in the regular course of business, title passes to the bank. *Union Nat. Bank v. Maines-Hough Motor Co.* (1921) — Colo. —, 197 Pac. 753. For cases holding that title passes when the depositor actually draws on the credit thus received, see the earlier note, at page 1062.

Title to a check indorsed by the payee "for deposit," and deposited with a bank, which paid the holder the full amount of the check, was held to pass to the bank in *Midwest Nat. Bank & T. Co. v. Niles & W. Sav. Bank* (1921) — Iowa, —, 180 N. W. 881. This conclusion is based largely upon the fact that when the check was presented to the bank, thus indorsed, the bank sent a telegram to the drawee, asking if it would be paid, and, upon receipt of an affirmative answer, paid the check, as above stated. There is an indication in the opinion that if the telegram in question had

not been sent and received, the form of the indorsement might have required a different holding; but this case is, as above stated, decided largely upon the effect of the passing of

the telegram. For cases adhering to the rule that title passes to the bank in case of indorsement "for deposit," see page 1066 of the earlier note.
W. A. E.

FRED NOHL, Appt.,
v.
BOARD OF EDUCATION OF THE CITY OF ALBUQUERQUE.

New Mexico Supreme Court—July 1, 1921.

(— N. M. —, 199 Pac. 373.)

Schools — power to carry insurance for teachers.

1. Boards of education of municipal school districts (Laws 1917, § 8, chap. 105), are given authority to defray "all other expenses connected with the proper conduct of the public schools in their respective districts." Held, in a suit to enjoin the expenditure of school funds for the purpose of carrying group insurance for teachers and employees, where the pleadings admit that, by carrying such group insurance, the school board is enabled to procure better teachers, and to retain such teachers in its employ by so doing at a much less expense than would otherwise be necessary, or except upon the payment of much larger salaries, such an expenditure is connected with the proper conduct of the public schools, and within the discretion intrusted to the board of education.

[See note on this question beginning on page 1089.]

Courts — power to review political questions.

2. A court of equity will not sit in review of the proceedings of subordinate political or municipal tribunals; and, where matters are left to the dis-

cretion of such bodies, the exercise of that discretion, in good faith, is conclusive, and will not, in the absence of fraud, be disturbed.

[See 14 R. C. L. 374; 24 R. C. L. 575.]

Headnotes by ROBERTS, Ch. J.

APPEAL by plaintiff from a decree of the District Court for Bernalillo County (Hickey, J.) in favor of defendant in an action brought to enjoin it from paying further instalments of premium on a policy of group insurance on the lives of its teachers and other employees. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. F. O. Westerfield, for appellant: Defendant did not have the power and authority to contract and to pay money out of the public funds as premiums on life insurance policies insuring the lives of its employees.

24 R. C. L. p. 593, § 45; Shanklin v. Boyd, 146 Ky. 460, 38 L.R.A.(N.S.) 710, 142 S. W. 104; State ex rel. Jenkinson v. Rogers, 87 Minn. 130, 58 L.R.A. 663, 91 N. W. 430; Whittaker v. Salem, 216 Mass. 483, 104 N. E. 359, Ann. Cas. 1915B, 794; Smith v.

Holovtchiner, 101 Neb. 248, L.R.A. 1917E, 331, 162 N. W. 630.

Messrs. Simms & Botts, for appellee:

The expense complained of is one "connected with the proper conduct of the public schools," and with the maintenance of a system of graded schools.

State ex rel. Haig v. Hauge, 37 N. D. 583, L.R.A.1918A, 522, 164 N. W. 289; 1916-17 Ops. Atty. Gen. 288, 292.

The decision and determination by

the board of education, in the exercise of their discretion, that the expense complained of is "connected with the proper conduct of the public schools," should not be disturbed or interfered with by the courts, there being no fraud.

24 R. C. L. 573, 575, §§ 21, 24; District of Columbia v. Dean, 38 App. D. C. 182, 38 L.R.A. (N.S.) 513.

The insurance provided by the expenditure complained of is an added salary allowance to the teachers, which the defendant is obligated to provide by its contract of employment.

State ex rel. Haig v. Hague, *supra*.

Roberts, Ch. J., delivered the opinion of the court:

Appellant, a taxpayer of the city of Albuquerque, brought this action to enjoin the board of education of the city of Albuquerque from paying further instalments of premium on a policy of group insurance upon the lives of the latter's teachers and other employees. From the judgment and decree for the defendant, plaintiff appealed.

The cause was decided upon the pleadings, and there was no dispute as to the facts. The board of education of the city of Albuquerque had contracted with the Equitable Life Insurance Society to furnish group life insurance for the teachers and employees of the board of education, under the terms of which the insurance continued in force during the year contracted for, if such employees remained in the employ of the board for such period, and was to be renewed annually, and, upon the death of any of such employees, the beneficiary named by such employee received from \$500 to \$2,000, depending upon the length of service of such employee with the board. Such insurance was payable to the employee in case of total and permanent disability. The monthly premiums paid for such insurance by the board varied in amounts from \$70 to \$90, depending upon the age and length of service of its employees for the time being. The funds were paid out of the public school funds of the municipal school district, and it was alleged in the complaint that

the school district, unless enjoined, would continue the payment of such monthly premiums out of the public school funds aforesaid. The complaint alleged that such payment of the funds for such use constituted a misapplication and a misappropriation of the same, to the irreparable damage of plaintiff and those similarly situated. The answer admitted the facts set forth in the complaint, but denied that the payment of the money constituted a misapplication of the funds or a misappropriation of the same, and further alleged:

"That defendant employs 110 teachers and 10 other employees in the conduct of the public schools in its district, and that the average monthly cost and expense of said insurance for each such teacher and employee does not exceed 85 cents for each such employee.

"That each of defendant's said teachers and other employees desires insurance upon his life, and that they cannot, by clubbing together, voluntary association, or otherwise than through defendant as their employer and at defendant's expense, obtain insurance of the kind and character described in plaintiff's complaint, or insurance of equal value in proportion to cost; and many employees, on account of family history, physical condition, and other obstacles, could not obtain individual insurance, or any insurance other than in the form described in plaintiff's complaint.

"That the efficiency and usefulness to the public and to the schools of the teaching force is greatly increased by permanency and length of time of service of teachers, and that by incurring the small expense necessary to pay said insurance defendant has been able to secure and retain, and has secured and retained, the services of more efficient and loyal teachers and other employees, and has increased the efficiency and usefulness of its said employees to a much greater extent than would have been possible otherwise without expending much larger sums for

higher salaries, and that thereby defendant has increased the efficiency, welfare, and usefulness of the public schools under its jurisdiction and control at a minimum of expense to the taxpayers.

"That defendant, by its proper officers and directors, has decided and determined, under all the facts and circumstances, that the procuring and carrying of said insurance, and the incurring of the expense thereof, will increase, and has increased, the permanency, ability, efficiency, and loyalty of its teachers and other employees commensurate with the amount of expense, and that such expense is connected with the proper conduct of the public schools in its district.

"That the payment of further monthly premiums on said insurance policy by defendant will be defraying expenses connected with the proper conduct of the public schools in its district, and is such an expense as defendant is required and given power by law to defray, and that defendant's decision and determination thereof, in the exercise of the judgment and discretion of its officers and directors, should not be disturbed or interfered with by this court."

A stipulation was filed, as follows:

"(1) That each and all of the allegations of plaintiff's complaint are true, except that defendant denies the correctness and soundness of the legal conclusions contained in paragraph 6 of said complaint, admitting, however, in event only that it should be finally determined that defendant is without authority of law to pay the insurance premiums complained of, that plaintiff is irreparably damaged and has no adequate remedy at law.

"(2) That each and all of the allegations of defendant's answer are true, except that plaintiff denies the correctness and soundness of the legal conclusions contained in paragraph 6 of said answer.

"(3) That the court may render judgment on the pleadings and this

stipulation for such party as, in the court's opinion, may be entitled thereto, and the parties hereto move the court to so do."

The single question for determination is whether the payment of money for the purpose stated was a misapplication or misappropriation of the school funds, and the solution of the question depends upon the statute. Section 8 of chapter 105, Laws 1917, which controls, reads as follows: "County boards of education and boards of education of municipal districts shall have power and be required to provide, by building, purchasing, or leasing, suitable schoolhouses; to keep same in repair, to provide the necessary furniture therefor, to provide for fuel and light, for the payment of the teachers' wages as well as other employees, excepting only the county school superintendent; to provide for the payment of interest on school bonds and to redemption thereof, and to defray all other expenses connected with the proper conduct of the public schools in their respective districts."

Was the expenditure "connected with the proper conduct of the public schools?" It will be observed that the expenditure of the funds under this statute is left entirely in the discretion and judgment of the school board, so long as such expenditure can be reasonably said to be conducive to the proper conduct of the schools. In *High on Injunctions*, vol. 2, § 1240, the author says: "A municipal corporation being a political body clothed with certain legislative and discretionary powers, equity is ordinarily adverse to interfering by injunction with the exercise of those powers at the suit of a private citizen. And no principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in

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good faith is conclusive, and will not, in the absence of fraud, be disturbed."

The text is abundantly supported by authority, and there are no cases to the contrary. The expenditure of public funds raised by taxation or other methods for public purposes must necessarily be intrusted by the legislature to public agencies, and these agencies are required to exercise discretion and judgment in determining the purpose for which such money will be spent, within the limits of the authority granted, and courts will not interfere unless there is a clear departure from the legislative authority. In the management and conduct of public schools of the state the school authorities are called upon to determine the objects and purposes for which the school funds shall be expended, within the limits of the authority granted, which will prove beneficial to and promote the interests of education, and to expend money daily for such purposes.

It is admitted that the securing of group insurance for the teachers enables the board of education to procure a better class of teachers, and prevents frequent changes in the teaching force. This is certainly desirable and conducive to the "proper conduct of the public schools." School funds are now being spent in all the school districts of the state, and in many, if not all of the other states, for purposes and objects unquestionably proper, gauged by our advancing civilization, which, a quarter of a century ago, would have been considered highly improper. In many of the schools we have mechanical instruction in many of the trades and professions which, not so many years ago, would not have been tolerated. The teaching of music, arts, and science has become a recognized necessity. Many things are provided now for the comfort and convenience of both teachers and pupils which heretofore would have been prohibited by injunction as an improp-

er expenditure of public funds. In some of the schools of the state gymnasiums, swimming pools, playgrounds, and other forms of recreation, amusement, and diversion are provided, because it is recognized by advanced public sentiment that such instrumentalities are calculated to and do promote the cause of education, and tend to better the schools and keep the pupils and teachers satisfied and contented. Many corporations employing large numbers of laborers throughout the country carry group insurance on such employees with the same object in view as that which evidently was in the minds of the members of the board of education of the city of Albuquerque when the insurance in question was purchased. In many parts of the state we have consolidated schools, where conveyances are hired, or means of transportation provided, by which pupils living at long distances from the school are transported to and from the consolidated school. The power of boards of education to do so has never been questioned, because it is recognized that better schools are thus provided, and the cause of education is promoted.

It is clear that the courts should not interfere with the discretion intrusted to boards of education under the statute, unless it plainly appears that there has been a gross abuse of such discretion, and that the funds are being spent for purposes and objects which have no relation to the public schools. This cannot be said in this case. Some cases are cited by both parties, but, as they all depend upon the interpretation of statutes, they do not afford much assistance. Appellant cites the cases of *Whittaker v. Salem*, 216 Mass. 483, 104 N. E. 359, Ann. Cas. 1915B, 794; *Shanklin v. Boyd*, 146 Ky. 460, 38 L.R.A.(N.S.) 710, 142 S. W. 1041; *State ex rel. Jennison v. Rogers*, 87 Minn. 130, 58 L.R.A. 663, 91 N. W. 430; *Smith v. Holovtchiner*, 101 Neb. 248, L.R.A.1917E, 331, 162 N.

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W. 630. And appellee cites the cases of *District of Columbia v. Dean*, 38 App. D. C. 182, 38 L.R.A. (N.S.) 513. But, as stated, these cases were all decided under local statutes, and are influenced more or less by the same.

For the reasons stated, we con-

clude that the expenditure was proper, and the judgment of the trial court will be affirmed; and it is so ordered.

Raynolds, J., concurs.

Parker, J., being absent, did not participate.

ANNOTATION.

Right to use public funds to carry insurance for public officers or employees.

The decision in the reported case (*NOHL v. BOARD OF EDUCATION*, ante, 1085), wherein the question of the right of a board of education to use the school funds for the purpose of carrying group insurance for school-teachers and employees was involved, is based on a statute giving the county board of education the authority, among other things, "to defray all expenses connected with the proper conduct of the public schools in their respective districts." It being admitted that the group insurance was conducive to the proper conduct of the school by enabling the county board of education to procure and retain a better class of teachers, the court held that the payment therefor from the school funds was a proper expenditure.

There seems to be but one other case passing on the question of the right to use public funds to carry insurance for public employees. In *People ex rel. Terbush & Powell v. Dibble* (1921) 189 N. Y. Supp. 29, affirmed without opinion in (1921) 196 App. Div. 913, 186 N. Y. Supp. 951, it appeared that the common council of a city passed an ordinance authorizing the mayor to enter into contracts insuring the officers and employees of the city other than those whose salary was fixed by law. The insurance was duly taken out, and money appropriated for the payment of the premium on the policy. The comptroller refused to pay the premium, claiming that the city had no authority in law to make such a contract of insurance. On an application for a writ of

16 A.L.R.—69.

mandamus to compel the comptroller to pay the premium, the court held that the city had no authority under any statute or charter to enter into a contract insuring its employees for their own benefit, saying: "Undoubtedly in these acts may be found implied, as well as express, powers conferred upon second-class cities to determine and regulate the number, mode of selection, terms of employment, qualifications, powers, and duties, and compensation of all employees of such cities; but these provisions are a long way from conferring upon a city the power to insure its employees without regard to their physical condition, efficiency, or capacity, compensation, or value of services. The employee receiving a small wage receives as much insurance as he who performs more efficient service and receives a larger wage. If this system of insurance may be upheld, there is no reason why the city may not hire the houses for its employees, provide for their clothing while in the employment of the city, or make any other provisions for them, and that entirely outside of anything directly connected with their employment or their duties. This insurance has no relation to the public health, public morals, nor the public safety, nor any of the other objects which come within the scope of the city's power. Attention is called to the granting of pensions to city employees, but it will be noted in such cases the action of the city authorities is provided for by legislative enactment." L. W. B.

CARL HENDERSON

v.

J. J. EDWARDS, Appt.

Iowa Supreme Court—June 25, 1921.

(— Iowa, —, 183 N. W. 583.)

Time — computation — until specified day.

1. Giving until a specified day for filing a motion for new trial includes that day.

[See note on this question beginning on page 1094.]

New trial—newly discovered evidence—lack of diligence.

2. One seeking a new trial for newly discovered evidence cannot be accused of lack of diligence when he possesses no means of knowing that the evidence subsequently discovered was previously obtainable.

[See 20 R. C. L. 289 et seq.]

Appeal—discretion as to new trial.

3. Where the right to a new trial on the ground of newly discovered evidence is statutory, the discretion of the trial court in refusing it will not be interfered with on appeal unless a reasonably clear case of abuse of discretion is presented.

[See 2 R. C. L. 217.]

New trial—when granted for newly discovered evidence.

4. If proffered evidence in support of a motion for new trial presents material facts germane to the issue in controversy, which, considered with the evidence presented on the trial, might cause a jury to take the other view, a new trial should be granted.

[See 20 R. C. L. 293, 294.]

—character of evidence necessary.

5. Newly discovered evidence does not authorize a new trial if it is merely cumulative, or of an impeaching character.

[See 20 R. C. L. 294, 295.]

—what is cumulative evidence.

6. Affidavits for a new trial in an action for commission for selling a farm, that plaintiff had told affiants that the amount of his commission was what he had received, and that he had been paid in full, are not merely cumulative, where they refer to different conversations than any testified to at the trial, and recite facts which were not established by any testimony offered at the trial.

—impeaching testimony.

7. Affidavits for new trial in an action for commission in selling a farm, that plaintiff told affiants that he had received the whole amount due for the service, do not simply tend to impeach plaintiff, so as not to be ground for new trial.

[See 20 R. C. L. 295.]

APPEAL by defendant from a judgment of the District Court for Union County (Evans, J.) in favor of plaintiff, and overruling a motion for new trial in an action brought to recover a commission for services rendered by plaintiff in securing a purchaser for defendant's farm. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Higbee & McEniry, for appellant:

The defendant used due diligence in discovering evidence for the trial.

Des Moines v. Frisk, 176 Iowa, 702, 158 N. W. 590; State v. Lowell, 123 Iowa, 427, 99 N. W. 125.

The discretion of a court in overruling a motion for a new trial is a legal one, and subject to review by the supreme court.

Shepherd v. Brenton, 15 Iowa, 84;

Tegeler v. Jones, 33 Iowa, 234; Murray v. Weber, 92 Iowa, 757, 60 N. W. 492; Grotte v. Schmidt, 80 Iowa, 454, 45 N. W. 771; Dobberstein v. Emmet County, 176 Iowa, 96, 155 N. W. 815; Mullong v. Mullong, 178 Iowa, 552, 159 N. W. 994.

The admissions against interest offered are not cumulative of evidence given on the trial.

Mayer v. Hamre, 162 Iowa, 662, 144 N. W. 334; Wayt v. Burlington,

C. R. & M. R. Co. 45 Iowa, 217; Des Moines v. Frisk, 176 Iowa, 702, 158 N. W. 590; Means Bros. v. Yeager, 96 Iowa, 694, 65 N. W. 993; Bullard v. Bullard, 112 Iowa, 423, 84 N. W. 513; Murray v. Weber, 92 Iowa, 757, 60 N. W. 492; Vickers v. Phillip Carey Co. L.R.A.1916C, 1164, note.

The evidence offered is not impeaching only.

Murray v. Weber, 92 Iowa, 757, 60 N. W. 492; Alger v. Merritt, 16 Iowa, 121; Mally v. Mally, 114 Iowa, 309, 86 N. W. 262; Dobberstein v. Emmet County, 176 Iowa, 96, 155 N. W. 815.

The motion for a new trial was filed in time, under an order allowing until September 20th to file the motion, it being filed on September 20th.

Consolidated Kansas City Smelting & Ref. Co. v. Peterson, 8 Kan. App. 316, 55 Pac. 673; St. Louis & S. F. R. Co. v. Gracy, 126 Mo. 472, 28 S. W. 736, 29 S. W. 579; State v. Mosley, 116 Mo. 545, 22 S. W. 804; Clarke v. New York, 111 N. Y. 621, 19 N. E. 436; Rogers v. Cherokee Iron & R. Co. 70 Ga. 717; Louisville & N. R. Co. v. Turner, 81 Ky. 489; Gottlieb v. Fred W. Wolf Co. 75 Md. 126, 23 Atl. 198; Penn Placer Min. Co. v. Schreiner, 14 Mont. 121, 35 Pac. 878; Houghwout v. Boisabuin, 18 N. J. Eq. 315.

Mr. L. J. Camp, for appellee:

The ruling upon a motion for a new trial is merely a matter of discretion.

Nelson v. Western U. Teleg. Co. 162 Iowa, 50, 143 N. W. 833; Davis v. Central Land Co. (Davis v. Trent) 162 Iowa, 269, 49 L.R.A.(N.S.) 1219, 143 N. W. 1073; Woodbury Co. v. Dougherty & B. Co. 161 Iowa, 571, 143 N. W. 416; Bartlett v. Illinois Surety Co. 142 Iowa, 538, 119 N. W. 729; Woerdehoff v. Muekel, 131 Iowa, 300, 108 N. W. 533; Trimble v. Tantlinger, 104 Iowa, 665, 69 N. W. 1045, 74 N. W. 25; Clark v. Van Vleck, 135 Iowa, 194, 112 N. W. 648.

A new trial ought not to be granted unless the newly discovered evidence is such as will be likely to lead to a different result.

Rockwell v. Ketchum, 149 Iowa, 507, 128 N. W. 940; Harber v. Sexton, 66 Iowa, 211, 23 N. W. 635; Carpenter v. Brown, 50 Iowa, 451.

A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative.

Kringle v. Kringle, 123 Iowa, 365, 98 N. W. 883; Hemmer v. Burger, 127 Iowa, 614, 103 N. W. 957; Farrel v.

Citizens' Light & R. Co. 137 Iowa, 309, 114 N. W. 1063; Rockwell v. Ketchum, 149 Iowa, 507, 128 N. W. 940.

The motion for a new trial was not filed in time under order allowing until September 20th to file the motion, it being filed on September 20th. "Until" excludes the day named. When time is given until a day named, the time does not, in the absence of a contrary intention, include the designated day, and the act must be done prior thereto.

Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518; Alston v. Falconer, 42 Ark. 114; Richardson v. Ford, 14 Ill. 332; Webster v. French, 12 Ill. 302; Eshelman v. Snyder, 82 Ind. 498; Erb v. Moak, 78 Ind. 569; People v. Walker, 17 N. Y. 502; Hartman v. Ringgenberg, 119 Ind. 72, 21 N. E. 464; Corbin v. Ketcham, 87 Ind. 138; Newby v. Rogers, 40 Ind. 9; Clarke v. New York, 111 N. Y. 621, 19 N. E. 436; Willey v. Laraway, 64 Vt. 566, 25 Atl. 435; Merritt v. Mora, 11 L.R.A. 724, 44 Fed. 369; 38 Cyc. 318.

In computing the time in which the motion is to be filed, Sunday or Decoration Day, or other day on which judicial business is not required to be transacted, is not to be excluded.

Robison v. Foster, 12 Iowa, 186; Conklin v. Marshalltown, 66 Iowa, 122, 23 N. W. 294; Ewalt v. Farlow, 62 Iowa, 212, 17 N. W. 487; German Sav. Bank v. Cady, 114 Iowa, 228, 86 N. W. 277.

Admissions made in ordinary or random conversations are not generally considered in law as satisfactory, and ordinarily such admissions are weak and unsatisfactory proof.

State v. Donovan, 61 Iowa, 278, 16 N. W. 130, 4 Am. Crim. Rep. 25.

De Graff, J., delivered the opinion of the court:

It is the claim of the plaintiff that during the month of July, 1919, he entered into an oral contract with the defendant, whereby it was agreed that if plaintiff found a purchaser for defendant's 240-acre farm in Union county, Iowa, defendant would pay him a commission of \$2 per acre and one half of any sum obtained over the price of \$150 per acre. Plaintiff sold the farm in question for \$160 per acre and was paid a commission of \$2 per acre.

Defendant denied that there was any other or different agreement than to pay plaintiff a commission of \$2 per acre, and refused to pay the bonus claimed by plaintiff.

There is no occasion to make a detailed statement of the facts of this case, as there is but one error relied upon for reversal, which involves the correctness of the ruling of the trial court in denying defendant's motion for a new trial. The motion for new trial was filed on the 20th day of September, 1920, and was supported by affidavits. The primary ground of this motion is newly discovered evidence.

It is undisputed that the conversations to which we will presently refer were not called to the attention of the defendant prior to the trial. The three affiants upon whose testimony defendant relies in support of his motion respectively state that the admissions of plaintiff contained in the affidavits were not previously called to the attention of the defendant, or to any other person. It may not be said that there was a lack of diligence on the part of defendant in discovering this evidence prior to the trial. A litigant may have opportunities to inquire, but there must be something which suggests to him the propriety of making such inquiry; otherwise he would be compelled to send a questionnaire to all persons within the area of probable knowledge who might have some information concerning the facts in dispute.

A party to a suit may not be accused of a lack of diligence when he possesses no means of knowing that the evidence subsequently discovered was previously obtainable. *State v. Lowell*, 123 Iowa, 427, 99 N. W. 125.

The right to a new trial on the ground of newly discovered evidence is statutory, and a ruling upon the motion involves legal discretion,

and, ordinarily, the ruling of the trial court will not be disturbed on appeal unless a reasonably clear case of abuse of discretion is presented. *Mullong v. Mullong*, 178 Iowa, 552, 159 N. W. 994.

Appeal—
discretion as to
new trial.

Code, § 3755, provides: "The former report, verdict, or decision, or some part or portion thereof, shall be vacated and a new trial granted, on the application of the party aggrieved, for the following causes affecting materially the substantial rights of such party: . . . (7) Newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial."

If it can be said that, in all probability, the newly discovered evidence will not affect the result in case of a second trial, then the motion should be denied. If the proffered evidence presents material facts germane to the issue in controversy, which, considered with the evidence presented on the trial, might cause a jury to take the other view, then the motion should be sustained. *Dobberstein v. Emmet County*, 176 Iowa, 96, 155 N. W. 815. True, this is speculative, but nevertheless the rule stated is a reasonably safe guide.

New trial—when
granted for
newly discovered
evidence.

Is the evidence offered in support of the instant motion merely cumulative, or of an impeaching character only? If it is within either class, then it is not within the purview of the statutory rule. *Des Moines v. Frisk*, 176 Iowa, 702, 158 N. W. 590.

—character of
evidence
necessary.

Turning, for a moment, to the affidavits filed, it is disclosed that one Walter Stevens had a conversation with the plaintiff during the autumn of 1919 concerning the sale of the farm in question; that in said conversation plaintiff told the affiant that he had sold the Edwards farm, and that Edwards had agreed

New trial—
newly discovered
evidence—lack of
diligence.

possesses no means
of knowing that the
evidence subsequently
discovered was previously
obtainable.

to pay him the sum of \$480 if the farm sold for \$160 per acre, and that he had been paid that sum; that, in substance, plaintiff said that the sum of \$480 was payment in full as compensation, and that the money would do him no good, for he had lost it in a crap game near Macksburg.

The affidavit of F. L. Blair discloses that the affiant had a conversation with the plaintiff about January 21, 1920, and that the plaintiff at said time stated that he had sold the Edwards farm and had made \$480 by obtaining a purchaser; that said sum was more money than he had ever made in his life in one day; that plaintiff led him to believe that \$480 was the total compensation for selling the farm, and that the deal was fully completed, and that plaintiff had received all the compensation to which he was entitled in said transaction.

The affidavit of C. E. Meyers discloses that he had a conversation with plaintiff about July 1, 1919, at Afton; that the plaintiff said that he had sold the 240-acre farm of Josh Edwards; that he had made \$480 on the deal; that he had collected the said sum; and that the plaintiff then produced a paper, saying that it was payment in full of the money he had made for selling said farm, and affiant was led to believe that the \$480 was his total compensation in the sale of said farm, and that said sum represented full settlement for making such sale.

No witness upon the trial testified that plaintiff had said or indicated that the commission paid in the sum of \$480 was in full settlement. It is difficult at times to note the line of demarcation between evidence that is purely cumulative and evidence which presents new facts for the consideration of the jury on the point in issue. The affidavits in question refer to other and different conversations than those testified to by any witness, and recite facts which were not established by the testimony offered up-

—what is cumulative evidence.

on the trial. It cannot be said, therefore, that the newly discovered evidence is merely cumulative. Means Bros. v. Yeager, 96 Iowa, 694, 65 N. W. 993; Bullard v. Bullard, 112 Iowa, 423, 84 N. W. 513; Murray v. Weber, 92 Iowa, 757, 60 N. W. 492; Feister v. Kent, 92 Iowa, 1, 60 N. W. 493.

Neither may it be said that the evidence offered in support of the motion for new trial tends simply to impeach the plaintiff. Incidentally it may impeach, but testimony offered by defendant in explanation or in contradiction of plaintiff's testimony generally possesses the flavor of impeachment. From a careful consideration of the newly discovered evidence tendered by the defendant, we are constrained to hold that the motion should have been sustained.

One further and vital objection is made by appellee that the motion for new trial was not filed within the period of time provided by order of court. It is insisted that the language of the order extending the time "until September 20th to file exceptions to verdict, motion in arrest of judgment, and for a new trial," excluded the date named in the order, and that the time for filing expired at the close of the day preceding that date.

The word "until" is an ambiguous term, and may be construed as either inclusive or exclusive of the day mentioned, according to the true intent and the subject-matter of the instrument in which the word is used. Proudman v. Mellor, 4 Hurlst. & N. 124, 157 Eng. Reprint, 782.

The word "until" may have an exclusive effect, as indicated and to be determined by the context, the intent of the parties, or the legislative intent expressed in the statute. Webster v. French, 12 Ill. 302; Richardson v. Ford, 14 Ill. 332; Alston v. Falconer, 42 Ark. 114; People ex rel. Woods v. Crissey, 91 N. Y. 616; Clarke v. New York, 111 N. Y. 621, 19 N. E. 436.

—impeaching testimony.

Time—computation—until specified day.

In *Carver v. Seevers*, 126 Iowa, 669, 102 N. W. 518, it is said: "When time is given until a day named, 'until' is ordinarily exclusive in its meaning, and will be so construed unless it be shown by the context or otherwise that the contrary was intended."

We cannot accept this pronouncement, and we overrule this decision in so far as this principle is concerned. Ordinarily, the word "until" is inclusive in its meaning, and will be so construed unless it be shown by the context or otherwise that the contrary is intended.

The cases are not in harmony. See *Corbin v. Ketcham*, 87 Ind. 138. Many of the decisions are ruled by the intent and the context, which explain the apparent variance. Under a Vermont statute a tender may be made at any time "until three days before the commencement of the term" to which the action is returnable. It is held that the intention is to exclude from the period in which the tender may be made the three days next preceding the commencement of the term, and the first day of the term, therefore, cannot be counted. *Willey v. Laraway*, 64 Vt. 566, 25 Atl. 435.

The record before us discloses that September 19th was Sunday. We must presume that the trial judge knew this, and that it was not intended that the motion for new trial should be filed by defendant on September 18th. Under the circumstances of this case we think the contemplation of the order providing a time "until" a certain date

within which to do the act includes the date named as the close of the period prescribed. In other words, the order does not have an exclusive effect.

The weight-of-authority rule clearly supports the doctrine that when an order of court gives a party litigant "until" a certain date to file a motion or pleading the order contemplates the inclusion of the day mentioned, unless the intent or context is reasonably clear to the contrary. See *Rogers v. Cherokee Iron & R. Co.* 70 Ga. 717; *Glynn County Academy v. Dart*, 67 Ga. 765; *Kerr v. Jeston*, 1 Dowl. N. S. 538; *Consolidated Kansas City Smelting & Ref. Co. v. Peterson*, 8 Kan. App. 316, 55 Pac. 673; *Delorme v. Ferk*, 24 Wis. 202; *St. Louis & S. F. R. Co. v. Gracy*, 126 Mo. 472, 28 S. W. 736, 29 S. W. 579; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Gottlieb v. Fred W. Wolf Co.* 75 Md. 126, 23 Atl. 198; *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878.

This appeal involves the right of appellant to have a reasonable opportunity to offer upon another trial evidence of plaintiff's admissions relative to the only issue in controversy, and to permit a jury to decide the cause in the light of the evidence discovered since the former trial. Justice requires that this opportunity should be granted on the showing made by appellant.

Wherefore this cause is reversed.

Evans, Ch. J., and Weaver and Preston, JJ., concur.

ANNOTATION.

Is "until" a word of inclusion or exclusion.

- I. Introductory, 1094.
- II. Time for performance of act connected with conduct of suit:
 - a. Cases holding word inclusive, 1095.
 - b. Cases holding word exclusive, 1097.

I. Introductory.

No general rule can be laid down to

- III. Effect of modifying language, 1098.
- IV. Illustrative cases:
 - a. Contracts, 1099.
 - b. Official acts, 1100.
 - c. Payment and tender, 1100.
 - d. Term of office, 1100.
 - e. Other rulings, 1101.

determine whether the word "until" is a word of inclusion or exclusion. A

strictly literal definition would doubtless make it one of exclusion, but popular use is quite as likely to give it an inclusive as an exclusive sense. The use of the word in particular instances may be such as to leave no doubt as to the meaning, and, in such cases, the court will give it the meaning intended. Thus, if a lease is given until the 1st of April, there could be no question that it would expire with March; while, on the other hand, if a lender told a borrower that he could have the money borrowed until the 15th of the month, few people would doubt that repayment on the 15th would comply with the agreement.

It is said in *State ex rel. Birdzell v. Jorgenson* (1913) 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450, that the word “until” may have an inclusive or exclusive meaning, according to the use to which it is applied, the nature of the transaction which it specifies, and the connection in which it is used; and it may be held to include the day to which it is prefixed. Such is the almost universal rule where the word is used with reference to a future day on which something is required to be done.

The reported case (*HENDERSON v. EDWARDS*, ante, 1090) lays down the general rule that, ordinarily, the word “until” is inclusive in its meaning, and will be so construed unless it is shown by the context, or otherwise, that the contrary is intended.

In *Bunce v. Reed* (1853) 16 Barb. (N. Y.) 352, the court, in considering the meaning of the word “between,” says it has been decided that “till” includes the day to which it is prefixed.

But in *Oberhaus v. State* (1911) 173 Ala. 483, 55 So. 898, it is said that “till” means the same as “until,” and, as marking the end of a period of time, it must be considered as *prima facie* exclusive of the terminus ad quem; although its construction will always yield to the contrary intent when shown in any legitimate way.

The words “to,” “till,” and “until” have the same meaning when used to designate a lapse of time, and the cases construing any one of them will,

therefore, be included in this annotation. Since, however, different considerations may be involved where there are words designating both the beginning and ending of the period, such as “from” and “until,” cases where both terms are used will not be included.

II. *Time for performance of act connected with conduct of suit.*

a. *Cases holding word inclusive.*

The cases which come nearest to presenting a pure question of law with respect to whether the word “until” is inclusive or exclusive are those in which, by stipulation or court order, a party to a suit is given until a specified day to file a pleading or brief, or present a bill of exceptions.

The decisions upon the question are divided, but the numerical weight of authority holds that the word is inclusive when used under such circumstances. This ruling seems to be in accord with the popular understanding, for if one is given until a certain day to file a pleading, the average man would assume that filing it on that day would suffice.

The following cases hold that it is sufficient if so filed:

Georgia.—*Glynn County Academy v. Dart* (1881) 67 Ga. 765; *Rogers v. Cherokee Iron & R. Co.* (1883) 70 Ga. 717; *Gainesville Grocery Co. v. Bank of Dahlonoga* (1920) 25 Ga. App. 230, 102 S. E. 912.

Kentucky.—*Meadows v. Campbell* (1866) 1 Bush, 104; *Louisville & N. R. Co. v. Turner* (1883) 81 Ky. 489; *Nance v. Newport News & M. Valley R. Co.* (1891) 13 Ky. L. Rep. 555, 17 S. W. 570; *Newport News & M. Valley R. Co. v. Thomas* (1895) 96 Ky. 613, 29 S. W. 437.

Maryland.—*Gottlieb v. Fred W. Wolf Co.* (1891) 75 Md. 126, 23 Atl. 198.

Missouri.—*State v. Mosley* (1893) 116 Mo. 547, 22 S. W. 804; *St. Louis & S. F. R. Co. v. Gracy* (1895) 126 Mo. 472, 28 S. W. 736, 29 S. W. 579; *State v. Flutcher* (1902) 166 Mo. 582, 66 S. W. 429; *Bloch Queensware Co. v. Smith, S. & Co.* (1904) 107 Mo. App. 13, 80 S. W. 592.

Montana.—*Penn Placer Min. Co. v.*

Schreiner (1894) 14 Mont. 121, 35 Pac. 878.

New York.—Thomas v. Douglass (1901) 2 Johns. Cas. 226; Sugerman v. Jacobs (1914) 160 App. Div. 411, 145 N. Y. Supp. 429.

Texas.—Harvey v. Provident Invest. Co. (1912) — Tex. Civ. App. —, 150 S. W. 284.

Washington.—State ex rel. Bickford v. Benson (1899) 21 Wash. 365, 58 Pac. 217.

Wyoming.—Conway v. Smith Mercantile Co. (1896) 6 Wyo. 327, 49 L.R.A. 201, 44 Pac. 940.

England.—Dakins v. Wagner (1835) 3 Dowl. P. C. 535.

Where one moving for a new trial is given "until" the next term to perfect his motion and brief of evidence, the term will be construed as allowing him during the next term, or until the case is called therein. Glynn County Academy v. Dart (Ga.) supra.

And that case was followed in Rogers v. Cherokee Iron & R. Co. (1883) 70 Ga. 717, where the rule was stated that when a movant for new trial is allowed until a certain day, time, or term to prepare and file the motion and approved brief of evidence, the word "until" includes such day, time, or term.

Where a garnishee has until the first day of a specified term of court in which to answer the garnishment proceedings, he may file his answer at any time within such first day. Gainsville Grocery Co. v. Bank of Dahlonega (Ga.) supra.

But when a movant for new trial is given "until" the hearing to prepare his brief of evidence, the time expires when the time set for hearing arrives. Davis v. State (1911) 8 Ga. App. 711, 70 S. E. 148.

Where one is given "until" the first day of the next term of court to file his bill of exceptions, he may file it on that day, but not later. Meadows v. Campbell (Ky.) supra.

Where one is given until the third day of the next term of court to file a bill of exceptions, the bill must be filed on or before that day. Louisville & N. R. Co. v. Turner (1883) 81 Ky. 489.

An order extending the time for filing a bill of exceptions "to" a date named, includes that date. Gottlieb v. Fred W. Wolf Co. (Md.) supra. The court says the words "to," "till," and "until" are construed as inclusive or exclusive, according to the intention, as shown by the subject-matter. It further says that the cases on which appellant relied were better reasoned and the conclusion reached more in harmony with justice and right, which always seek to promote intention rather than to defeat it by being too technical.

In State v. Mosley (1893) 116 Mo. 547, 22 S. W. 804, it seems to be assumed that an extension of time for filing a bill of exceptions "until" December 15 would permit it to be filed on that day.

A bill of exceptions is in time if filed on the day named. St. Louis & S. F. R. Co. v. Gracy (1894) 126 Mo. 472, 28 S. W. 736, 29 S. W. 579. The court says the word "until" may readily disclose an intent to include, not exclude, the day mentioned. When that intent is reasonably clear, effect should be given to it.

Where time for filing a bill of exceptions is extended to a specified term of court, it must be filed on the first day thereof. Bloch Queensware Co. v. Smith, S. & Co. (1904) 107 Mo. App. 13, 80 S. W. 592. The court says the word "to" has no one specific meaning in a legal sense, though it is generally a word of exclusion. This meaning is ascertained from reason and the sense in which it is used.

But extension of time to file a bill of exceptions "until" the following term is good no longer than the day of the beginning of the following term. Akins v. Humansville (1908) 133 Mo. App. 502, 113 S. W. 687.

When the time for filing a motion is extended "to" a named date, such date is included in the time allowed. Penn Placer Min. Co. v. Schreiner (Mont.) supra.

An order granting "until" the second day of the term to plead permits the filing of the pleading at any time on such second day. Thomas v.

Douglass (1801) 2 Johns. Cas. (N. Y.) 226.

A stipulation giving “until” a specified day in which to file an answer allows the answer to be filed at any time during the day named. *Sugerman v. Jacobs* (1914) 160 App. Div. 411, 145 N. Y. Supp. 429. The court says: “We think that the ordinary construction that will be put upon this language is that the party receiving it had the whole of that day within which to serve his pleading.”

Where an appellant was given “until” a specified day to file a statement of facts, and filed it on that day, the other party contended that it was too late; but the court said that while the word “until” is, perhaps, most frequently used in a restrictive sense, and excludes the day mentioned, such is not its necessary or only meaning. Whether it includes or excludes the day mentioned depends upon the intention with which it is used, which is to be inferred from the nature and circumstances of the case. “In this case, we think this word should be given a liberal construction rather than a restrictive one, which would defeat the appeal without reference to the merits.” *Harvey v. Provident Invest. Co.* (1912) — *Tex. Civ. App.* —, 150 S. W. 284.

Extending the time for filing a statement of facts on appeal to a specified day will be construed to include that day. The court says whether the words “to,” “till,” or “until” will be held to be words of inclusion or exclusion is usually determined by the context of the statute or instrument in which they are used, and will be held to include or exclude the day named as the evident intention requires. In an order of this kind the word includes the day. *State ex rel. Bickford v. Benson* (1899) 21 Wash. 365, 58 Pac. 217.

The word “until” may have an inclusive or exclusive meaning according to the use to which it is applied, the nature of the transaction which it specifies, and the connection in which it is used. Ordinarily, the word excludes the day to which it relates; but where time is given to file a bill

of exceptions “until” a specified date, which is the first day of the succeeding term of court, the court held that it seems not to do violence to the language to construe the order as including that day, which is the first and only day after the trial term when there is a court in session to which the bill may be presented; and the court concludes that the weight of authority is decidedly in favor of the position that the word “until,” used in a connection similar to the order under review, includes the last day named. *Conway v. Smith Mercantile Co.* (1896) 6 Wyo. 327, 49 L.R.A. 201, 44 Pac. 940.

In *Dakins v. Wagner* (1835) 3 Dowl. P. C. (Eng.) 535, the judge, who extended the time to plead until Tuesday, stated, in holding that the judgment was prematurely signed on that day, “I meant the word ‘until’ to include the Tuesday.”

b. Cases holding word exclusive.

The following cases have held that the word “until,” or a similar word, was exclusive when it was used in an order fixing the time for filing a pleading or other paper, or settling a bill of exceptions.

Alabama. — *Richardson v. State* (1905) 142 Ala. 12, 39 So. 12; *Heal v. State* (1906) 147 Ala. 686, 40 So. 571.

Illinois. — *Clark v. Ewing* (1877) 87 Ill. 344.

Indiana. — *De Haven v. De Haven* (1874) 46 Ind. 296; *Erb v. Moak* (1881) 78 Ind. 569; *Eshelman v. Snyder* (1882) 82 Ind. 498; *Corbin v. Ketcham* (1882) 87 Ind. 138; *Hartman v. Ringgenberg* (1888) 119 Ind. 72, 21 N. E. 464; *Myers v. Winona Interurban R. Co.* (1912) 50 Ind. App. 258, 98 N. E. 131.

Iowa. — *Carver v. Seevers* (1905) 126 Iowa, 669, 102 N. W. 518.

Kansas. — *Croco v. Hille* (1903) 66 Kan. 512, 72 Pac. 208; *State v. Dyck* (1904) 68 Kan. 558, 75 Pac. 488; *Maynes v. Gray* (1904) 69 Kan. 49, 105 Am. St. Rep. 146, 76 Pac. 443, 2 Ann. Cas. 518; *Garden City v. Merchants' & Farmers' Nat. Bank* (1899) 8 Kan. App. 785, 60 Pac. 823.

Granting permission to file a bill of

exceptions until a specified day excludes that day, so that the time for signing it expires with the previous day. *Richardson v. State* (1904) 142 Ala. 12, 39 So. 12.

Where the time to plead is extended "to" a specified day, the time extends only to the opening of court on that day, and if the plea is not then filed, default may be taken at once. *Clark v. Ewing* (Ill.) *supra*. The dissenting judge, in distinguishing the *Webster Case* (1850) 12 Ill. 302, *infra*, says it is one thing to say that certain things may continue to be done until a given day, and quite another to say that the time at which a given thing must be done is extended or postponed until a given day. Suppose the time for a public sale be extended or postponed until a specified day, does that mean that it must take place before that day?

Extension of time for filing a bill of exceptions "until" the next term of court does not include the term or any part of it. *DeHaven v. DeHaven* (Ind.) *supra*.

Giving one until the second day of a term of court to file a bill of exceptions does not permit the filing of it on that day. *Erb v. Moak* (1881) 78 Ind. 569. The court says that "on" the second day is not included in "until" such day.

Permission extended to file a brief "to" a specified date expires on the day preceding that named. *Myers v. Winona Interurban R. Co.* (Ind.) *supra*.

Under permission to file an amended petition "until" the first day of the next term, a petition filed on that day will not avail. *Carver v. Seevers* (Iowa) *supra*.

Attention is called, however, to the reported case of *HENDERSON v. EDWARDS*, cited *supra*, in which the general rule is stated that the word "until" is inclusive.

Under an order allowing "until" a specified date to serve a case made, it cannot be served on that date. *Croco v. Hille* (1903) 66 Kan. 512, 72 Pac. 208.

If one is given until a specified date to settle a bill of exceptions, it cannot

be settled on that date. *State v. Dyck* (1904) 68 Kan. 558, 75 Pac. 488. The court, however, says that this rule is subject to the exception that where it is the manifest intention of the parties to include the day, such intention will be given effect. So, if the order fixes a day certain on which the transaction is to be done, it may be done on that day. And the court says that if the time given was until Christmas, or until the next market day, the intention would clearly be to include the day named.

A case cannot be served on the day "to" which authority to serve it was extended. *Garden City v. Merchants & Farmers' Nat. Bank* (Kan.) *supra*. The court held that the word "to" had the same meaning as "till" or "until," which were words of exclusion.

Where a person is given "to" a specified date to serve a case made, the time expires at midnight on the date before that named. *Maynes v. Gray* (1904) 69 Kan. 49, 105 Am. St. Rep. 146, 76 Pac. 443, 2 Ann. Cas. 518.

There are two cases in Kansas, however, which have reached the opposite conclusion upon this question:

In *State v. Bradbury* (1903) 67 Kan. 808, 74 Pac. 231, the court held that extension of the time to file a bill of exceptions "to" a specified date authorizes the filing on that date. There was no discussion of the question in reaching this decision, and the case does not seem to have been noticed in subsequent cases decided in that state.

A similar ruling had been made in *Consolidated Kansas City Smelting & Ref. Co. v. Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673, where the court held that a case may be served on the day named in an order giving until that date to serve it. The court says there are cases holding to the contrary, but the weight of authority is in support of this conclusion.

III. Effect of modifying language.

The context may determine whether the word "until" shall have an inclusive or exclusive meaning, and when the meaning is made clear by the context, the court will give it its intended force.

The general rule that the word “until” is a word of exclusion must yield to the intention of the parties, apparent on the face of the whole instrument, as applied to the subject-matter, and an assignment on August 31, of all rents by tenants paying on the first of each month, which shall become due “until” October 1, will include those falling due on the 1st of October. *Kendall v. Kingsley* (1876) 120 Mass. 94.

Although the use of the word “until” implies an intention to exclude the day to which it refers, yet, where the statute provides for regular terms of court to begin on the first Monday of each calendar month, and to be deemed open until the third Monday of the same month, when all pending cases shall be continued, the third Monday will be included in the term. *Ryan v. State Bank* (1880) 10 Neb. 524, 7 N. W. 276. The court says the plain intent was to fix the third Monday as the time when the pending cases should be ascertained and continued, which must be done before the term ends.

Where one was given until the 6th of March to answer, and it was stipulated that plaintiff should have judgment unless a third person within the time mentioned, and on or before March 6, applied for leave to defend, the court held that if there was nothing to modify the language, the 6th of March would probably be excluded; but the subsequent provision for on or before such date indicated that the answer might be filed on that date. *Barker v. Keith* (1866) 11 Minn. 65, Gil. 37.

Under a statute permitting the receipt of bids until a specified day, at which time the bids should be opened and compared, bids cannot be received on the day mentioned. *Webster v. French* (1850) 12 Ill. 302. The court held that certainty as to the time for closing bids was necessary, and therefore, if the terms of the statute would fairly and reasonably admit of a construction which fixes a determined period, that construction should be adopted. The court says the term “until” may have

an inclusive or exclusive meaning, according to the use to which it is applied and the language of the transaction which it specifies, and the connection in which it is used.

IV. Illustrative cases.

a. Contracts.

One given until a specified day to accept a proposal for contract may accept on that day. *Houghwout v. Boisauvin* (1867) 18 N. J. Eq. 315.

Where property was leased, rendering rent at Michaelmas, and further leased to the executors of the lessee until Michaelmas after the death of the lessee, it was held that the word extended the term to the end of the feast; otherwise, no rent could be collected, because the term would end before Michaelmas. *Anonymous* (1588) 3 Leon. 211, 74 Eng. Reprint, 639.

In *Goode v. Webb* (1875) 52 Ala. 453, which involved construction of a lease renting “from” one date “to” another, the court, in considering the contention that the use of the word makes the lease reach only to the beginning of the day named, asks, “Why should it be held to mean ‘up to’ any more than ‘into’?”

A release of all obligations usque diem of the date of a writing does not include obligations executed on that day. *Newman v. Beaumont* (1592) Owen, 50, 74 Eng. Reprint, 892.

Where defendant pleaded to an action for trespass 24 March usque 26 August, that he had made satisfaction for all trespasses usque ad 24 April, and that he had committed none after 24 April, leaving out such 24th, North, Ch. J., thought the plea was good, but the other justices ruled that the word “usque” was exclusive, so that plaintiff was not required to prove a trespass on that day, since it was not denied, saying that a release of all demands “till” 26 April would not release a bond dated that day. *Nichols v. Ramsel* (1677) 2 Mod. 280, 86 Eng. Reprint, 1072.

Isaacs v. Royal Ins. Co. (1870) L. R. 5 Exch. (Eng.) 296, 39 L. J. Exch. N. S. 189, 22 L. T. N. S. 681, 18 Week. Rep. 982, involved insurance from a specified date to the 14th of August. The

loss occurred on the last-named date, and the defense was that the policy had expired. The court said that they were not concerned with the question whether or not the "from" date was excluded, but merely with whether or not the "until" date was included. And the court held that it was.

b. Official acts.

Upon extension of time to make an award "till" the first day of Hilary term, it may be made upon the day named. *Knox v. Simmonds* (1791) 3 Bro. Ch. 358, 29 Eng. Reprint, 582, 1 Ves. Jr. 369, 30 Eng. Reprint, 390.

And a similar ruling was made in *Kerr v. Jeston* (1842) 1 Dowl. N. S. (Eng.) 538.

Where an auditor gave notice that his report was ready and could be examined at his office "until March 25," the court held that the usual understanding of the word "until" includes the day named; and therefore, exceptions filed on the day named were in time, although he filed the report on that day before the exceptions were received. *Re Croft* (1884) 14 W. N. C. (Pa.) 437.

Requiring assessment books to be kept open until the 1st day of May excludes such day as a time for examination of the books. *Clarke v. New York* (1889) 111 N. Y. 621, 19 N. E. 436.

A statute requiring an assessment roll to be left at a specified place for inspection until the third Tuesday in August, and that on that day the assessors will meet to review their assessments, requires it to be left only during the preceding day, and the right to examine the roll terminates at that time. *People ex rel. Cornell S. B. Co. v. Hornbeck* (1900) 30 Misc. 212, 61 N. Y. Supp. 978.

In *People ex rel. New York & N. J. Teleph. Co. v. Neff* (1897) 15 App. Div. 12, 44 N. Y. Supp. 46, affirmed in (1898) 156 N. Y. 701, 51 N. E. 1093, it is assumed that when assessment rolls are required to be open until the 1st day of July, the intention is that they shall be closed on that day.

c. Payment and tender.

In *Stanley v. Pilker* (1918) 40 S. D. 403, 167 N. W. 393, it appeared that

one had until December 1 to make a payment, and tendered it on that day. The other party contended that it was too late; but the court held that, the preceding day being a holiday, the statute gave an additional day for performance, and therefore the necessity of passing upon the question whether or not the contract gave the right to pay on December 1 did not arise.

An agreement extending time of payment of a note until the summer or fall means until the 1st day of June or September. *Abel v. Alexander* (1874) 45 Ind. 528, 15 Am. Rep. 270.

In *Stearns v. Sweet* (1875) 78 Ill. 446, the court, in considering the effect of an indorsement on a note of payment of interest "to" a specified date, says, taking the word "to" in its plain, ordinary, popular sense, it is clear the interest was paid only until or before the date specified.

Under a statute permitting a tender at any time "until three days before the commencement of the term" to which the action is returnable, the intention is to exclude from the period in which the tender may be made the three days next preceding the day on which the term commences. *Wiley v. Laraway* (1892) 64 Vt. 566, 25 Atl. 435.

d. Term of office.

Where the office of a jury commissioner runs until a specified Monday, the term, in the absence of anything to control such construction, expires at midnight on the preceding Sunday. *Oberhaus v. State* (1911) 173 Ala. 483, 55 So. 898.

A statute providing that recess appointees to office shall hold office until the third Monday in a specified month in the next legislative session, "when," if such appointment is not confirmed, the office shall become vacant, entitles the appointee to the office during the whole of the day named. *State ex rel. Birdzell v. Jorgenson* (1913) 25 N. D. 539, 49 L.R.A. (N.S.) 67, 142 N. W. 450. The court says the use of the word "when" has an important bearing upon the meaning of the word "until." The court, in considering the argument that, if a man rent a house until a certain day,

when the lessor stated he would move into it himself, the term would expire on the preceding day, said, in such case, the terms of the agreement definitely limited and terminated the tenancy; while, under the statute, there was no termination of the office unless the legislature should fail to confirm the same.

In *Johnson v. State* (1904) 141 Ala. 7, 109 Am. St. Rep. 17, 37 So. 421, it was held that the use of the word “until” generally implies an intention to exclude the day to which it refers unless the contrary appears from the context, and therefore, where a term of court is by statute to extend until a specified Saturday, it ends with Friday.

In *Montgomery Traction Co. v. Knabe* (1909) 158 Ala. 458, 48 So. 501, however, the *Johnson Case* was expressly overruled, and it was held that when a term of court is to extend “until” a specified day, that day should be included.

e. Other rulings.

In *Rex v. Navestock* (1772) Burr. Sett. Cas. (Eng.) 719, which was a settlement case, it was held that a hiring from the day after Michaelmas day “till” the following Michaelmas day, was a hiring for a year, which would give a settlement. Lord Mansfield says that if this was not a hiring for a year, then no settlement could be gained by a servant in the country, because all servants were hired according to this custom.

In an indictment for violating a statute against the receipt of presents by certain officers, the allegation that they were officers until a specified date, on which date they received presents, the word “until” has an inclusive meaning. *Rex v. Stevens* (1804) 5 East, 244, 102 Eng. Reprint, 1063, 1 Smith, 437. The court, in the opinion, says that where exactness is wanted and ambiguity is to be avoided, some words are necessary to mark and define the precise meaning of the words “to” and “until;” and without them the reader may be often uncertain in which sense they are to be understood.

Where, in a pleading, it was alleged that one resided in the jurisdiction

from a certain time until October 27, and, on the latter date, a trial court was held, and he was amerced, it was held that the word “until” was exclusive, so that he was not shown to be an inhabitant within the jurisdiction of the court at the time the court was held. *Wicker v. Norris* (1735) Cas. t. Hardw. 116, 95 Eng. Reprint, 73.

Protection of a bankrupt's goods from process until the 29th of the month includes the whole of the day named. The order provided for a meeting of creditors at noon on the day named, and the court said that no doubt the court intended that the protection should extend until after the meeting. *Bellhouse v. Mellor* (1859) 4 Hurlst. & N. 120, 157 Eng. Reprint, 780.

And the same ruling was made in *Proudman v. Mellor* (1859) 4 Hurlst. & N. 124, 157 Eng. Reprint, 782.

A stay of execution until a specified day permits the execution to issue on that day. *Rogers v. Davis* (1845) 8 Ir. L. Rep. 399. One of the judges suggests that the question whether the word “until” is exclusive or inclusive depends upon which person is to do the act. In the case before the court, the execution was stayed until the specified date when it was to issue.

A corporation the charter of which is to continue in force until a specified date ends with the day preceding that named. *People v. Walker* (1858) 17 N. Y. 502. The court says the word “until” is very frequently employed in a sense excluding the day named, and that is its obvious meaning, though it must be conceded that a very slight matter in the context would be sufficient to give it a different and inclusive meaning. In that case the corporation was to continue in force until the 1st of January. The court says to give the word its exclusive meaning ends the corporation at the close of the legal and political year. All our habits and usages point to that as the natural meaning of the word in such a connection, and are opposed to a construction which would give the corporation just one day's existence in the new year.

H. P. F.

JOHN GILMAN
v.
CENTRAL VERMONT RAILWAY COMPANY.

Vermont Supreme Court — May 20, 1919.

(93 Vt. 340, 107 Atl. 122.)

Automobile — operation without register — negligent injury — action.

1. Violation of a statute forbidding the operation of unregistered automobiles on a public highway under penalty does not deprive one of a right of action for negligent injury to the machine by another person.

[See note on this question beginning on page 1108.]

Statute — adoption — subsequent construction — effect.

2. Construction of a statute by the courts of the state where it is enacted furnishes no guide to the intention of the legislature of another state in previously adopting the statute.

[See 25 R. C. L. 1075.]

Proximate cause — blocking highway crossing — condition of accident.

3. Blocking a highway crossing by a standing train longer than allowed by statute does not render the railroad company liable for injury to an automobile colliding with the train, if the violation of statute was a condition, and not a cause, of the accident.

Railroad — blocking highway crossing — negligence.

4. Persons in charge of a freight train standing on a highway crossing

at night are justified in believing that persons traveling in an automobile properly lighted and driven will be able to see the cars before the machine collides with them, and are therefore not negligent in failing to station a man with a lantern at the crossing, to warn travelers of the presence of the train.

— collision between automobile and train — slippery condition of highway.

5. A railroad company is not liable for injury to an automobile which collides with a train standing on the highway crossing in the night if the injury was caused by the freshly oiled condition of the road, which condition was unknown to the trainmen, and made it impossible to stop the automobile after the presence of the train was discovered.

EXCEPTIONS by defendant to rulings of the Orange County Court (Wilson, J.), made during the trial of an action brought to recover damages for the destruction of plaintiff's automobile, alleged to have been caused by defendant's negligence, which resulted in a denial of its motion for a directed verdict. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. W. Redmond and Charles F. Black, for defendant:

There was no evidence in the case tending to show any negligence of defendant.

Gage v. Boston & M. R. Co. 77 N. H. 289, L.R.A.1915A, 363, 90 Atl. 855; Farmer v. New York, N. H. & H. R. Co. 217 Mass. 158, 104 N. E. 492; Atlantic Coast Line R. Co. v. Kelly, 16 Ala. App. 360, 77 So. 972; Dudley v. Northampton Street R. Co. 23 L.R.A. (N.S.) 561, and note, 202 Mass. 443, 89 N. E. 25; Feeley v. Melrose, 205 Mass. 329, 27 L.R.A. (N.S.) 1156, 137 Am. St. Rep. 445, 91 N. E. 306; Bourne

v. Whitman, 209 Mass. 155, 35 L.R.A. (N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; Hemming v. New Haven, 18 Ann. Cas. 242, note; Wachsmith v. Baltimore & O. R. Co. Ann. Cas. 1913B, 684, note; Doherty v. Ayer, 197 Mass. 241, 14 L.R.A. (N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677; Chase v. New York C. & H. R. Co. 208 Mass. 137, 94 N. E. 377; Johnson v. Irasburgh, 47 Vt. 28, 19 Am. Rep. 111; Holcomb v. Danby, 51 Vt. 428; McClary v. Lowell, 44 Vt. 116, 8 Am. Rep. 366.

Plaintiff was guilty of contributory negligence.

Carter v. Central Vermont R. Co.

72 Vt. 193, 47 Atl. 797; *Manley v. Delaware & H. Canal Co.* 69 Vt. 101, 37 Atl. 279.

Mr. March M. Wilson for plaintiff.

Taylor, J., delivered the opinion of the court:

The accident out of which this action arose is unique in the annals of highway crossing accidents in this state. The action is for damage to plaintiff's automobile, occasioned by running into a freight train that was standing at a grade crossing on Church street, in the village of Bethel, on the line of defendant's railroad. The accident occurred about 2:45 A. M., August 30, 1917. Church street crosses the railroad nearly at right angles, the railroad at that point running substantially north and south. The highway approaching the railroad from the west descends quite a steep hill, with buildings and banks on either side. The road is straight, and the crossing visible to one approaching from the west for at least 250 feet. About 450 feet south of the crossing was a switch controlling a "passing track" that extended thence south. At the time in question defendant's freight train, which was south bound, had arrived at Bethel under orders that required it to take said passing track. It consisted of a locomotive and forty-three cars. The usual crossing signals were given, and, when the locomotive reached a point about a car length from said switch, it halted, and a brakeman went forward to the switch, threw it, and the train moved onto the sidetrack. There is a controversy as to the length of time the train occupied the crossing; the defendant's evidence tending to show that it halted only a matter of seconds while the switch was being thrown, and the plaintiff claiming that there were circumstances tending to show that it had been there more than five minutes.

Plaintiff was driving his car from Randolph to Bethel village. He stopped about five minutes at the head of Church street to leave a passenger, and then proceeded to the

crossing. The highway he had traversed for the most part of 2½ miles from Bethel towards Randolph was near and in plain sight of defendant's track, and the head and part of Church street were in sight thereof. His evidence tended to show that neither he nor the other occupants of the car saw or heard any train on the track that night after leaving Randolph until they reached the crossing, and that they had good opportunity both to see and hear. The night was rainy and misty, and the automobile top and wind shield were up. About 50 feet east of the track was a covered bridge over the river, which was lighted by electric lights. The bridge was undergoing repairs, and there were also lanterns on the end of the bridge towards the railroad that were visible to the plaintiff as he descended the hill towards the crossing. Plaintiff was well acquainted with the locality and the condition of the road. As plaintiff started down the hill, he threw out the clutch and applied the brakes, which worked properly, and slowed the speed of the car to 10 miles an hour or less. He looked and listened and saw and heard nothing. Part way down the hill he relaxed his brake somewhat to increase his speed a little, but kept his foot on the brake. When a short distance from the track, he discovered the train and put on the brakes, which held; but the car, with its wheels locked, slid forward into the train, owing to the steepness of the grade and the wet and slippery condition of the road. The damage to the car was occasioned by the train starting just as the car struck it. Plaintiff saw no light at the crossing or on the train, and first discovered the presence of the train when he reached a point where the cars obstructed the light from the bridge, a distance of 15 to 20 feet from the crossing. The road had been recently oiled and was greasy. Such was the tendency of the evidence, regarded in the light most favorable to the plaintiff.

The defendant relies only on its exception to the denial of its motion for a directed verdict. The several grounds of the motion assigned in the court below may be summarized as follows: (1) The evidence shows that the plaintiff was unlawfully traveling the highway at the time of the accident, and so was a trespasser, and that the defendant was not guilty of any shortage of duty owed to the plaintiff. (2) There is no evidence in the case tending to show any negligence on the part of the defendant. (3) On the evidence plaintiff was guilty of contributory negligence. In overruling the motion the court expressed grave doubt as to whether it should not be granted, but deemed it advisable to take that course, that the case might be finally determined in this court.

Concerning the first ground of the motion, it was conceded that the plaintiff bought the automobile in question a month or six weeks before the accident; that it had been registered by the former owner; but that the plaintiff had not had it registered in his name, as required by law. Gen. Laws, 4716, provides that an automobile or motor vehicle shall not be operated upon a public highway, or a private way laid out under authority of law, unless registered as provided in the preceding sections. By Gen. Laws, 4718, a person who violates a provision of the chapter of the statutes relating to the regulation of automobiles and motor vehicles, for which other penalty is not provided, is subjected to a fine of not more than \$100. It is provided elsewhere in this chapter that, upon the sale of an automobile, its registration shall expire, and that the purchaser shall take out new registration (Gen. Laws, 4677); and that the fee for reregistering the automobile shall be \$1, provided it is done within five days after the purchaser comes into possession of the automobile (Gen. Laws, 4674).

The defendant's claim is that the plaintiff was unlawfully traveling on the highway, had no right to be

there, as he was violating the law of the state; and therefore it was under no duty to take precaution for his safety while so using the highway approaching the crossing. The defendant relies upon an Alabama case and several Massachusetts cases that fully sustain its contention. It is there held, under statutes similar to ours prohibiting the operation of unregistered automobiles on the highways, that the violation of this prohibitive statute makes a plaintiff a trespasser, and not entitled to the privileges and protection which the law accords to a traveler on the highway. The unregistered automobile is regarded as "outside the pale of travelers" on the highway, and as having no rights there except to be protected from reckless or wilful injury.

This provision of our statute regulating automobiles is now for the first time brought in question here. The Massachusetts court had occasion to construe the statute in *Holden v. McGillicuddy*, 215 Mass. 563, 102 N. E. 923, which was an action for injury to plaintiff's automobile from a collision at Guilford, Vermont. In the absence of evidence of the "common law" of this state on the subject, the court applied the Massachusetts rule, and held that the plaintiff was a trespasser upon the highway, and that the defendant had violated no duty owed to him, though the jury had found, by special verdict, that the defendant was not in the exercise of ordinary care at the time of the accident.

The statute regulating automobiles and motor vehicles was enacted in 1904 (No. 86, Acts of 1904), and appears to have been taken bodily from the Massachusetts statute of the preceding year. The provision of the latter statute similar to the one now under consideration first came under consideration in 1908, in *Doherty v. Ayer*, 197 Mass. 241, 14 L.R.A. (N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677. The construction giv-

Statute—
adoption—
subsequent
construction—
effect.

en by the Massachusetts courts furnishes no guide to the legislative intention in this state, since their decisions were subsequent to the adoption of the statute here; but a brief review of the Massachusetts cases may prove helpful as showing where the rule adopted there leads to. It was said in *Doherty v. Ayer*, supra, that since the plaintiff was upon the road only as one riding in and operating an automobile, if it was unregistered and if he was unlicensed, he had no relation to the highway, and he was in no sense a traveler, except as a violator of the law in reference to the use that may be made of the way. It was further said, in regard to the right of recovery, that a violation of the statute in this particular so affected his relation to the town in regard to the way and the only use he was making of it, as to leave him without remedy for an injury caused by a defect therein. In *Dudley v. Northampton Street R. Co.* 202 Mass. 443, 23 L.R.A. (N.S.) 561, 89 N. E. 25, while recognizing the general principle that for an unlawful act to preclude recovery it must have directly contributed to the injury, the court held that the legislature intended to outlaw unregistered automobiles, and to give them, as to persons lawfully using the highways, no other right than that of being exempt from wanton or wilful injury; that the plaintiff was a mere trespasser, not only as to the owner of the soil, but also against the rights of all other persons who were lawfully using the highway; and that the defendant owed him no duty except to abstain from injuring him by wantonness or gross negligence. The court reached this conclusion because of the "peculiar provisions" of the statute, referring to the prohibition of the operation of an unregistered automobile upon the highway.

As the logical result of this conclusion, it was held in *Feeley v. Melrose*, 205 Mass. 329, 27 L.R.A. (N.S.) 1156, 127 Am. St. Rep. 445, 91 N. E. 306, that there could be no recovery for injuries to passengers

16 A.L.R.—70.

in an unregistered automobile, though the passengers did not know that it was not registered, as they were not travelers upon the highway, but trespassers. Following this decision, the legislature enacted that the fact that the automobile was not registered should not be a defense unless the plaintiff knew, or had reasonable cause to know, that the statute was being violated. *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507. In *Chase v. New York C. & H. R. R. Co.* 208 Mass. 137, 94 N. E. 377, the court calls attention to the distinction between unlawful conduct which is a cause of the injury and that which is a mere condition of it; but held that the operation of an unregistered automobile was unlawful in every aspect of it, that everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law, that the machine is at all times an outlaw, and that the conduct of the operator of such an automobile is permeated by disobedience of law, and so directly contributes to the injury. The operator of an unregistered automobile is held liable as a defendant for all direct injury resulting from its operation upon the highway, though such injury was not the result of an act of negligence. *Koonovsky v. Quелlette*, 226 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146. In *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A. (N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318, the court reaffirms its position as to an unregistered automobile, but holds that an unlicensed operator is not a trespasser and so precluded from recovery, unless the failure to have a license is shown to be a contributing cause of the injury sued for. These decisions place the operator of an unregistered automobile so far outside the protection of the law in Massachusetts that he is permitted to recover only when the defendant's conduct is in the nature of a wilful, intentional injury; or, in other words, when it amounts to a criminal or quasi criminal act.

Dean v. Boston Elev. R. Co. 217 Mass. 495, 105 N. E. 616.

Turning to the decisions of other states, we find a general dissent from the rule adopted in Massachusetts. They place violations of statutes requiring the registration of automobiles in the same category as other criminal statutes, and hold that they do not preclude a recovery unless there is a proximate, causal connection between the violation of the statute and the injury complained of. We have not gone to the trouble to compare their statutes with that of Massachusetts, as we regard any possible dissimilarity of little consequence in view of the construction we give to our own. We cannot conceive that the legislature intended to place the operator or occupant of an unregistered automobile outside the protection of the law when injured by the unlawful act of another, or to take away his civil rights merely because he is committing a misdemeanor, when his illegal act in no way contributes to the accident. To be sure, in form the statute prohibits the operation of an unregistered automobile upon a public highway; but its real purpose is to penalize the operation of such an automobile. The distinction between the status of a person operating an unregistered automobile and one operating an automobile without a license seems to us to be a distinction without any real difference. The statute requiring a license provides that a person shall not operate an automobile or motor vehicle upon a public highway unless licensed so to do, as provided by law. Gen. Laws, 4693. Both statutes are prohibitive in form and the same person is the actor in each case. How can it be said that he is a trespasser in one case and not in the other? We held in *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760, that the operation of an automobile without the required license was not negligence per se, nor evidence of negligence, when causal connection was not shown between the violation of the statute and the injury

sued for. There, the illegality of the defendant's act was considered a mere condition, and not a cause, of the plaintiff's injury. It would follow logically that an unlicensed operator of an automobile would not be precluded from recovering damages for an injury to himself or his property merely because he had no license. Such is the holding in Massachusetts (*Holland v. Boston*, 213 Mass. 560, 100 N. E. 1009), and we are not aware of any decision elsewhere to the contrary.

Construing the statute under consideration as we do, the fact that plaintiff's automobile was not registered, as the law required, would not make him a trespasser upon the highway nor affect his relation, at the time, to the defendant. We have no occasion to consider how it would be if the plaintiff were suing a town for damages due to a defect in the highway. Defendant relies upon *Johnson v. Irasburgh*, 47 Vt. 28, 19 Am. Rep. 111, and *Holcomb v. Danby*, 51 Vt. 428, where the effect of a statute then in force, forbidding certain travel upon the highway on Sunday, was considered. But those cases are not in point with the case at bar. They went upon the ground that towns were not bound to maintain their highways for an unlawful use. See *Hoadley v. International Paper Co.* 72 Vt. 79, 47 Atl. 169. It was of no consequence to the defendant that the plaintiff's automobile was not registered. Though his conduct was unlawful, it was a remote illegal act; or, in other words, merely a condition, and not a proximate cause, of the accident. The accident would have happened if the law in this respect had been fully observed.

Holding, as we do, that the defendant's duty to the plaintiff was that owed to a traveler upon the highway, we pass to the inquiry whether there was evidence for the jury on the question of defendant's negligence. Plaintiff's claim at the

Automobile—
operation with-
out register—
negligent injury
—action.

trial was that the defendant was negligent in failing to station a man with a lantern at the crossing to give warning that it was obstructed by the train. As to the controversy concerning the length of time that the crossing had been obstructed, it is enough to say that it is wholly immaterial whether the train had been standing there more than five minutes, or whether it had merely paused for a few seconds. Concededly it was moving, or on the point of moving, at the time the plaintiff ran into it. If the defendant had occupied the crossing more than five minutes, in violation of the statute (Gen. Laws, 5177), it was not, in the circumstances, evidence of negligence, for it was only a condition, and not the proximate cause, of the accident. Assuming that the train had occupied the crossing for an unlawful length of time, plaintiff was not injured thereby. Nor, in the circumstances, was the length of time material in any view of the matter.

In order to charge the defendant with negligence, it must be found from some substantial evidence that its servants, in the exercise of ordinary care, should have known that, on account of the darkness, the cars upon the crossing were such an obstruction that a person traveling upon the highway approaching the crossing from the west, at a reasonable rate of speed, in an automobile properly equipped with lights and carefully operated, would be liable to come in collision with the train. *Trask v. Boston & M. R. Co.* 219 Mass. 410, 106 N. E. 1022; *Gage v. Boston & M. R. Co.* 77 N. H. 289, L.R.A.1915A, 363, 90 Atl. 855. In order to sustain the court's ruling and charge the defendant with the negligence claimed it must be held that the jury would be justified in finding that men of ordinary prudence and foresight, in charge of the train at the time, would have anticipated that such an accident might happen in these circum-

stances. We think that reasonable men could come to only one conclusion. Defendant's servants would be amply justified in acting upon the belief that travelers in automobiles properly lighted, and traveling at reasonable speed, would observe the cars upon the crossing in time to avoid a collision. To borrow an illustration used in *Gage v. Boston & M. R. Co.* supra: "Suppose, instead of the place being the intersection of a highway and the railroad, it had been the crossing of two highways, and the plaintiffs had run into the side of a load of logs which were being transported over the crossing; the driver of the logging team would have the same duty to exercise care for the benefit of the plaintiffs that the trainmen had, and the care he would be bound to exercise would be commensurate with the apparent danger to travelers on the other highway, caused by his occupation of the crossing with a heavily loaded team. If the driver of the approaching automobile could see the obstruction in time to avoid colliding with it, reasonable men could not find that it was the duty of the driver of the team to have a lighted lantern on the side of his load toward the automobile, as a warning that the crossing was occupied."

If the circumstances attending the accident were as plaintiff claimed, it is apparent that the automobile was not stopped before it struck the train because of the greasy condition of the road. But the defendant was not responsible for this condition, and there was no evidence that the trainmen knew or ought to have known of its existence. Thus, an unusual condition, unknown to the defendant's servants, intervened that changed the plaintiff's situation from one of safety to that of danger. There was nothing in the

Railroad—
blocking high-
way crossing—
negligence.

Proximate
cause—blocking
highway cross-
ing—condition
of accident.

—collision
between auto-
mobile and train
—slippery
condition of
highway.

evidence to show that the trainmen did not manage the train with reasonable care and prudence in view of all the circumstances they knew or ought to have known. The accident happened through no fault of the defendant, and the court should have sustained its motion on the ground that there was no evidence for the jury tending to show actionable negligence. Any such duty as the plaintiff claims was, to say the least, conjectural and visionary; but a verdict based upon conjecture cannot stand. As

in other cases, something more than a mere scintilla of evidence is required to sustain the burden of proof in an action for negligence. *Gage v. Boston & M. R. Co. supra*; *Fadden v. McKinney*, 87 Vt. 316, 322, 89 Atl. 351.

It is unnecessary to consider the questions presented under the third ground of defendant's motion, as the exception is otherwise sustained.

Judgment reversed, and judgment for the defendant to recover its costs.

ANNOTATION.

Civil rights and liabilities as affected by failure to comply with regulations as to registration of automobile or licensing of operator.

- I. Right to recover against one other than municipality:
 - a. Unlicensed vehicles:
 1. General rule, 1108.
 2. Minority rule, 1111.
 - b. Unlicensed operator, 1113.
 - c. Express statutory provision as to civil liability, 1114.
- II. Right to recover against municipality, 1115.
- III. Liability for injury or damage by unlicensed car, or car driven by unlicensed person, 1117.

As to violation of statute or ordinance regulating movement of vehicle as affecting violator's right to recover for negligence, see annotation in 12 A.L.R. 458.

- I. *Right to recover against one other than municipality.*
 - a. *Unlicensed vehicles.*

1. General rule.

It is a well-established rule of law that one who does an unlawful act is not thereby placed outside the protection of the laws, but that, to have this effect, the unlawful act must have some causal connection with the injury complained of. In accord with this rule it is held by the great weight of authority and the better reasoned cases, that one who sustains injuries to his person or property by the negligence of another while using or riding in an unlicensed automobile is

not precluded from recovering by reason of the failure to comply with statutes in effect providing that motor vehicles shall be registered, and shall not be operated on the highway unless they are registered, where the failure to register in compliance with the statute had no causal connection with the injury.

Alabama.—*Birmingham R. Light & P. Co. v. Aetna Acci. & Liability Co.* (1913) 184 Ala. 601, 64 So. 44; *Stovall v. Cory Highlands Land Co.* (1914) 189 Ala. 576, 66 So. 577.

California. — *Shimoda v. Bundy* (1914) 24 Cal. App. 675, 142 Pac. 109.

Florida.—*Atlantic Coast Line R. Co. v. Weir* (1912) 63 Fla. 69, 41 L.R.A.(N.S.) 307, 58 So. 641, Ann. Cas. 1914A, 126; *Porter v. Jacksonville Electric Co.* (1912) 64 Fla. 409, 60 So. 188.

Georgia.—*Central of Georgia R. Co. v. Moore* (1919) 149 Ga. 581, 101 S. E. 668, answers to certified questions conformed to (1920) 24 Ga. App. 716, 102 S. E. 168; *Hines v. Wilson* (1920) 25 Ga. App. 63, 102 S. E. 646.

Indiana.—*Central Indiana R. Co. v. Wishard* (1914) — Ind. App. —, 104 N. E. 593.

Iowa.—*Lockridge v. Minneapolis & St. L. R. Co.* (1913) 161 Iowa, 74, 140 N. W. 834, Ann. Cas. 1916A, 158.

Kentucky.—*Moore v. Hart* (1916) 171 Ky. 725, 188 S. W. 861.

Maine.—Cobb v. Cumberland County Power & Light Co. (1918) 117 Me. 455, 104 Atl. 844.

Minnesota.—Armstead v. Lounsberry (1915) 129 Minn. 34, L.R.A. 1915D, 628, 151 N. W. 542, 9 N. C. C. A. 828.

Missouri.—Dixon v. Boeving (1919) — Mo. App. —, 208 S. W. 279.

New Jersey.—Shaw v. Thielbahr (1911) 82 N. J. L. 23, 81 Atl. 497.

Rhode Island.—Marquis v. Messier (1917) 39 R. I. 563, 99 Atl. 527.

Texas.—American Automobile Ins. Co. v. Struwe (1920) — Tex. Civ. App. —, 218 S. W. 534.

Vermont.—GILMAN v. CENTRAL VERMONT R. Co. (reported herewith) ante, 1102.

Virginia. — Southern R. Co. v. Vaughan (1916) 118 Va. 692, L.R.A. 1916E, 1222, 88 S. E. 305, Ann. Cas. 1918D, 842.

Washington.—Switzer v. Sherwood (1914) 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216.

Canada.—Halpin v. Grant Smith & Co. (1920) 15 Alberta L. R. 537, 53 D. L. R. 38; Godfrey v. Cooper (1919) 46 Ont. L. Rep. 565, 10 B. R. C. —; Martin v. Ralph (1921) 54 N. S. 277.

The court in Moore v. Hart (1916) 171 Ky. 725, 188 S. W. 861, said: "It is vigorously insisted that the plaintiff was operating a machine on the public highway when it was not registered, and had in his employ an unlicensed chauffeur, both of which were in open violation of the statutory law of this state, and that these violations made him a trespasser upon the highway, and himself and his machine, in the language of defendant's counsel, 'under the ban of the law' continuously while on the highway, and that these violations constituted negligence per se on his part, depriving him of any right of action for injury to himself or to his machine, and which violations constitute a complete defense to this suit. Strange as it may seem, we are furnished with authority for this cruel and almost savage doctrine. It seems that the courts of Massachusetts give to such violations the force and effect contended for by the defendant

in this case, and we are referred to the case of Chase v. New York C. & H. R. R. Co. (1911) 208 Mass. 137, 94 N. E. 377, as sustaining the doctrine contended for. In that case the plaintiff was riding in an unregistered automobile, which collided with a train of the defendant, producing the injuries sued for, and a recovery was denied because the machine was unregistered. The court, in disposing of the case, to the chagrin of the plaintiff and his counsel, says: 'Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way and entering upon the crossing the machine is an outlaw. The operator, in running it there, and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine. He is, within the words of the statute, in no better condition to recover than a person would be who was violating the law by walking on the track of a railroad, and was struck by an engine when he had reached the crossing of a highway.' The same doctrine seems to be adhered to by that court in the cases of Dudley v. Northampton Street R. Co. (1909) 202 Mass. 443, 23 L.R.A. (N.S.) 561, 89 N. E. 25, and Dean v. Boston Elev. R. Co. (1914) 217 Mass. 495, 105 N. E. 616, it being held in the last-named case, in substance, that all occupants of the unregistered machines were trespassers upon the highway, and were entitled to no consideration from other travelers except to be protected from reckless or wanton injury. We have been unable to find any other court going to this extent, although some of them hold that, under certain circumstances, and under the peculiar facts of the particular case, evidence of the machine being unregistered, or the chauffeur being unlicensed, may be

introduced as evidence under the plea of contributory negligence,—a question which we shall hereafter consider under the peculiar facts of this case. On the contrary, the courts of Minnesota, Alabama, Illinois, Pennsylvania, Florida, Kansas, Virginia, and perhaps others, do not give to such violations of the statute so broad, and what might be called destructive, effect as does the Massachusetts court. In *Berry on Automobiles*, 2d ed. § 195, the author, in discussing the point under consideration with reference to the failure of the chauffeur to have obtained a license, says: 'And the operating of an automobile without a license, when one is required by law, is evidence of negligent operation, but does not affect the rights of such person, nor of those riding with him, as travelers, nor bar their right of action or defense in personal-injury actions; such persons not being rendered thereby trespassers upon the highway.' The case of *Armstead v. Lounsberry*, L.R.A.1915D, 628, is a Minnesota case ((1915) 129 Minn. 34, 151 N. W. 542, 9 N. C. C. A. 828) and is one growing out of a collision between two automobiles going in opposite directions, which, in this particular, makes it unlike the one we have here, but this fact can have no bearing upon the question now under consideration, which is whether a failure to comply with the law shall constitute a bar to the action. The plaintiff in that case had failed to register his machine, as required by the laws of Minnesota, and the defendant contended that he thereby became a trespasser upon the street, and was entitled to no duty from the defendant, except the latter should avoid wilfully or wantonly injuring him. It was also shown that in that case the city of Duluth, where the accident occurred, had passed an ordinance requiring all operators of machines to be licensed, and that the plaintiff had not, at the time of the accident, complied with this law. Neither of these violations was permitted to defeat the action, and the court, in the course of the opinion, so forcefully states the rea-

sons that should govern the courts in denying the comprehensive effect of such violations as was insisted upon that we feel authorized to take therefrom the following: 'The right of a person to maintain an action for a wrong committed upon him is not taken away because he was, at the time of the injury, disobeying a statute law which in no way contributed to his injury. He is not placed outside all protection of the law, nor does he forfeit all his civil rights, merely because he is committing a statutory misdemeanor. The wrong on the part of the plaintiff which will preclude a recovery for an injury sustained by him must be some act or conduct having the relation to that injury of a cause to the effect produced by it. *Sutton v. Wauwatosa* (1871) 29 Wis. 21, 9 Am. Rep. 534; *Philadelphia, W. & B. R. Co. v. Philadelphia Steam Towboat Co.* 23 How. (U. S.) 209, 16 L. ed. 433. Plaintiff's violation of the law, in order to affect his case, must, like any other act, "be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action." 1 *Shearm. & Redf. Neg.* 94. A collateral unlawful act not contributing to the injury will not bar a recovery. *Hughes v. Atlanta Steel Co.* (1911) 136 Ga. 511, 36 L.R.A. (N.S.) 547, 71 S. E. 728, Ann. Cas. 1912C, 394, 1 N. C. C. A. 429. Plaintiff's violation of the law in this case is of this collateral character. There was no relation of cause and effect between the unlawful act and the collision. The registration of plaintiff's automobile was of no consequence to defendant. The law providing for such registration was not for the prevention of collisions, and had no tendency to prevent collisions. There is no pretense that the registration of plaintiff's automobile would have had any tendency to prevent this collision. Plaintiff's failure to obey the law in no way contributed to his injury, and could not bar his right of recovery. This rule is sustained by the great weight of authority.' . . . The court then proceeds to a consideration of the rule as announced in *Mas-*

sachusetts, and concludes by saying: 'It appears to us the weight of argument, as well as the weight of authority, is against the rule of the Massachusetts cases, and in accordance with the rule we have above laid down.' Without encumbering this opinion, it is sufficient to say that the opinions of the courts to which we have referred are in accord with the Minnesota court upon this subject, and were we content to rest our opinion alone upon the greater weight of authority, we would be compelled to disregard the rule as laid down in Massachusetts, and to adopt that prevailing in the other states. But, aside from the weight of authority, we would be unable to agree with the rule as announced in Massachusetts, as it evidently sounds a discordant note to our conceptions of the very basic principles of the law, which, we learn from the earliest writers, are founded on reason and right. For the purposes of this case we do not have to decide whether the statute, requiring the licensing of a chauffeur in this state, or the registering of machines, is one of revenue only, or one looking to the qualifications of the chauffeur and safety of the traveling public upon the highway, because if it should be regarded as partaking of both, or the latter alone, a violation of it does not render the violator an outlaw, nor deprive him of all consideration dictated by the plainest principles of humanity; nor can the fact that the statute has not been complied with in these respects affect his cause of action, unless such violation has some causal connection with the producing of the injury. In other words, the violations must be the proximate cause of the injury. It is not only so stated in the Minnesota case from which we have quoted, but is recognized everywhere, and by an unbroken line of decisions by this court, the last case being that of *Louisville & N. R. Co. v. Hulette* (1916) 171 Ky. 500, 188 S. W. 653. We therefore conclude that there was no error committed in denying to this defensive plea the effect contended for."

And it will be observed that the

court in the reported case (*GILMAN v. CENTRAL VERMONT R. Co.* ante, 1102), although recognizing that their statute was copied from that of Massachusetts, refused to place the construction on it that the courts of that state had done, or to hold the operator of an unregistered automobile a trespasser on the highway, and not entitled to recover, or deprive the violator of a right of action for a negligent injury to the machine by another. The court here directly rejected the construction put upon the Vermont statute by the Massachusetts court in *Holden v. McGillicuddy* (1913) 215 Mass. 563, 102 N. E. 923, set out *infra*, I. a, 2.

And in *Derr v. Chicago, M. & St. P. R. Co.* (1916) 163 Wis. 234, 157 N. W. 753, the fact that the plaintiff, when an injury occurred, was driving his automobile under the previous year's registration, and had failed to register it for the year in which the injury happened, as required by a statute providing that no automobile should be operated or driven on any highway unless it had been registered, was held not to bar a recovery, where it had no causal connection with the accident.

And in *Halpin v. Grant Smith & Co.* (1920) 15 Alberta L. R. 537, 53 D. L. R. 381, it was held that one who had recently purchased an automobile and was operating it in violation of a section of the Motor Vehicle Act, providing for a penalty for the use of number plates by any person other than the owner to whom they had been issued, was not a trespasser on the highway, and was not, by reason of the violation of such act, precluded from recovering for damage resulting from the negligence of one constructing an irrigation ditch across the highway.

2. *Minority rule.*

A rule in conflict with the general rule before stated originated in Massachusetts, where a statute providing that automobiles should be registered, and that, "except as otherwise provided, . . . no automobile or motor-cycle shall . . . be operated upon any public highway unless registered

as above provided," has been held to render unlicensed automobiles 'out-laws on the highway, so that their occupants are entitled to no other right than that of being exempt from reckless, wanton, or wilful injury. *Dudley v. Northampton Street R. Co.* (1909) 202 Mass. 443, 23 L.R.A.(N.S.) 561, 89 N. E. 25; *Chase v. New York C. & H. R. R. Co.* (1911) 208 Mass. 137, 94 N. E. 377; *Love v. Worcester Consol. Street R. Co.* (1912) 213 Mass. 137, 99 N. E. 960; *Crompton v. Williams* (1913) 216 Mass. 184, 103 N. E. 298; *Dean v. Boston Elev. R. Co.* (1914) 217 Mass. 495, 105 N. E. 616; *Conroy v. Mather* (1914) 217 Mass. 91, 52 L.R.A.(N.S.) 801, 104 N. E. 487; *Downey v. Bay State Street R. Co.* (1916) 225 Mass. 281, 114 N. E. 207; *Wentzell v. Boston Elev. R. Co.* (1918) 230 Mass. 275, 119 N. E. 652.

And in *Dean v. Boston Elev. R. Co.* (1914) 217 Mass. 495, 105 N. E. 616, where recovery was sought against a railway company for injuries sustained by reason of a collision between a street car and an unregistered automobile, it was held that all occupants of the car were trespassers upon the highway, and had no rights against other travelers, except to be protected from reckless or wanton injury, and the evidence in the case, which, among other things, showed the failure of the motorman to see the automobile, and bring his car to a stop before the collision occurred, was held not to show such wanton and wilful conduct on the part of the defendant as to render it liable.

And in *Chase v. New York C. & H. R. R. Co.* (1911) 208 Mass. 137, 94 N. E. 377, it was held that persons riding in an unlicensed automobile were precluded from recovering for injuries sustained by a collision with a locomotive engine at a railroad crossing, and could not avail themselves of the provisions of the statute requiring a bell to be rung or a whistle sounded for the protection of travelers at railroad crossings, since persons riding in an unlicensed automobile had not the rights of travelers.

And in *United Transp. Co. v. Hass* (1915) 91 Misc. 311, 155 N. Y. Supp.

110, affirmed in (1915) 171 App. Div. 971, 155 N. Y. Supp. 1145, which affirmed (1918) 222 N. Y. 623, 118 N. E. 1080, where the injury for which recovery was sought happened to the plaintiff's automobile in Massachusetts, and was governed by the law of that state, the court held, after reviewing the Massachusetts cases, that, under the law of that state, an unregistered automobile has no rights against other travelers except to be protected from reckless or wanton injury, and the question whether the defendant's conduct was reckless and wanton was held to be for the jury, and a finding for the plaintiff was sustained, where there was evidence that his automobile, while ascending a hill, was run into by defendant's high-powered car, which came over and down a hill at 50 or 60 miles an hour, although the operator knew that the emergency brake on the car was broken and could not be used.

And in *Holden v. McGillicuddy* (1913) 215 Mass. 563, 102 N. E. 923, where recovery was sought for damages to the plaintiff's unregistered automobile, sustained in a collision which occurred in Vermont, and the only provision of the Vermont statute which appeared was that "no automobile or motor vehicle shall be operated upon a public highway unless so registered," the court stated that the statute lacked some of the language employed in the Massachusetts act, but held, applying the general rules of the common law, that the Vermont act, like that of Massachusetts, was not only enacted as a police regulation, but also for the protection of travelers on the highway, and that no recovery for damage resulting from the collision could be had in the absence of evidence that the defendant acted recklessly or wantonly.

And following the Massachusetts cases, it has been held in Pennsylvania, under an act similar to that of Massachusetts, that one holding no license to operate an automobile, who was driving an unregistered car, could not recover for an injury sustained through a collision with a trolley car, where there was no evidence of inten-

tional injury on the part of the defendant's servant. *Bortner v. York R. Co.* (1913) 22 Pa. Dist. R. 84.

And in *Contant v. Pigott* (1913) 15 D. L. R. (Manitoba) 358, it was held that no recovery could be had for an injury by one driving an automobile not licensed under the Motor Vehicles Law of Manitoba, the provisions of which do not appear, where the injury was not shown to have been wilful or malicious.

And in *Knight v. Savannah Electric Co.* (1917) 20 Ga. App. 314, 93 S. E. 17, where a statute provided that it shall be "unlawful for any person to run, drive or operate any automobile . . . propelled by steam, gas, gasoline, electricity or any power other than muscular power . . . upon or along any public road, . . . except and until such person shall comply with the provisions of this act," and one of the provisions required every person owning an automobile to register it, and pay a registration fee, it was held that the intent of the statute was to outlaw unlicensed machines and to give them, as to persons lawfully using the highway, no other right than that of exemption from reckless, wanton, or wilful injury; and accordingly, that one who was driving an unlicensed motorcycle could not recover against a railway for an injury sustained, although the collision between the motorcycle and the car was due to the defendant's negligence, there being no evidence of wilfulness or wantonness. Attention is called to the fact, however, that this case was overruled in *Central of Georgia R. Co. v. Moore* (1919) 149 Ga. 581, 101 S. E. 668, cited under the general rule *supra*, I. a, 1.

It has been held that the burden of proving that the plaintiff's automobile was unregistered at the time of a collision with the defendant's car is upon the latter, and that it should be ruled as a matter of law that the plaintiff's automobile was unregistered at the time of the collision, where there was testimony that the plaintiff was the owner of an automobile which was identified by the manufacturer's number, and that it

was the only car he owned or had registered at the time the accident occurred, or the year before, and that he was unable to find his registration certificate, and the records of the highway commission covering the time in question were produced, and showed that the machine in question was registered the year preceding the accident, but did not show an application by the plaintiff for registration the year of the accident, and the accuracy of these records was not attacked. *Dean v. Boston Elev. R. Co.* (1914) 217 Mass. 495, 105 N. E. 616.

b. Unlicensed operator.

In accord with the general principle, stated at the beginning, the courts are agreed that the fact that the operator of the automobile had no license, as required by statute, will not bar a recovery for an injury, where this fact had no causal connection with the injury.

Florida. — *Porter v. Jacksonville Electric Co.* (1912) 64 Fla. 409, 60 So. 188.

Illinois. — *Crossen v. Chicago & J. Electric R. Co.* (1910) 158 Ill. App. 42; *Moyer v. Walden W. Shaw Livery Co.* (1917) 205 Ill. App. 273.

Kentucky. — *Moore v. Hart* (1916) 171 Ky. 725, 188 S. W. 861.

Missouri. — *Dixon v. Boeving* (1919) — Mo. App. —, 208 S. W. 279; *Stack v. General Baking Co.* (1920) 283 Mo. 396, 223 S. W. 89.

North Carolina. — *Zageir v. Southern Exp. Co.* (1916) 171 N. C. 692, 89 S. E. 43.

Pennsylvania. — *Yeager v. Winton Motor Carriage Co.* (1913) 53 Pa. Super. Ct. 202; *Hadeed v. Neuweiler* (1915) 44 Pa. Co. Ct. 53; *McIlhenny v. Baker* (1916) 63 Pa. Super. Ct. 385.

Canada. — *Godfrey v. Cooper* (1919) 46 Ont. L. R. 565, 10 B. R. C. —.

Thus, the fact that the plaintiff was driving her automobile without having stood the examination or obtained the license required by the ordinances of a city will not prevent a recovery for an injury sustained through the negligence of the defendant in running into her car unless such violation of the statute was the proximate cause

of the injury, and not merely a collateral unlawful act, not contributing thereto. *Zageir v. Southern Exp. Co.* (N. C.) *supra*.

And the Massachusetts court has only construed the statutes of that state broadly enough to exclude a recovery because of a failure to comply with the regulations as to licenses and registration in cases where there was a nonregistration of the motor vehicle, it being held, even by that court, that the fact that one injured while in an automobile on a highway was driving the car without an operator's license, or had employed an unlicensed person to operate the car, contrary to the provisions of the statute, will not, of itself, prevent one who negligently caused the injury from being held liable, although it is evidence of negligence on the part of the plaintiff. *Holland v. Boston* (1913) 213 Mass. 560, 100 N. E. 1009; *Holden v. McGillicuddy* (1918) 215 Mass. 563, 102 N. E. 923; *Conroy v. Mather* (1914) 217 Mass. 91, 52 L.R.A. (N.S.) 801, 104 N. E. 487; *Pigeon v. Massachusetts Northeastern Street R. Co.* (1918) 230 Mass. 392, 119 N. E. 762; *Griffin v. Hustis* (1919) 234 Mass. 95, 125 N. E. 387.

(As bearing upon the reason for the distinction between the failure to register the car and the failure to obtain an operator's license, see the quotation from *Bourne v. Whitman* (1911) 209 Mass. 155, 35 L.R.A. (N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318, *infra*, III.)

In *Wolcott v. Renault Selling Branch* (1916) 175 App. Div. 858, 162 N. Y. Supp. 496, reversed on other grounds in (1918) 223 N. Y. 288, 119 N. E. 556, where the statute provided that unlicensed chauffeurs should not drive motor vehicles, and that no person should operate such a vehicle as a chauffeur upon a public highway unless such person should have complied in all respects with the requirements of the Motor Vehicle Act, the court was of the opinion that these provisions did not apply to the driver of an automobile which was being towed, but held that, even if the statute was applicable, there was no evi-

dence whatever that the lack of the chauffeur's license had any bearing upon the accident causing the death of the plaintiff's husband.

c. Express statutory provision as to civil liability.

The Connecticut statute expressly denies a right of recovery for personal injuries sustained while riding in an unregistered motor vehicle.

Thus, in *Stroud v. Water Comrs.* (1916) 90 Conn. 412, 97 Atl. 336, where the statute provided that "no recovery shall be had in the courts of this state by the owner or operator or any passenger of a motor vehicle which has not been legally registered in accordance with § 2 or 3 of this act, for any injury to person or property received by reason of the operation of said motor vehicle in or upon the public highways of this state," it was held that one who had falsely registered his automobile under a name other than his own could not recover for an injury to his car, which was negligently run into while standing in front of a hotel. The plaintiff here contended that the provisions as to registration were primarily for revenue, and that false statements as to the identity of the owner were not material; but the court held that one important object of registration was to identify the owners, and that the false statement was material. And it was held that the injury complained of was "received by reason of the operation" of the automobile, within the meaning of the statute, the word "operation" being held to include such stops as motor vehicles ordinarily make, and the words, "received by reason of the operation," not referring merely to injuries proximately caused by such operation.

And in *Hughes v. New Haven Taxicab Co.* (1913) 87 Conn. 416, 87 Atl. 721, the court stated that, under the statute involved in the *Stroud* Case, *supra*, no recovery could be had for an injury to an occupant of the car, or for damages thereto, if they were sustained while the car was being operated by an unlicensed person, unaccompanied by a licensed chauff-

feur; but in that case, where the unlicensed person was driving, and the licensed operator was on the back seat of the automobile, it was held that it could not be said, as a matter of law, that the unlicensed driver was not "accompanied by" a licensed operator.

And in *Brown v. New Haven Taxicab Co.* (1917) 92 Conn. 252, 102 Atl. 573, it was held that the word "owner," as used in the Connecticut statute, included one having an interest in property under a special title; and there being evidence that the legal title to the car driven by the plaintiff was in an automobile company which had given a conditional bill of sale to the person who loaned the plaintiff money to pay for the car, it was held that the evidence of ownership by the plaintiff, in whose name the car was registered, was sufficient to entitle him to go to the jury in an action to recover for damage to the car and personal injuries.

In *Kiely v. Ragali* (1919) 93 Conn. 454, 106 Atl. 502, where a judgment for plaintiff was sustained, the decision was upon the ground that the requirements as to registration and license had been substantially complied with.

The somewhat radical construction adopted by the Massachusetts court has been tempered by a statute as to persons other than the owner of an unregistered machine who did not know, or have reasonable cause to know, that there was a violation of the statute.

Thus, in *Wentzell v. Boston Elev. R. Co.* (1918) 230 Mass. 275, 119 N. E. 652, it appears that the Massachusetts statute was changed by Statute 1915, chap. 87, which provided that a violation of the statute for the registration of automobiles "shall not constitute a defense to actions of tort for injuries suffered by a person or for the death of a person, or for injury to property, unless it is shown that the person injured in his person or property or killed was the owner or operator of the motor vehicle the operation of which was in violation of said provisions, or unless it is shown

that the person so injured or killed, or the owner of the property so injured, knew or had reasonable cause to know that said provisions were being violated." This statute was held inoperative in that case, however, since the injuries were sustained before its passage, and the Massachusetts rule was applied, holding the occupants of an unregistered automobile trespassers on the highway, and not entitled to recover for an injury, in the absence of wanton and wilful misconduct on the defendant's part.

But the amended Massachusetts statute was applied in *Rolli v. Converse* (1917) 227 Mass. 162, 116 N. E. 507, where it was held that one who was injured while riding in an unlicensed motor truck was not thereby precluded from recovery for his injury, where it appeared that he was an employee of the owner, and there was no evidence that he knew or had reasonable cause to know that the truck was not legally registered. It was held, however, that there could be no recovery for damage to the truck, or for an injury to a member of the partnership owning it, where such member and the other partners knew that the truck was not properly registered.

II. *Right to recover against municipality.*

It is held in some cases that the failure of the plaintiff to have his automobile registered, as required by statute, or to obtain a license to operate it, will not preclude a recovery for damage to the car, or for an injury caused by a defect or an obstruction in the street, where such failure had no causal connection with the injury. *Hemming v. New Haven* (1910) 82 Conn. 661, 25 L.R.A. (N.S.) 734, 74 Atl. 892, 18 Ann. Cas. 240; *Phipps v. Perry* (1916) 178 Iowa, 173, 159 N. W. 653; *Wolford v. Grinnell* (1917) 179 Iowa, 689, 161 N. W. 686; *Hersman v. Roane County Ct.* (1920) 86 W. Va. 96, 102 S. E. 810.

But in *McCarthy v. Leeds* (1916) 115 Me. 134, L.R.A. 1916E, 1212, 98 Atl. 72, where a statute provided that all motor vehicles should be regis-

tered by the owner or person in control thereof, and that no motor vehicle should be operated by a resident of the state upon any highway, town way, etc., unless registered, as required by the act, and imposed a penalty for a violation of the statute, it was held that the owner of an automobile which was registered under the number of the dealer from whom the owner had shortly before purchased it could not recover for injuries to himself and property, sustained by reason of defects in a bridge over which he was passing, it being held that the owner was prohibited by the statute from using the unregistered machine on the highway, and that the defendant town owed him no duty to keep the way safe for his travel, but that his rights were only those of a trespasser upon the land of another.

And in another action growing out of the same accident that caused the injury in the preceding case, it was held that a town was not liable for the death, because of a defective bridge, of a child who was riding in an unregistered automobile, where the statutes required highways to be kept safe for travelers, and forbade the use of any motor vehicle on the highway unless it was registered, the court holding that a person in an unlicensed automobile is not a traveler within the meaning of the statute. (1917) 116 Me. 275, L.R.A.1918D, 671, 101 Atl. 448, 16 N. C. C. A. 671. The court here expressly called attention to the fact that the action was not one at common law, but was a statutory one against a municipality, based on a statute providing that highways should be kept in repair so as to be safe and convenient for "travelers." In a dissenting opinion, Madigan, J., said: "That those innocent of an intentional wrong should be held trespassers on the highways established for the benefit of the public does not seem reasonable. A machine may be operated contrary to the provisions of the statute, but why must all passengers therein be classed as outlaws? Few violations of statutory prohibitions entail such drastic punishment. A sleigh without bells, a carriage without lights, a wagon with narrow

tires, if forbidden, should be in the same class; but must we hold all in such vehicles trespassers, and therefore without protection from defective highways or the negligence of other travelers? If certain appliances were required by law on trolley cars, would we hold all passengers in an offending trolley as trespassers? Massachusetts, which is one of the few states holding as Maine does, applies a different rule to the unlicensed chauffeur than to the unregistered car. Can we say a machine in perfect condition, unregistered, but driven by a licensed driver, is more dangerous than a registered car, driven by a man whose license has been revoked for reckless driving? Under the rule adopted in the majority opinion, at our peril we accept a ride with a friend, or enter a public bus. The women and children in the sight-seeing cars in the cities, and public cars running from town to town, may be without remedy in case of injury. License plates are no indication of compliance with the law. They frequently are changed from car to car. Only by making sure that the maker's number agrees with that on the state license is there reasonable assurance of safety. If by change of ownership the license has lost its efficacy within an hour, the car and its occupants are beyond the pale of the law. The cruelty of our interpretation is brought home to us in the case of these innocent children. If the accident, instead of proving fatal, had rendered them cripples for life, they would have been without redress for the criminal negligence of some town official. We say the law says, 'Thou shalt not,' and therefore travelers are trespassers, though the failure to pay a state license has not the slightest connection with the accident. Is it a necessary sequence, or is it thus because we say it is? Why might not the penalty here, as in other instances of violation of law, stop with fine or imprisonment? Conditions in our state and highways are no different than in states taking the contrary view, and, as it seems to me, fairer and juster rule."

It will be noted that the Maine court

is in accord with the general rule in holding that the nonregistration of an automobile will not preclude a recovery by the driver or consenting owner, against one other than a municipality, whose negligence caused damage to the car or injury to the occupant, where the failure to register had no causal connection with the accident. See *Cobb v. Cumberland County Power & Light Co.* (1918) 117 Me. 455, 104 Atl. 844, cited *supra*, I. a, 1.

In *Doherty v. Ayer* (1908) 197 Mass. 241, 14 L.R.A. (N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677, which was an action by one operating an automobile to recover for injuries sustained by defects in a highway, it was held that a *prima facie* case was made without showing that the plaintiff was licensed to operate an automobile upon the public highway, or that his automobile was registered according to the Massachusetts statute, although the court said that if it appeared affirmatively that the plaintiff was traveling without a proper registration of the vehicle, or without a license to operate it, it might well be that he was not a traveler on the highway in a legal sense, and that the town owed him no duty under a statute requiring it to keep its highways in repair, and that a violation of the license statute so affected the direct relation of the violator to the town in regard to the way and the only use that he was making of it, as to leave him without remedy for an injury caused by a defect therein.

The intimation in the *Doherty* Case that the lack of an operator's license might preclude recovery against the municipality is contradictory to the subsequent holding in *Holland v. Boston* (1913) 213 Mass. 560, 100 N. E. 1009, to the effect that the fact that the plaintiff did not have an operator's license was not fatal to his right to recover against the municipality on account of a defect in the street, viz., a rope stretched across the same.

But in the *Holland* Case the court said that if the car was not registered or to be regarded as registered, as required by the statute, then the plaintiff's conduct in running it upon the highway and against the rope was

the act of a mere trespasser, only entitled to be protected against reckless, wanton, or wilful injury.

And in *Feeley v. Melrose* (1910) 205 Mass. 329, 27 L.R.A. (N.S.) 1156, 137 Am. St. Rep. 445, 91 N. E. 306, it was held that there could be no recovery against a municipality either for personal injuries sustained by those riding in an unregistered automobile, or for injury to the car, by a defect in a highway, the court stating that such a vehicle was unlawfully on the highway, and that those using it were trespassers, and not travelers, although the passengers riding therein might not have been aware of the fact that the car was unregistered. See, however, the Massachusetts cases under I. c.

And in *Greig v. Merritt* (1913) 11 D. L. R. (B. C.) 852, the view was taken that the right of the plaintiff to recover against a municipality for an injury resulting from pipe left in the highway would, in any event, have been defeated by his failure to comply with a statute providing that "no person shall have, drive, or use a motor on or along any highway unless such motor has been registered and licensed pursuant to this act." The plaintiff in this case, however, was denied recovery on the grounds that he was guilty of contributory negligence, and that there was no negligence shown on the part of the defendant.

III. Liability for injury or damage by unlicensed car, or car driven by unlicensed person.

By the weight of authority it is held that the fact that a motor vehicle, or the driver of such a vehicle, was not licensed, as required by statute, will not charge the owner or operator with liability for injury or damage caused by its operation on the highway, where the failure to obtain a license had no causal connection with the injury or damage.

United States. — *Castle v. Zorilla* (1915) 8 Porto Rico Fed. Rep. 491.

Alabama. — *Armstrong v. Sellers* (1913) 182 Ala. 582, 62 So. 28.

Delaware. — *Lindsay v. Cecchi* (1911) 3 Boyce, 133, 35 L.R.A. (N.S.) 699, 80 Atl. 523, 1 N. C. C. A. 88;

Brown v. Green (1917) 6 Boyce, 449, 100 Atl. 475.

New York. — *Hyde v. McCreery* (1911) 145 App. Div. 729, 130 N. Y. Supp. 269.

Tennessee. — *Black v. Moree* (1916) 135 Tenn. 73, L.R.A.1916E, 1216, 185 S. W. 682.

Texas. — *Munne v. Sutherland* (1917) — Tex. Civ. App. —, 198 S. W. 395.

Vermont. — *Dervin v. Frenier* (1917) 91 Vt. 398, 100 Atl. 760.

Thus, it is held that the fact that the driver of the defendant's automobile did not have a license will not render him liable for damages inflicted by his car, but the liability in such case depends upon whether or not there was negligence in the operation of the car. *Castle v. Zorilla* (Fed.) *supra*.

And, it has been held that the fact that neither the seller of an automobile nor the purchaser, whom he was teaching to run it, had a license to operate an automobile, as required by statute, is evidence of negligence on their part, in an action to recover against them for an injury inflicted by the car, only where there is a proximate, causal connection between the violation of the statute and the injury complained of. *Dervin v. Frenier* (Vt.) *supra*.

And in *Mumme v. Sutherland* (Tex.) *supra*, where recovery was sought for injury to person and property by the defendant's automobile, it was held that there was no causal connection between the failure to register the defendant's automobile and the injury, and that evidence as to non-registration was inadmissible.

In *Black v. Moree* (Tenn.) *supra*, the effect of the violation by an owner of an automobile of a registration statute upon his liability for an injury alleged to have been caused by his machine was presented, and it was held that the mere fact that an automobile which was being driven along the highway was not registered, under a statute making such failure a misdemeanor, punishable by fine, did not render the owner liable for injury to an occupant of a vehicle overturned

by the animal drawing it becoming frightened at the automobile, where the failure to register had no connection with the accident, although the statute also provided that there should be a lien upon the automobile for any damages for injury to person or property caused by running it in violation of the provisions of the act, there being provisions with respect to speed and conduct of the driver to which such provision could apply.

In *Armstrong v. Sellers* (Ala.) *supra*, the court said in effect that if standing alone, unreinforced by the criminal provision, the part of the statute providing for registration would impose no liability, as it provides for nothing but the registration of automobiles and a certificate thereof, and prescribes no qualifications for drivers, and does not require a number to be displayed on the machine, so that the failure to register constitutes only a mere condition, and not a contributory cause, of an injury inflicted by the machine. Passing to the effect of the criminal statute passed in aid of the registration statute, the court said that its expressed purpose was to prohibit the operation of unregistered automobiles "by the owners or custodians;" that it did not prohibit the operation by persons other than the owners or custodians, but only their operation by those whose duty it was to register them; and that its penalties could not be extended by implication beyond its fair letter, even though to do so would help to round out the expression of the supposed legislative purpose. It was accordingly held that the owner of a car would not, by virtue of the registration statute, or the criminal act in aid thereof, be liable for an injury while the car was temporarily in charge of another, even if the registration statute had not been complied with.

In *Hyde v. McCreery* (N. Y.) *supra*, it was held that an act requiring owners of automobiles to cause them to be registered and have the numbers assigned displayed on the machine, and which provided that a violation of such law should be a misdemeanor, punishable by fine, did not purport to

subject an owner to civil liability for injuries caused while doing the prohibited act, and that there was nothing in the act indicating that it was intended to afford greater protection to the public; and that it was reversible error to instruct a jury that the fact that the defendant in a personal-injury case had not obtained a license for his automobile, as required by the act referred to, was proof that he was running it contrary to the law of the state, and that this was an element which might be considered as *prima facie* proof of negligence against the defendant.

As might be anticipated from the position of the Massachusetts court in the cases in the preceding sections, it is held in that state, in cases involving the liability of the driver, or assenting owner, of an unregistered automobile, for an injury inflicted by it, that the use of such an unregistered machine on the highway is unlawful, and creates a nuisance, and renders the driver or assenting owner liable for all the direct injury resulting from such use, although the injury was not the result of an act of negligence. *Koonovsky v. Quellette* (1917) 226 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146; *Evans v. Rice* (1921) — Mass. —, 130 N. E. 672.

In *Koonovsky v. Quellette* (Mass.) *supra*, it was held that instructions were properly refused that if the jury found that the automobile was not registered, as required by statute, the plaintiff, in order to recover, must also prove that the defendant was negligent in the operation of the automobile and that the operation of an unregistered automobile was only evidence of the defendant's negligence, but not conclusive. The court said that if the machine was unregistered by the owner or dealer, its presence on the highway was, in itself, unlawful, and against the right of all other persons who were lawfully using the highway, that it was "outside the pale of travelers," and an outlaw, and as a wrongdoer and creator of a nuisance, the defendant was liable at least for all direct injury resulting from his act, although such injury

could not have been contemplated as the probable result of the act done, and therefore was not the result of an act of negligence.

And in *Evans v. Rice* (Mass.) *supra*, under the Massachusetts statute, it was held that an automobile could not be lawfully operated on the highway unless it was duly registered and equipped with number plates as required by the statute, and that the driver and assenting owner were liable for an injury inflicted by the machine while it was being operated without compliance with the provisions as to registration, although the injury inflicted by the machine was not the result of an act of negligence in operating the car.

And in *Fairbanks v. Kemp* (1917) 226 Mass. 75, 115 N. E. 240, where the defendant's husband applied for the registration of his automobile, but died before the registration took effect, and his widow, the defendant, placed the registration numbers on the car and used it, it was held that the vehicle was not legally registered, and that the driver was a trespasser on the highway, and was responsible to one injured if her unlawful act directly contributed to the injury, and that the defendant's culpability might well be greater if she was wilfully driving as an outlaw on the highway than it would be if she had observed the requirements of the law, and that the failure to have the car legally registered might be considered as an element in assessing the damages for an injury inflicted by it while being used on the highway.

In *Gould v. Elder* (1914) 219 Mass. 396, 107 N. E. 59, it was held that if an automobile which was negligently operated and caused an injury was not lawfully registered, the owner could not legally operate it upon the highway, nor lawfully authorize or permit any other person to do so; and that if he did allow his unregistered car to be driven on the highway by his son, he was liable for an injury resulting from its negligent operation, whether the son was acting within the scope of his employment, or was using it in connection with his own busi-

ness or pleasure; but it was held that the owner would not be liable for an injury resulting from its negligent operation if his son took the machine and used it without his consent or permission, either express or implied.

It will be noted that the Massachusetts court, in dealing with liability to another injured by the car, follows the same distinction between an unregistered car and unlicensed operator as that observed in dealing with the right to recover for damage, or an injury to an occupant thereof.

Thus, in *Bourne v. Whitman* (1911) 209 Mass. 155, 35 L.R.A. (N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318, it was held that the failure to comply with a statute forbidding one, under penalty, to operate an automobile on a public highway without a license, does not, in case the operator is in fact competent, make him a trespasser on the highway so as to be liable for all injuries to other vehicles with which he comes in collision, even though it was not due to any negligence in the operation of his car. (It was recognized that the defendant's failure to have an operator's license would be evidence of negligence.) As bearing upon the distinction above noted, the court in this case said: "The difference between this provision of the statute (as to registering car) and that involved in the present case (as to obtaining operator's license) is in

part one of form, but, in connection with the form, it is still more the seeming purpose and intent of the legislature as to permitting such machines upon the public ways without adequate means of identifying them and ascertaining their owner, together with the requirement that the machine itself, as a thing of power, shall have its own registration and legalization, the evidence of which it shall always carry with it. In the last of the cases cited (*Chase v. New York C. & H. R. R. Co.* (1911) 208 Mass. 137, 94 N. E. 377) is this language: 'Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. . . . The operator, in running it there, and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law,' etc. We are of opinion that the law of these last cases should not be extended to the provision of the statute requiring every operator to have a personal license to operate the car. The jury should have been instructed that the defendant's failure to have a license was only evidence of his negligence as to the management of the car."

J. T. W.

UNION NATIONAL BANK

v.

FARMERS' & MECHANICS' NATIONAL BANK, Appt.

Pennsylvania Supreme Court — July 1, 1921.

(271 Pa. 107, 114 Atl. 506.)

Bank — collection of forged check — defense against return of funds.

1. A bank collecting a forged check may, when sued by the drawee for return of the funds, set up any defense which might have been made by the one originally cashing the check, even though the collecting bank is regarded as owner and not merely as agent for collection.

[See note on this question beginning on page 1125.]

Bills and notes — payment of forged checks — presumption of loss.

2. Upon payment by a drawee of forged checks, and failure to discover the fact and give notice to the collecting bank in time, a conclusive presumption of injury arises unless it is shown that assets of the forger are available to make good the loss.

Evidence — burden of proof — absence of loss from paying forged check.

3. A bank which pays a forged check and fails to give prompt notice

to the ones receiving the money has the burden of showing that they have funds of the forger out of which to make good the loss to relieve itself from liability.

Bank — assumption as to genuineness of signatures.

4. A bank which has collected a series of forged checks from the drawee, without objection on its part, may assume that similar signatures on future checks passing through its hands are genuine.

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County (Shoemaker, J.), in favor of plaintiff in an action brought to recover money paid by plaintiff to defendant on certain forged checks. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Theodore F. Jenkins, for appellant:

It was the duty of the plaintiff on the receipt of each check to examine it, and, if a forgery, to notify defendant within a reasonable time.

Iron City Nat. Bank v. Ft. Pitt Nat. Bank, 159 Pa. 46, 23 L.R.A. 615, 28 Atl. 195; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280.

Plaintiff, having failed to use care, should bear the loss.

McNeely Co. v. Bank of North America, 221 Pa. 588, 20 L.R.A. (N.S.) 79, 70 Atl. 891; *Marks v. Anchor Sav. Bank*, 252 Pa. 304, L.R.A. 1916E, 906, 97 Atl. 399, 14 N. C. C. A. 812; *United States Nat. Bank v. Union Nat. Bank*, 268 Pa. 148, 110 Atl. 792.

There is no pretense that defendant, or the Commonwealth Title Insurance & Trust Company, or Lawrence Hershman was guilty of negligence. They were all innocent parties, acting with such diligence as the law requires.

Byles, Bills, *325; *Wilkinson v. Johnson*, 3 Barn. & C. 428, 107 Eng. Reprint, 792, 5 Dowl. & R. 403, 3 L. J. K. B. 58; *Cocks v. Masterman*, 9 Barn. & C. 902, 109 Eng. Reprint, 335, 21 Eng. Rul. Cas. 68; *United States v. National Exch. Bank*, 214 U. S. 302, 53 L. ed. 1006, 29 Sup. Ct. Rep. 665, 16 Ann. Cas. 1184; *Price v. Neal*, 3 Burr. 1354, 97 Eng. Reprint, 871, 1 W. Bl. 390, 96 Eng. Reprint, 221; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334; *Dan. Neg. Inst.* § 1359; *Allen v. Fourth Nat. Bank*, 59 N. Y. 12.

16 A.L.R.—71.

Messrs. Joseph J. Brown and Henry P. Brown, for appellee:

Even if defendant had acted in fact as the agent of the Commonwealth Company, it could not defend upon the ground of possible injury to that company.

United States Nat. Bank v. Union Nat. Bank, 268 Pa. 147, 110 Atl. 792.

Simpson, J., delivered the opinion of the court:

I. Leiberman was a bookkeeper for Wapner & Rushansky, and was paid his salary sometimes in cash and sometimes by checks drawn by them upon their account in the Union National Bank, the plaintiff in this case. On December 17, 1917, Leiberman requested Lawrence Hershman to cash a check of that date, which purported to have been drawn to his (Leiberman's) order by his employers on their account with plaintiff. Hershman refused to do this until he was sure the check was good, whereupon, by agreement, it was indorsed by Leiberman, deposited by Hershman in his account with the Commonwealth Title Insurance & Trust Company, which in turn indorsed and delivered it to the Bank of North America, so that it could be collected through the Clearing House Association, of which plaintiff, the Bank of North America, and defendant, the Farmers & Mechanics National

Bank, were members, but the trust company was not. Having received notice that the check had been duly paid by plaintiff, Hershman gave to Leiberman the amount specified therein. Subsequently Hershman cashed for Leiberman twelve other checks, drawn in the same way, all of which were indorsed by the latter. These were indorsed and deposited by Hershman in his account with the trust company, were indorsed by it, and defendant collected the amount thereof from plaintiff through the Clearing House Association. In this way eight of these checks were paid by plaintiff prior to January 31, 1918, and on that date were deducted in the settlement of Wapner & Rushansky's account, without objection by the latter. They did not, however, receive the forged papers until February 15, 1918, when, in accordance with their custom, they called at the bank for them, under the circumstances hereinafter set forth. Two others of the forged checks were paid February 8, 1918, and the last two on February 14, 1918. On February 15, 1918, Wapner & Rushansky were notified by plaintiff bank that their account was overdrawn, whereupon they called and received the checks included in the settlement of January 31, 1918, examined them and all the others paid to the first-named date, and pronounced the twelve checks above referred to, to be forgeries, as they in fact were, the signatures thereon having been forged by Leiberman. On the same day plaintiff, in turn, notified defendant of the forgeries. During all this time the balance due by defendant to the trust company was far in excess of the total amount of said checks; but neither defendant, the trust company, nor Hershman, either then or thereafter, had any money or property belonging to Leiberman, who was insolvent and in prison, and who subsequently was indicted, tried, convicted, and sentenced for the forgeries.

Plaintiff demanded of defendant

that it repay the amount of the forged checks, and, this being refused, brought the present suit. At the trial the court below refused defendant's point for binding instructions, and directed a verdict for plaintiff for the aggregate of the twelve checks, with interest. Later the court in banc dismissed defendant's motion for judgment non obstante veredicto, and entered judgment on the verdict, whereupon defendant appealed.

Plaintiff claims that, under § 10 of the Act of April 5, 1849 (P. L. 426; Pa. Stat. 1920, § 16,011), it can recover back the amounts paid to defendant; and though conceding on the authority of *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 159 Pa. 46, 23 L.R.A. 615, 28 Atl. 195, it "is still presumed to know [its depositor's] signature," "the principles of the commercial law are still applicable, and there is still the same necessity as before, for care, diligence, and proper notice under the settled rules of the law of negotiable paper," and "the statute does not . . . exempt [plaintiff] from the consequences of [its] own negligence, if thereby loss would accrue to the other party," it points to the *United States Nat. Bank v. Union Nat. Bank*, 268 Pa. 147, 110 Atl. 792, as authority for the proposition that defendant has not suffered loss, since it at all times had in its hands a sum due the trust company far in excess of the amount of the checks. This latter case, however, was decided on the principle of *res judicata*; the fact upon which plaintiff relied for recovery having been a relevant fact in the prior case of *Union Nat. Bank v. Franklin Nat. Bank*, 249 Pa. 375, 94 Atl. 1085, wherein the United States Bank assisted in the defense made by its agent, the Franklin National Bank, and would have defeated that action if it had been interposed therein. No such situation arises here; and hence the only pertinency of that case is in its conclusion that a defendant who is an agent can set up in a suit which arises out of

the agency, any defense its principal could have interposed had he, and not the agent, been the party sued.

It is not necessary to consider the disputable question (3 R. C. L. 524) as to whether or not, upon the deposit of the checks by Hershman, the title remained in him, the trust company and defendant being simply his agents for collection, or whether it presumptively passed to the companies in turn; for the same result is reached in either event.

The opportunity to proceed at once against a forger is a valuable one, the deprivation of which, by failure to give notice promptly, conclusively determines that loss has resulted, for there is no way by which it can be satisfactorily determined there was no loss (*Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *McNeely Co. v. Bank of North America*, 221 Pa. 588, 20 L.R.A. (N.S.) 79, 70 Atl. 891, unless it is shown there is on hand a fund belonging to the forger out of which defendant can reimburse himself in whole or in part (*Union Nat. Bank v. Franklin Nat. Bank*, 249 Pa. 375, 94 Atl. 1085; *United States Nat. Bank v. Union Nat. Bank*, 268 Pa. 147, 110 Atl. 792).

In the first of the case above mentioned the question now before us was not raised, the parties in that case choosing to rely on the fact that the Franklin National Bank had, ad interim, paid over to its principal, the United States National Bank, a fund in excess of the amount received from the Union National Bank, the drawee named in the checks; but this was held to be no defense, since the Franklin National Bank still had on hand ample funds of the United States National Bank from which to recoup its payment to the latter. In the last of the cases cited, however, it was decided that, if it had been made to appear in the former case the United States National Bank, in which the forged check was first deposited, had paid to the forger, or on his orders, all

or any part of the proceeds of the forged check, this would have been a defense to the claim by the Union National Bank against the Franklin National Bank.

The only question which now remains open is, therefore, On whom is the burden of proof when such a defense is suggested? In the present case, the plaintiff evidently assumed it had the burden (and we think correctly), for it produced evidence to show that the trust company was, and at all times had been, indebted to defendant bank in a sum largely in excess of the amount of the forged checks. The point has not been squarely raised, however, in any of our prior cases, and must therefore be decided on principle.

Starting with the admitted facts that plaintiff wrongfully paid the forged checks, failed to discover the forgeries and to give notice thereof in time, and that somebody must suffer as a result thereof, and considering that, as already pointed out, a conclusive presumption of injury to the other

parties to the checks arises, unless it is shown

Bills and notes—
payment of
forged checks—
presumption of
loss.

assets of the wrongdoer are available to make good the loss, we have a case wherein plaintiff seeks to escape the result of its own negligence; and hence we have no difficulty in holding it falls within the ordinary rule that "the burden of evidence [proof] being always upon that party

against whom the decision of the tribunal would be given if no further

Evidence—
burden of proof
—absence of loss
from paying
forged check.

evidence were introduced, or, to speak more accurately, if no evidence were introduced which the judge would permit the jury to consider as the basis of their verdict." 16 Cyc. 932; 22 C. J. 76.

This being so, it necessarily follows plaintiff was required to prove the circumstances which it alleged should relieve it from suffering the loss caused by its negligence; and it could do this only by showing the

relations of the parties to each other and to the transaction, and the facts, growing out of them, which justified the court below in directing a verdict in its favor. The record, however, is wholly barren of proof of anything justifying even the submission of this question to the jury. If we assume the trust company and defendant were collecting agents for Hershman, then, as this defense is one which can be made in the present suit, even though defendant be treated as an undisclosed agent (*United States Nat. Bank v. Union Nat. Bank*, 268 Pa. 147, 110 Atl. 792), the question is, Has Hershman anything of Leiberman's out of which he could have made his loss good? and, since there is no proof he has, plaintiff cannot recover. If, on the other hand, we assume defendant was the owner of the checks, the result is the same; for, as between defendant, the trust company, and Hershman, the loss, if any, would fall upon Hershman, under the contention now made by plaintiff; and defendant can set up

Bank—collection of forged check—defense against return of funds.

in this suit any defense which Hershman could have made if he had been sued by plaintiff, as he might have been under the Act of 1849. 21 R. C. L. 1065; *Mortland v. Himes*, 8 Pa. 265; *Metropolitan Nat. Bank v. Merchants' & M. Bank*, 155 Pa. 20, 25 Atl. 764. This is the same principle (underlying a large body of the law) which permits an agent to defend upon any ground that would have availed his principal, if sued. It is true in the instant case defendant is not strictly a surety, nor, on the alternative now being considered, an agent; but the basis of the rule, viz., that a creditor having a claim against several cannot recover thereon in a suit against one who, as between himself and another, is secondarily liable, if the one primarily responsible has a valid defense to the claim. Any other conclusion would be a travesty upon justice; for, using the present case as an illustration, it would en-

able one who has been negligent to cast the resulting loss upon the innocent party whom he chooses to sue, instead of another innocent party who is liable over to the one sued, but who, if sued by the creditor, as he might have been, would have had a complete defense to the claim, since there is no proof Hershman had any assets of Leiberman's out of which the amount of the checks could have been made good, in whole or in part. Equity, which is part of the common law of Pennsylvania, never would permit liability to depend upon the option of one party to a controversy, instead of upon legal principles applicable to all concerned.

The situation, so far as relates to all the checks but the last two, is, therefore, that plaintiff paid them to its own loss; and since it negligently failed to discover the forgeries until after the time when, with care and diligence, it should have done so, and all other parties have acted in good faith, and have no assets of the forger from which to recoup the loss, it cannot recover back the amounts paid, but is relegated to a claim against the forger alone.

As to the last two checks, however, a different question arises. A sufficiently prompt notice of the forgeries thereof was given, and the defense to the recovery thereon (which also applies equally to most of the prior checks) falls within another principle. Having paid the earlier checks without objection, plaintiff's "silence was tantamount to a declaration [that they were genuine], and, in afterwards honoring checks signed by the same person, the [defendant] bank had a right to consider the fact that these signatures had been at least tacitly recognized by the plaintiff as genuine." *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 12, 74 Am. St. Rep. 672, 44 Atl. 280. It is not easy to reconcile this rule with the principle that ordinarily estoppel only arises because of ac-

—assumption as to genuineness of signatures.

tion with knowledge which it cannot be presumed, and certainly was not proved, plaintiff had regarding the fact of forgery when it paid the checks; but this exception, in the case of bank checks, is well settled here and elsewhere, and must be corrected, if at all, by the legislature.

Appellee further contends that, even though we reverse, this court should not enter judgment for defendant "until the question of appellee's and Hershman's possible negligence had been determined in its [defendant's] favor by the jury." We are not interested in "possible" negligence, however, since no actual negligence by Hershman is shown, plaintiff's negligence is conclusively established, and it did not sustain the defense of "no loss" upon which it relied.

The judgment of the court below is reversed, and judgment is here entered for defendant non obstante veredicto.

NOTE.

The right of the drawee of a forged check or draft to recover money paid thereon is the subject of an extended annotation in 12 A.L.R. 1089. Aside from the reported case (UNION NAT. BANK v. FARMERS' & M. NAT. BANK, ante, 1120), the only case in point reported since that annotation is First Nat. Bank v. United States Nat. Bank (1921) — Or. —, 14 A.L.R. 479, 197 Pac. 547, which holds that a drawee paying a check to a holder for value in due course, without negligence or notice that the drawer's signature is forged, cannot recover the money when it is discovered that such forgery in fact existed, but recognizes an exception where the drawee was innocent of actual fault, and the one collecting the check knew of circumstances causing suspicion of its genuineness of which the drawee was ignorant, or by his negligence contributed to the drawee's mistake in honoring the check.

C. G. PALMBERG, Appt.,

v.

CITY OF ASTORIA, Resp't.

Oregon Supreme Court (In Banc) — July 26, 1921.

(— Or. —, 199 Pac. 630.)

Municipal corporation — liability for misleading contractor for public work.

1. A contractor who is misled by an advertisement for bids for public work, made in accordance with the provisions of a city charter, so that it becomes its act, which materially understates the amount of work required to be done, through the negligence, incompetence, or carelessness of its engineer, may hold the municipality liable in damages for the loss thereby caused him through the negligent acts of the city.

[See note on this question beginning on page 1131.]

— liability for tort.

2. A municipal corporation cannot escape liability for an ordinary tort arising from its negligent acts or omissions, unless its charter or ordinance provides an equivalent remedy against the officer through whose agency or neglect the wrong was committed.

[See 19 R. C. L. 1107-1109.]

Pleading — complaint — absence of allegations — defect.

3. A complaint in an action against a municipal corporation to recover damages for misleading a contractor for public work, by erroneous specifications of the work required to be done, is defective, which does not state that the specifications set out to

show the mistake are all that were on file in the office to which bidders were referred for information.

Public improvements—right to rely on advertisements for quantity of work to be done.

4. A bidder for public works may rely on calculations by the public engineer of the quantity of work to be done as set out in the advertisements for bids, without making new surveys

or new computations from data on file.

[See 22 R. C. L. 617.]

—completion of contract—waiver of claim for damages.

5. A contractor for public work does not waive his right to damages for being misled by the advertisements for bids as to quantity of work to be done, by completing the contract after discovering the error.

APPEAL by plaintiff from a judgment of the Circuit Court for Clatsop County (Eakin, J.) sustaining a demurrer to the complaint and dismissing an action brought to recover damages alleged to have been sustained by plaintiff by reason of a mistake made by an engineer of the defendant city. *Affirmed.*

Statement by McBride, J.:

This is an action to recover damages which the plaintiff claims to have sustained by reason of an error committed by the defendant, through mistake, in materially understating in its specifications the amount of embankment required to complete an improvement upon a street of defendant city, by reason of which misrepresentation the plaintiff was induced to bid a lower sum for completing the improvement and to expend a greater sum of money therefor than would have been necessary had the conditions been as specified in defendant's advertisement for bids. A further statement of facts appears in the opinion. There was a general demurrer to the complaint, which was sustained. The plaintiff's refusal to plead further was followed by a judgment dismissing the action, from which judgment plaintiff appeals.

Messrs. Norblad & Hesse, for appellant:

A municipality is liable in damages for extra or additional work rendered necessary on account of the fault, negligence, fraud, incompetency, or error or mistake of its municipal officers.

Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263; Mulholland v. New York, 113 N. Y. 631, 20 N. E. 856; First Sav. & T. Co. v. Milwaukee County, 158 Wis. 237, 148 N. W. 22, 1093; Spearin v. United States, 51 Ct. Cl. 155; O'Neill v. Milwaukee, 121 Wis. 32, 98 N. W.

965; McManus v. Philadelphia, 211 Pa. 394, 60 Atl. 1001; McCann v. Albany, 11 App. Div. 383, 42 N. Y. Supp. 94; Chicago v. Duffy, 218 Ill. 242, 75 N. E. 912, affirming 117 Ill. App. 266; Christie v. United States, 237 U. S. 234, 59 L. ed. 933, 35 Sup. Ct. Rep. 565; Hollerbach v. United States, 233 U. S. 165, 58 L. ed. 893, 34 Sup. Ct. Rep. 553; Becker v. New York, 170 N. Y. 219, 63 N. E. 299; McConnell v. Corona City Water Co. 149 Cal. 60, 8 L.R.A. (N.S.) 1171, 85 Pac. 929; Wyandotte & D. R. Co. v. King Bridge Co. 40 C. C. A. 325, 100 Fed. 197; Erskine v. Johnson, 23 Neb. 261, 36 N. W. 510; Little v. Portland, 26 Or. 249, 37 Pac. 911; Carroll County v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; MacKnight Flintic Stone Co. v. New York, 160 N. Y. 72, 54 N. E. 661; Atlantic Dredging Co. v. United States, 35 Ct. Cl. 463.

Plaintiff was under no duty to make an independent investigation of the amount of yardage to be moved, but had a right to rely upon the correctness of defendant's specifications.

Spearin v. United States, 51 Ct. Cl. 155; Hollerbach v. United States, 233 U. S. 165, 58 L. ed. 893, 34 Sup. Ct. Rep. 553; Atlanta Constr. Co. v. New York, 103 Misc. 233, 175 N. Y. Supp. 453; Continental & C. Trust & Sav. Bank v. Corey Bros. Constr. Co. 126 C. C. A. 64, 208 Fed. 976; Bush v. Jones, 6 L.R.A. (N.S.) 774, 75 C. C. A. 582, 144 Fed. 942; Atlantic Dredging Co. v. United States, 35 Ct. Cl. 463.

Although a contract may specifically provide that the quantities of dirt to be moved, as set forth in the specifications, were approximate only, and that

the bidder should make his own investigation, a contractor is under no obligation to do so where the specifications set forth the amount of yardage to be moved.

Hollerbach v. United States, 233 U. S. 165, 58 L. ed. 898, 34 Sup. Ct. Rep. 553; Spearin v. United States, 51 Ct. Cl. 155.

A provision in a builder's contract, that the contractor shall not be entitled to recover for extras or additional work, applies only to minor or trifling charges, but not to substantial charges, amounting practically to the making of a new contract.

Salt Lake City v. Smith, 43 C. C. A. 637, 104 Fed. 457; Plum Bayou Levee Dist. v. Roach, 99 C. C. A. 453, 174 Fed. 949; Hayden v. Astoria, 74 Or. 525, 145 Pac. 1072, 84 Or. 205, 164 Pac. 729; Cook County v. Harms, 108 Ill. 157.

The defendant city is likewise liable ex contractu for the reasonable value of additional work and labor furnished by plaintiff on account of errors and mistakes occasioned by its officials.

Hayden v. Astoria, 74 Or. 525, 145 Pac. 1072, 84 Or. 205, 164 Pac. 729.

Defendant city is likewise liable in quasi contract on the theory that nobody shall be allowed to enrich himself at the expense of somebody else and at the same time retain the benefits of the transaction.

Carroll County v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Bass Foundry & Mach. Works v. Parke County, 115 Ind. 234, 17 N. E. 593.

Messrs. Olof Anderson, Anderson & Setters, G. C. Fulton and A. C. Fulton, for respondent:

Where, by statute, the power of a municipality or other public corporation to make a contract is limited in a certain manner, and under certain circumstances, and any other manner of entering into such contract or obligation is expressly or impliedly forbidden, no liability can arise against the municipality for benefits received under a contract within the scope of such statute and violative thereof.

Springfield Mill. Co. v. Lane County, 5 Or. 265; Grafton v. Sellwood, 24 Or. 118, 32 Pac. 1026; McCormick v. Miles, 27 L.R.A.(N.S.) 1120, note; Reams v. Cooley, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260; Denver v. Hindry, 40 Colo. 42, 11 L.R.A.(N.S.) 1028, 90 Pac.

1026; Sullivan v. Leadville, 11 Colo. 483, 18 Pac. 736; Indianapolis v. Wann, 144 Ind. 175, 31 L.R.A. 743, 42 N. E. 901; Salt Creek Twp. v. King Iron Bridge & Mfg. Co. 51 Kan. 520, 33 Pac. 303; Perry Water, Light & Ice Co. v. Perry, 29 Okla. 593, 39 L.R.A.(N.S.) 72, 120 Pac. 582; People ex rel. Coughlin v. Gleason, 121 N. Y. 631, 25 N. E. 4; Wellston v. Morgan, 65 Ohio St. 219, 62 N. E. 127; Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865; Bank of Columbia v. Portland, 41 Or. 5, 67 Pac. 1112; American-La France Fire Engine Co. v. Astoria, 218 Fed. 480.

Under the charter provisions of the municipality of Astoria, such municipality cannot render itself responsible for work done or materials furnished beyond the contract price for a public street improvement, for such charter provisions, as well as the contract, specially provide that such payments can only be made from assessments on the lands benefited.

Huntington v. Force, 152 Ind. 368, 53 N. E. 443.

It was plaintiff's duty, immediately upon discovering the alleged mistake, unless he desired to ratify the same, to rescind the contract.

O'Rourke v. Philadelphia, 211 Pa. 79, 60 Atl. 499; Hutchinson v. White, 80 Kan. 37, 101 Pac. 458; Chicago Sanitary Dist. v. Ricker, 34 C. C. A. 91, 91 Fed. 844; 20 C. J. 5; Cuyahoga Contracting Co. v. Port Huron, 147 C. C. A. 282, 233 Fed. 352; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798, 10 Mor. Min. Rep. 445.

The profile of the improvement formed a part of the contract, and correctly showed the quantity of excavation and fill, and, by an examination of it, plaintiff would have been fully informed as to such quantities. His failure to do so precludes him from recovery.

International Contract Co. v. Tacoma, 79 Wash. 311, 140 Pac. 373; Grymes v. Sanders, supra.

Mr. James W. Mott also for respondent.

McBride, J., delivered the opinion of the court:

Taking the complaint as true, the facts may be concretely summed up as follows: The city council, having in contemplation the improvement of Olney avenue, a street in

Astoria, directed its engineer and surveyor to prepare plans and specifications, which was done, and as an exhibit to the complaint a profile of the proposed improvement and the following specifications are attached, and it is alleged that these were also made a part of the contract between plaintiff and the defendant city. It is not alleged that these constituted all the plans and specifications on file with the city auditor. The specifications which are included in the complaint are as follows:

Items of Work and Material.

Item No.	Total Quantities.	Units.	Unit Prices.	Totals.
Excavation	9,650 cu. yds.	cu. yds.		
Embankment	17,087 cu. yds.	cu. yds.		
16' planked roadway	390 ft.	per ft.		
5' wooden sidewalk	820 ft.	per ft.		
Repair of macadam between 7th and 5th. Macadam 6" thick by 20' x 355 = 160 cu. yds. consolidated.		cu. yds.		

The failure to allege that these exhibits constituted all the data filed with the city auditor becomes important in the case, as will hereinafter be shown.

Thereafter the council caused the following advertisement for bids to be published:

"Notice is hereby given, that the committee on streets and public ways of the common council of the city of Astoria will on the 27th day of July, 1918, at the hour of 2 o'clock P. M., in the office of the auditor and police judge, in the city hall, of the city of Astoria, open bids for improving Olney avenue from the west line of 5th street to the east line of 10th street, excepting the intersection or crossing of Olney avenue with 7th street, according to plans and specifications and ordinance number 5,275, providing for the time and manner of making said improvement, which ordinance was approved on the 19th day of July, 1918.

"Sealed bids will be received by the auditor and police judge, up to

the hour of 2 o'clock P. M., of said 27th day of July, 1918.

"A certified check for an amount equal to 5 per cent of the total amount bid must accompany each bid, which said certified check shall be made payable to the order of the city of Astoria, Oregon, and each proposal must be accompanied by the guaranty of responsible sureties to furnish bond in the amount of 75 per cent of the total amount bid, if the proposal is accepted.

"Character of Work."

"Excavation, 9,650 cu. yds.; embankment, 17,087 cu. yds.; 16-ft. planked roadway, 390 ft.; 5-ft. wooden sidewalk, 820 ft.; repair to existing macadam; macadam roadway 20 feet wide by 355 ft. long and 6 in. thick.

"Plans and specifications and blank forms of proposal are on file with the auditor and police judge and city surveyor, and may be had upon application to the city surveyor, at the city hall, upon deposit of the sum of \$5.

"The right is reserved to reject any and all bids."

The plaintiff, relying upon the specifications as to the amount of embankment, bid the sum of \$19,849 for the completion of the whole work, and his bid was accepted. He then gave his bond and entered upon the work of making the improvement. The foundation of this action lies in the fact that, in his computations as shown above, the city surveyor made a mistake as to the number of cubic yards of embankment to be constructed, so that, instead of necessitating 17,087 cubic yards, the improvement actually required 28,567, involving, according to the complaint, an additional cost of \$14,258. After plaintiff had entered upon the prosecution of the work he discovered this mistake and notified the city surveyor, who demanded that he go ahead and complete his contract. He notified the city, so the complaint states, that he would complete the contract under protest, but would hold the city

liable in damages sustained by him by reason of the mistake in the specifications. He completed the work, and the city paid him the contract price, but refused to pay his claim of \$14,258 for the additional embankment; and this action follows.

Plaintiff's case is this: The city invited him to bid on a contract, representing in its invitation that he would have to construct approximately 17,000 cubic yards of embankment, when in fact there were over 28,000 yards. He relied on this representation, and, after he had given his bond to complete the street and entered upon the work, he found that he had been deceived to the extent above indicated, through the mistake of the city surveyor in preparing the specifications. His contract did not provide that he should be paid a certain amount per cubic yard for constructing the embankment, but it was in gross, requiring him to complete the whole improvement for a certain sum. There is no provision for payment for extra work; indeed, such payment is excluded by the terms of the contract. Plaintiff's remedy, if any, must therefore be found in an action for damages for the loss occasioned by the misleading error of the city surveyor. Were this an action by a contractor against a private person, who had so negligently misled him and caused him to incur extra expense, the remedy would be plain. The law would say that, having misled the contractor by his representation, if negligently made, and having profited by the result of his labors, the employer should make good the damages caused to the contractor by the employer's mistake. But municipal corporations of the present day are so hedged about with provisions restricting their liability that it becomes a matter of extreme nicety to determine whether or not such liability exists in a case like the present.

It is easy to say that a municipal corporation has no more right to be dishonest than a private individ-

ual, but the books are full of cases in which municipal corporations have been permitted by the peculiar provisions of their constitutions to escape liability for acts or omissions for which a private citizen would have been compelled to respond pecuniarily. It is

settled, however, in this state, that a **Municipal corporation—liability for tort.**

municipal corporation cannot escape liability for an ordinary tort arising from its negligent acts or omissions, unless its charter or ordinance provides an equivalent remedy against the officer through whose agency or negligence the wrong was committed. Here the advertisement for bids was inserted by virtue of the provisions of the charter prepared by the city's agents, and was therefore the city's invitation to bid, and whatever representations it contained were the city's representations. When the advertisement, by a mistake amounting to negligence, materially understated the amount of embankment which the contractor would be required to construct, it was the city's misrepresentation; and if the contractor had a right, under the circumstances, to rely upon it as being approximately correct and, so relying, made a ruinous or unprofitable bid, we see no reason, if the other elements necessary to a recovery are present, why the city should not be held liable; and this, not on the ground of a contract, or on a quantum meruit for the reasonable value of the labor and expense of the contractor in bringing the embankment up to grade, but as damages for a negligent act whereby the contractor was induced to enter into the contract and to expend a greater sum in completing it than would have been necessary had the conditions been correctly stated.

—liability for misleading contractor for public work.

The demurrer is based on the theory that the action is brought upon the contract, and that plaintiff is precluded not only by the charter of the defendant city, but also by the

contract itself, to recover for extra work made necessary by the conditions actually existing upon the ground and which were not in the contemplation of the parties when the contract was executed. If the premise is correct, the defendant's contention is well founded. But while the complaint is somewhat indefinite, and subject to criticism on that account, we are of the opinion that, taken as a whole, it sounds in tort rather than contract. Although the measure of damages in either case would be the sum expended by plaintiff in the construction of the additional quantity of embankment required to complete the improvement, the complaint, if it charges actionable damages, considered as an action for damages, would not be, in the respects mentioned, vulnerable to a general demurrer.

As the element of falsity of the representation is admitted by the demurrer, we next come to the question of intent to deceive, so far as intent is necessary. It is not alleged in the complaint that the city or its officers knew as a matter of fact that the representation was false. Neither is it alleged that the city knew that the city surveyor was incompetent. It is charged that the misrepresentation was occasioned by an error of that officer in making his computation. The city owed a duty to prospective bidders to state with approximate accuracy the correct amount of earth required for the embankment, if it attempted to state it at all. It was a matter of engineering and computation, capable substantially of mathematical demonstration, and a negligent failure of the officer designated by the city to make the surveys and prepare the specifications to make these computations with the care necessary to insure their substantial accuracy might, under some circumstances, be such negligence as would amount to a tort, and we see no difference in this regard from hundreds of other cases in the books where a party has recklessly or negligently made

an untrue representation in regard to a material fact without taking pains to assure himself that in such cases the party so misled is entitled to recover to the same extent that he would have done, had the representation been wilfully and intentionally false.

It is urged, however, that a reference to the profile included in the contract would readily have shown the error and advised plaintiff of the fact that the specification in regard to embankment was several thousand cubic yards more than the computation indicated. With the limited knowledge of engineering possessed by members of this body, we are unable to say as a matter of law that this is the case. The writer has been unable to make such computation, and if it is within the bounds of mathematics for any expert to do it, it would seem to be rather a matter for expert testimony than judicial notice. The complaint does not in express terms allege that the profile and computation, which are made part of the complaint, were all the data on file in the office of the city auditor, and although this seems to be substantially assumed in the briefs, we think the complaint defective in not so stating. We do not believe that, in view of the advertisement and the representations therein, it was incumbent upon the contractor to make new surveys or calculations from an independent profile, if this profile and the accompanying specification were all that were on file, in order to verify the city surveyor's calculations. But, assuming that the computation and profile prepared by the city surveyor were all the data filed with the auditor, to which prospective bidders were referred, we think that plaintiff had a right to rely upon the city surveyor's computations as being substantially correct.

Pleading—
complaint—
absence of
allegations—
defect.

Public improve-
ments—right to
rely on adver-
tisements for
quantity of work
to be done.

The defendant contends that the plaintiff proceeded to complete his contract after discovery of the mistake in the surveyor's computations, and has therefore waived his right to recover for the additional expense incurred by reason of the mistake; in other words, that plaintiff cannot sue for damages without having rescinded the contract upon the discovery of the misrepresentation. Such is not the law, and would work a great hardship in a case of this kind, where the work had been partially

—completion of contract—waiver of claim for damages.

completed before such discovery was made. The rule is exactly the opposite. A party induced by a false representation to enter into a contract may proceed to perform it and sue for damages for the misrepresentation. *Whitney v. Allaire*, 4 Denio, 554; *Mallory v. Leach*, 35 Vt. 156, 82 Am. Dec. 625.

So far we hold with the plaintiff. But the complaint is defective in this: That it merely states that there was a mistake made by the surveyor. It does not charge that the error was due to carelessness, negligence, or incompetence of the

agent of the city who made it. In these respects the complaint does not state facts sufficient to constitute a cause of action. We have considered and discussed the other points raised, because we have not been unmindful of the moral injustice of a failure of the city to compensate the plaintiff for the consequences of its erroneous specifications, should they appear to have been negligently made, and because it appears at least possible that the omissions above noted may be corrected in a new action.

The judgment of the Circuit Court, so far as it sustains the demurrer, will be affirmed. But in view of the conditions above recited, and upon the authority of *Williams v. Pacific Surety Co.* 66 Or. 151, 157, 127 Pac. 145, 131 Pac. 1021, 132 Pac. 959, 133 Pac. 1186, the cause will be remanded to the Circuit Court, with permission to plaintiff to apply there for leave to amend his complaint. The defendant will recover the costs of this appeal.

Burnett, Ch. J., concurs in the result of this opinion.

ANNOTATION.

Liability of municipal corporation to contractor for mistake in estimates prepared by former's officers or employees.

While the court in the reported case (*PALMBERG v. ASTORIA*, ante, 1125) held that where there is a mere mistake on the part of a municipal employee in the making of estimates for a public improvement, without any showing of negligence, carelessness, or incompetency, there will be no liability on the part of the municipality to a contractor who contracts in reliance upon such estimates, yet that case does hold that where the proximate cause of a contractor's loss is the negligence, carelessness, or incompetence of a municipal employee in making the estimates of a public improvement, the municipality will be liable.

In harmony with that view it has been held that a contractor may re-

cover for extra work necessitated by mistake of the assistant engineer of a city in giving an insufficient depth for the excavation of a sewer trench. *McCann v. Albany* (1896) 11 App. Div. 378, 42 N. Y. Supp. 94, affirmed without opinion in (1899) 158 N. Y. 634, 53 N. E. 673.

So, too, extra back masonry made necessary in bringing to a proper line a tunnel which, because of the negligence of the city's engineer, was not run in a straight line, was held in *Chicago v. Duffy* (1905) 218 Ill. 242, 75 N. E. 912, to be an expense to be borne by the city; since by the contract the construction of the tunnel was to be carried on under the direction of the city engineer.

And a city is not justified in declaring a contract for building a city hall forfeited because of the contractor's refusal to do certain work called for by the original plans and specifications, where such work was the result of changes made in the original plans and specifications by the city's architect, which changes, through neglect or inadvertence, were not noted in the tracing copies made expressly for the use of contractors and bidders, and which the successful bidder used in estimating his bid. *Sexton v. Chicago* (1883) 107 Ill. 323.

Where, however, it is expressly understood and agreed by the parties that the estimates are approximate only, the city will not be liable for any mistake in the estimates.

Thus, recovery cannot be had for expense of excavation in excess of engineer's estimates, where it was expressly understood and agreed by the parties to the contract that the engineer's estimates were approximate only, and the contract was for a lump sum with extra compensation only in case of work resulting from changes in plans and specifications. *Molloy v. Briarcliff Manor* (1911) 145 App. Div. 483, 129 N. Y. Supp. 929.

And where a bid for construction of a city sewer is based upon approximate estimates only, and was given and accepted as such, a variation in the estimate of the work to be done arising through mistake or inadvertence is at the risk of the contractor. *Leary v. Watervliet* (1918) 222 N. Y. 337, 118 N. E. 849.

So, too, under specifications of a contract for building a crib for a drawbridge over a bay, providing that the contractor must satisfy himself of the correctness of the soundings shown on the plan, and which further provided that "all loss or damages arising from encumbrances on the line of the work . . . shall be sustained by the contractor," a contractor cannot recover for expense of delay caused by finding a water pipe on the bed of the bay at the place where the crib was to be located, and which the crib would probably break if placed upon it, and this although

the location of the pipe was such that the city officials might have known of it. *Mairs v. New York* (1900) 52 App. Div. 343, 65 N. Y. Supp. 160, affirmed without opinion in (1901) 166 N. Y. 618, 59 N. E. 1126.

But when a line of bed rock is given in a blue print as "approximate," it is intended to express the idea that the line as shown is nearly, though not exactly, correct. And so the city would not be protected against liability for extra work where there was a material discrepancy as to depth of the bed rock. *Richmond v. I. J. Smith & Co.* (1916) 119 Va. 198, 89 S. E. 123.

A municipality will not be liable where the proximate cause of the contractor's loss is his own negligence or carelessness in relying upon the estimates.

Thus, material mistakes in plans for excavation will not entitle recovery for extra excavations necessitated by such mistakes, where there is no representation that the plan is made from actual survey, and especially where there is every indication that it was not. *Lentilhon v. New York* (1905) 102 App. Div. 548, 92 N. Y. Supp. 897, affirmed without opinion in (1906) 185 N. Y. 549, 77 N. E. 1190.

And in *Jahn Contracting Co. v. Seattle* (1918) 100 Wash. 166, 170 Pac. 549, it was held that the fact that the plans and profiles were inaccurate as to amount of excavation necessary in a municipal improvement will not render a city liable for the extra excavation necessary, where there is every indication that the plans and profiles were prepared with reference to physical conditions that had existed some years prior, and the physical conditions were not so concealed that the profile would operate as a representation upon which a contractor might rely to the exclusion of all other considerations. The court stated that it was the duty of a contractor, under the circumstances, to satisfy himself as to the amount of excavation necessary, and not rely upon the plans and profiles furnished by the city.

One who contracts to build a sewer

cannot recover for expense of pumping out water which percolated into it during construction, on the ground that he had expected to be able to drain into an existing sewer, where, although the plan of construction did indicate an existing sewer, he, before bidding on the work, went over the ground and saw that there was no sewer as indicated on such plan. *Cunningham v. New York* (1902) 39 Misc. 197, 79 N. Y. Supp. 401, affirmed without opinion in (1904) 90 App. Div. 606, 85 N. Y. Supp. 1129.

And in *Thilemann v. New York* (1903) 82 App. Div. 136, 81 N. Y. Supp. 773, it was held that the fact that plans for construction of a sewer showed an existing sewer in the same locality, when in fact there was none, furnished a contractor no basis for claim for damages against a city for cost of pumping, and failure of the city to supply him with such a serviceable sewer for drainage. The court seems to have based its decision on the fact that an examination of the locality should have apprised the contractor that there was no sewer there; and on the further fact that the contract contained no provision that there should be a right to use a sewer at that point or any other place, for drainage, but on the contrary the contractor expressly agreed to supply the necessary pump and facilities for that purpose.

And the mistake of an engineer in setting his stake will not make a city liable for extra work done by a contractor in the grading of a street, where the contract provided that the work should be done in conformity with the plans on file. *Wilson v. St. Joseph* (1907) 125 Mo. App. 460, 102 S. W. 600.

In *Becker v. New York* (1902) 170 N. Y. 219, 63 N. E. 298, where a contract for street improvements provided that "a city surveyor will be employed by the parties of the first part to see that the work is completed in conformity to the profile, and to ascertain and certify the quantity of the work done. Said surveyor, at the request of the contractor, will be directed to designate and fix grades for

his guidance during the progress of the work without charge, provided that the said parties of the first part shall not be liable for any delay or for any errors of said surveyor in giving such grades, and said surveyor shall be considered as the agent of the contractor as far as giving such grades is concerned, and not the agent of the city of New York," it was held that a loss suffered by a contractor on account of mistakes in grades furnished him by the city surveyor was not recoverable from the city, where, although the city surveyor went upon the work without request from the contractor and fixed a grade, the court said that the contractor, having without objection used such grade, must, under the terms of the contract, be regarded as having ratified the action of the surveyor and accepted him as his agent.

The *Becker Case* (N. Y.) *supra*, however, did hold that under such a contract a contractor cannot be held to have made the city surveyor his agent, so as to defeat recovery for loss due to the mistake of the city surveyor in fixing the center line of a street, where there was no request that the city surveyor fix such line, and the contractor, having ascertained that the line was incorrect, notified the superintendent of streets of that fact, but was ordered by the superintendent to go ahead. The court said: "It cannot be reasonably said that under this state of facts the contractor had, by acquiescence, made the city surveyor his agent. On the contrary, the contractor was reasonably alert to discover the correct center line, and followed the one furnished him, which he had been advised by his own surveyor was inaccurate, only when the superintendent of street improvements, after being fully advised as to all the facts, ordered him to do so. The loss sustained by the contractor, due to this inaccurate center line, is a proper charge against the defendant, and may be recovered in this action." Upon a second appeal in this case in (1902) 176 N. Y. 441, 68 N. E. 855, it appeared

that upon a new trial there was evidence tending to show that the contractor called the attention of the superintendent of streets to inaccuracies in the grades furnished by the surveyor, but was required by the superintendent to proceed according to those grades, and it was urged, in view of this evidence, that the principle which was applied on the first appeal to the mistake in respect of the center line should be applied on the second appeal to the mistake in respect of the grades, but the majority of the court held that the city was not liable for the extra expense due to the mistake in respect of the grades, as it was the duty of the contractor to grade the street in conform-

ance with the profile attached to the contract, and that the direction of the superintendent of streets to proceed and conform the street to the grade given by the city surveyor was a change or modification of the contract, which was beyond his power to make. The dissenting opinion, Martin, J., in which Parker, Ch. J., and Vann, J., concurred, in effect sustains the plaintiff's contention, and takes the position that the principle established on the first appeal entitled the plaintiff to recover the damages due to the mistake as to the grade lines, in view of the showing on the second trial that he was required to follow the grades as given him by the surveyor. J. H. B.

COMMONWEALTH OF PENNSYLVANIA, Appt.,

v.

FRED MAXWELL et al.

Pennsylvania Supreme Court — July 1, 1921.

(271 Pa. 378, 114 Atl. 825.)

Jury — qualification of women.

1. Where, by statute, jurors are to be selected from qualified electors, the adoption of a constitutional amendment making women electors qualifies them for jury duty.

[See note on this question beginning on page 1154.]

— constitutional right — what includes.

2. A constitutional provision that trial by jury shall be as heretofore, and the right thereof remain inviolate, fixes merely the right to jury trial in certain kinds of cases, not the mode of selecting the jurors or their qualifications.

[See 16 R. C. L. 196-198.]

— power of legislature to change qualifications.

3. When, at the time of the adoption of a constitutional provision that trial by jury shall be as heretofore, it was

the custom for the legislature to determine the qualification of jurors, it may change such qualifications at its discretion.

Statute — construction — prospective operations.

4. Legislative enactments, in general and comprehensive terms prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope, coming into existence subsequent to their passage.

[See 25 R. C. L. 778.]

APPEAL by the Commonwealth from an order of the Court of Oyer and Terminer for Erie County (Rossiter, J.) quashing an indictment charging defendants with murder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. C. Arthur Blass and Otto Herbst, for the Commonwealth:

The qualifications of the jury is a matter subject to legislative control, and the legislature may fix qualifications differing from those at common law.

Re Mana, 178 Cal. 213, L.R.A.1918E, 771, 172 Pac. 986; Com. v. Baranowski, 6 Pa. Co. Ct. 157; Klemmer v. Mt. Penn Gravity R. Co. 163 Pa. 529, 30 Atl. 274.

Qualified electors of the female sex are eligible to serve upon grand and petit juries in the courts of Pennsylvania.

Byers v. Com. 42 Pa. 89; Rhines v. Clark, 51 Pa. 96; Haynes v. Levin, 51 Pa. 412; Van Swartow v. Com. 24 Pa. 131; People v. Harding, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555, 19 N. W. 155; People v. Barltz, 212 Mich. 580, 180 N. W. 423; Rosencrantz v. Territory, 2 Wash. Terr. 267, 5 Pac. 305; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Quinn v. United States, 238 U. S. 347, 59 L. ed. 1340, L.R.A. 1916A, 1124, 35 Sup. Ct. Rep. 926.

Messrs. John R. Haughney and Lytle & Perry, for appellees.

Schaffer, J., delivered the opinion of the court:

In this case, the court below quashed an indictment charging the defendants with murder, because a woman served on the grand jury which found the bill. The commonwealth has appealed; and this brings before us the important question whether women are eligible to serve as jurors in Pennsylvania.

It is conceded that, under the 19th Amendment to the Constitution of the United States, women are given the right to vote, and are therefore electors; but the oyer and terminer held that the provision of our Constitution (art. 1, § 6), "trial by jury shall be as heretofore, and the right thereof remain inviolate," preserves in this state trial by jury as it existed at common law, and that neither the Federal Amendment nor its effect upon the Act of April 10, 1867 (P. L. 62; Pa. Stat. 1920, §§ 12,860 et seq.), providing for the selection of jurors, alters the ancient rule that men only may serve.

Let it be noted that what we are

called upon to determine is the composition of juries so far as the qualifications of jurors are concerned, not the conduct of trials before such a body or the kinds of cases which, under the Constitution, must be decided by that character of tribunal.

At the time the provision we are considering was placed in Pennsylvania's first Constitution, in 1776, justice had been administered in the commonwealth according to English forms for about a century. Does the word "heretofore" refer to jury trials as conducted in England, or in Pennsylvania? We find the method of selecting juries and the qualifications of jurors, at the time of the promulgation of this Constitution, September 28, 1776, was regulated in Pennsylvania and in England by legislation, and not by the common law; in the latter country by the Act of 3 Geo. II. chap. 25. 3 Bl. Com. 361.

Under the Laws of the Duke of Yorke, April 2, 1664 (Duke of Yorke's Book of Laws, 1682-1700, p. 33), which were in force in Pennsylvania, it was provided, for the summoning of jurors, that the constable shall warn so many of the overseers to attend as jurymen and return their names to the undersheriff. It was also provided: "No jury shall exceed the number of seven, nor be under six, unless in special causes upon life and death, the justice shall think fit to appoint twelve."

By an amendment (Duke of Yorke's Book of Laws, p. 69) it was provided: "In all cases to be tried by juries at the general court of assizes the number of jurors shall be twelve, but at the several courts of sessions the same number is sufficient, as already in the law is set forth."

The "Frame of Government of the Province of Pennsylvania," confirmed by the first provincial council May 5, 1682, provided: "Eighth. "That all trials shall be by twelve men, and as near as may be peers, or equals, and of the neighborhood,

and men without just exception." Duke of Yorke's Book of Laws, 1682-1700, p. 100.

The "Great Law or the Body of Laws" of the province of Pennsylvania, passed at an assembly held at Chester, December 7, 1682, provided: "Chapter xxxviii. That all trials in civil cases, shall be by twelve men, and as near as may be peers or equals and of the neighborhood, and men without just exception." Duke of Yorke's Book of Laws, p. 117.

This law was abrogated by William and Mary in the year 1693. It was re-enacted, however, the same year, June 1, 1693, by chapter 25 of "A Petition of Right." Duke of Yorke's Book of Laws, p. 199.

From this review of the early statutes, it will be seen that the framers of the Constitution of 1776 knew that legislation determined the qualifications of jurors, not the common law, and, as will be hereafter demonstrated, specifically provided that this method should continue. After the promulgation of our first fundamental law, on March 19, 1785, an act was passed (2 Stat. at L. 486) entitled "An Act for the Better Regulation of Jurors," which provides (§ 2) the sheriff shall summon "sober and judicious persons of good reputation, and none other."

Following the adoption of the Constitution of 1790, the legislature provided the method by which jurors should be selected. By the Act of March 29, 1805 (P. L. 183, chap. LXV., "An Act Directing the Mode of Selecting and Returning Jurors," it was enacted that "in each county of this commonwealth the sheriff and county commissioners, or any two of said commissioners with the sheriff, shall meet at the seat of justice at least thirty days previously to the first court of common pleas to be holden in each and every year, and shall then and there select, from the list of taxable citizens, the names of a sufficient number of sober and judicious persons, to serve as jurors at the several courts hereinafter mentioned."

The Act of April 4, 1807 (P. L. 124), contained the provision: "It shall be the duty of the assessors of the several townships and districts within this commonwealth, and of the assessors of the several wards in the city of Philadelphia, and of each borough, to return the names of all the white male taxable citizens, liable to serve as jurors, of competent ability, understanding, and knowledge of the English language, to the county commissioners of their respective counties; and it shall be the duty of the county commissioners aforesaid, to deposit the names of the persons so returned to them, in the proper wheels in proportion to the numbers requisite for each."

The Act of February 13, 1816 (P. L. 52), further regulated the subject. It says: "In each county of this commonwealth, the sheriff and county commissioners, or any two of the said commissioners with the sheriff, shall meet at the seat of justice at least thirty days previously to the first court of common pleas to be holden in each and every year, and shall, then and there, select from the list of taxable citizens, the names of a sufficient number of sober, intelligent, and judicious persons, to serve as jurors at the several courts to be held in each county, respectively for that year."

An examination of the Act of April 14, 1834 (P. L. 341), "An Act Relative to the Organization of the Courts of Justice," shows that it regulated the whole subject of selecting jurors. Section 85 provides that "the sheriff, and at least two of the commissioners of every county, shall, at least thirty days previously to the first term in every year of the court of common pleas of the respective county, meet, and thereupon proceed with due diligence to select, at the seat of justice thereof, from the taxable citizens of the county, a sufficient number of sober, intelligent and judicious persons, to serve as jurors in the several courts of such county in which juries shall be required to be holden therein during that year."

The Act of March 27, 1865 (P. L. 779), entitled, "An Act for the Better and More Impartial Selection of Persons to Serve as Jurors, in the Several Courts of Somerset, Bedford, Fulton, Westmoreland, Perry, Juniata Counties," required the election of two jury commissioners for these counties, repealed so much of any acts of assembly as made it the duty of the sheriff and county commissioners to select and draw jurors, and required the jury commissioners to select "from the whole male taxable citizens, of the respective county, at large, a sufficient number of sober, intelligent and judicious persons, to serve as jurors, in the several courts of such county, during that year."

Under the Act of April 10, 1867 (P. L. 62, § 2; 2 Purdon, 2062, § 2; Pa. Stat. 1920, § 12,861), which expressly applies to "each of" the counties in the commonwealth, except Philadelphia, the jury commissioners are required to select "from the whole qualified electors of the respective county, at large, a number" such as shall be designated by the court of common pleas, "of sober, intelligent and judicious persons, to serve as jurors in the several courts of such county during that year." The 7th section of this act exempts Philadelphia from its provisions. The statutory enactment which covers Philadelphia is § 2 of the Act of April 20, 1858 (P. L. 354; 2 Purdon, 2077, § 94; Pa. Stat. 1920, § 12,955). It sets forth that "prior to the 1st day of December in each and every year the receiver of public taxes of the said city shall lodge with the said sheriff, for the use of the said board [of judges], a duly certified list of all the taxable inhabitants of the said city, setting out their names, places of residence, and occupation; and prior to the 10th day of December in each and every year it shall be the duty of the said board, or a quorum thereof, to assemble together and select from the said list of taxables a sufficient number of sober, healthy and discreet citizens, to constitute the several

panels of jurors, grand and petit, that may be required for service in the . . . several courts for the next ensuing year, in due proportion from the several wards of the said city, and the principal avocations."

It will thus be seen that since 1805, when the Constitution of 1790 was in force, the persons charged with the duty of jury service have been fixed, from time to time, by the legislature, and have been "taxable citizens," "white male taxable citizens," "male taxable citizens," "taxable inhabitants," and "qualified electors." This follows the rule that the qualification of jurors and the manner of selecting them are usually by statute. 16 R. C. L. 234.

"The mode of selecting electors for jury service has never been regarded as an essential element in the right of trial by jury. Different modes have been adopted and have prevailed at different times, as were best suited to local requirements; and so the method of selection is entirely within the control of the legislature, provided only that the fundamental requisite of impartiality is not violated." 16 R. C. L. 234.

"It was not intended to tie up the hands of the legislature so that no regulations of the trial by jury could be made; . . . all the authorities agree that the substantial features, which are to be 'as heretofore,' are the number twelve, and the unanimity of the verdict. . . . The constitutional provision does not, however, go beyond the essentials of the jury trial as understood at the time. It does not extend to changes of the preliminaries or of the minor details, or to subsequent steps between verdict and judgment. . . . The jury is above everything a practical part of the administration of justice, and changes of nonessential features, in order to adapt it to the habits and convenience of the people, have therefore always been made without hesitation even in this country under the restrictions of the constitutions; . . . other changes, such

as the qualifications of the jurors themselves, the vicinage from which they shall come, the mode of selecting and summoning them, the regulation of venires, and notably, even the matter of challenges, . . . have been held to be within legislative control." *Smith v. Times*, 178 Pa. 481, 499, 35 L.R.A. 819, 36 Atl. 297.

"Jurors must possess the qualifications which may be prescribed by statute. . . ." *Bouvier's Law Dict. Rawle's 3d Rev. vol. 2, p. 1774.*

"Subject to the constitutional provisions as to impairing the right of trial by jury, the legislature has power to define the qualifications of jurors. It may dispense with the freehold qualifications required by common law. *Kerwin v. People*, 96 Ill. 206; *Com. v. Dorsey*, 103 Mass. 412." *Bouvier*, p. 1775.

In *Re Mana*, 178 Cal. 213, L.R.A. 1918E, 771, 172 Pac. 986, it was held that a constitutional provision substantially to the effect that the right of trial by jury shall be secured to all and remain inviolate does not prevent the legislature from authorizing women jurors. The court said (L.R.A. 1918E, p. 772): "Qualifications of the jury is a matter subject to legislative control, and that, even though such qualifications may differ from those at common law, such legislation is nevertheless a valid exercise of legislative power."

Passing upon the precise point that we are called upon to determine, the supreme court of Michigan in *People v. Baritz*, 212 Mich. 580, 180 N. W. 423, in which that court held the constitutional amendment giving women the right to vote operated to make them eligible for jury service under a prior act of assembly, providing that persons being citizens having the qualifications of electors were eligible for jury service, used this language at page — of 212 Mich., at page 426 of 180 N. W.: "It seems to be the settled law in all the states, so far as we have been able upon examination to discover, that the qualifica-

tions of jurors are matters of legislative control, even though the qualifications laid down by the legislature differ from those at the common law. . . . So long as the essential requisites of trial by jury are preserved, it is competent for the legislature to prescribe the necessary qualifications of jurors, and additional qualifications may from time to time be imposed by the legislature."

The qualifications of jurors at common law changed and varied. At an early period it was required that a juror should be possessed of some property as a qualification. *Proffat, Jury Trials*, § 115. At common law, jurors were required to be freeholders, and the qualification continued by statutes from the time of Henry V. down to that of George II. 20 Am. L. Reg. 437. The Statute of 2 Hen. V. chap. 3, requires jurors that pass upon a man's life to have 40 shillings per annum freehold. At the time of the adoption of Pennsylvania's first Constitution, in 1776, there was a property qualification in England for all jurors. 3 Bl. Com. 362.

Just what was the common-law right of trial by jury is somewhat difficult to determine and define. Certain it is that in England it was not in 1776, when our first Constitution was adopted, the same as it had been in earlier times. *Proffat, Jury Trials*; *Forsyth, Trial by Jury*; *History of the Jury System by Lesser*. *Magna Charta* (1215) provided that no man should be deprived of life, liberty, or property unless "by the lawful judgment of his peers and by the law of the land." While this has been popularly accepted as a guaranty of trial by jury, yet such trials, in their present form, did not come into existence until some time later; and the phrase "lawful judgment of his peers and the law of the land," when used, meant nothing more than a guaranty of the right to trial according to one of the then-existing modes—by recognition, compurgation, combat, ordeal, witnesses, and other forms then in

vogue. Bigelow, History of Proc. 155; Taylor, Due Process of Law, Introductory Chapter. In the words of Mr. Justice Williams, in Smith v. Times Pub. Co. 178 Pa. 481, 506, 35 L.R.A. 819, 36 Atl. 308: "It simply protected Englishmen from the power of secret, irresponsible tribunals, and conceded the jurisdiction of the legally established courts over all causes."

The modes of procedure gradually changed, through the centuries which elapsed from the granting of King John's Charter to the founding of the early English colonies in America; at the latter time trial by jury, substantially as we know it, had replaced the other forms.

That a wedding of modern society to the ancient jury system would not be tolerated is pointed out in *Hurtado v. California*, 110 U. S. 516, at page 530, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, at page 118, where, after referring to the various ancient modes of trial, it is said: "When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our 'ancient liberties.' It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government."

The same idea finds expression in *Twining v. New Jersey*, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14, 20, where it was said by Mr. Justice Moody: "It does not follow, however, that a procedure settled in English law at the time of

the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a strait-jacket, only to be unloosed by constitutional amendment."

A careful reading of the words of the section of the Constitution we are considering, as it appeared in the Constitution of 1776 (§ 25), shows that it was not precisely similar to its present phraseology. As it first appeared it was "trials," not "trial," by jury, shall be as heretofore, and the section went on to say: "And it is recommended to the legislature of this state, to provide by law against every corruption or partiality in the choice, return, or appointment of juries."

This first constitutional enactment on the subject indicates that what was to remain as theretofore was the "trials" of certain kinds of cases and the method of trial; they were to be by jury as theretofore,—not by a judge alone, or by some other tribunal,—and the trial itself was to be carried on as such trials had customarily been conducted; and so far as the qualifications of the jurors were concerned, as the latter clause of the section shows, they were to be, as they had been, matters for legislative regulation.

When the section was carried into the Constitution of 1790, it appeared in article 9, the Declaration of Rights, in its present form: "That trial by jury shall be as heretofore, and the right thereof remain inviolate."

It thus appears in the Constitution of 1838 and in the present Constitution. It is evident, however, that what was being guaranteed by these three subsequent instruments was the same thing spoken of in the Constitution of 1776, the right to a jury trial of certain kinds of cases and the method of trial, and not a rigid fixing of the mode of

Jury—constitutional right—what includes.

selecting jurors or their qualifications by past standards. If the qualifications of jurors can be fixed only by the Constitution, it is inconceivable that the right of the legislature to determine what they shall be has not been challenged from the foundation of our present state government until now.

Without feeling called upon to determine what other matters the word "heretofore" in the Constitution of 1873 refers to, we do say that when that Constitution was adopted the uniform method of selecting jurors and determining their qualifications was by legislation, both here and in England.

This was known to the framers of the first and all succeeding Constitutions, in the first being specifically recognized; and it and all the others, in guaranteeing the right of trial by jury, did not in any way limit the legislature from determining from time to time how juries should be composed.

We have, then, the Act of 1867, constitutionally providing that the jury commissioners are required to select "from the whole qualified electors of the respective county . . . persons, to serve as jurors in the several courts of such county," and the 19th Amendment to the Federal Constitution, putting women in the body of electors.

"The word 'elector' is a technical, generic term, descriptive of a citizen having constitutional and statutory qualifications that enable him to vote, and including not only those who vote, but also those who are qualified, yet fail to exercise the right of franchise." *20 C. J. 58.

If the Act of 1867 is prospective in operation, and takes in new classes of electors as they come to the voting privilege from time to time, then, necessarily, women, being electors, are eligible to jury service. That the

—qualification
of women.

Act of 1867 does cover those who at any time shall come within the des-

ignation of electors there can be no question.

"Statutes framed in general terms apply to new cases that arise, and to new subjects that are created from time to time, and which come within their general scope and policy. It is a rule of statutory construction that legislative enactments, in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage." 25 R. C. L. 778.

Summing up, we conclude: (1) There was no absolute and fixed qualification of jurors at common law, and from very ancient times their qualifications were fixed by act of Parliament; (2) the qualification of jurors was not the thing spoken of by the section of the Constitution under consideration; (3) the words "as heretofore" in that section refer to the kinds of cases triable before juries and the trial, not the qualifications of the jurors; (4) the designation "qualified elector" embraces all electors at the time jurors are selected from the body of electors; (5) the term "electors" embraces those who may be added to the electorate from time to time.

While it is true the supreme court of Massachusetts, in giving an advisory opinion to the legislature of that state (Re Opinion of Justices, — Mass. —, 130 N. E. 685), recently determined that, under its Constitution and existing statutes, women are not liable to jury duty, yet the opinion in question holds, as we do, that the qualification of jurors is a matter not constitutionally fixed, but within the control of the legislature, and that the general assembly of that state is authorized to make a change in the statutory law upon the subject, so as to render women liable to jury duty. The only difference between their conclusion and the one reached by us is that we hold our existing legislation sufficient in

Statute—
construction—
prospective
operations.

itself to meet the situation, while they think a further statute is required. Had the Massachusetts legislation been similar to that in Pennsylvania, which is not the case, their conclusion might possibly have accorded with ours; but, however that may be, the decision under discussion is in no sense binding upon us, notwithstanding the high respect in which we hold the tribunal which rendered it.

The pending case calls for the immediate decision only of the right of women to serve as jurors in those counties which are covered by the Act of 1867. We entertain no

doubt, however, that women are eligible to serve as jurors in all the commonwealth's courts.

The order quashing the indictment is reversed, and the indictment is reinstated, with direction to the court below to proceed with the trial of the defendants in due course.

NOTE.

The question whether or not conferring the right of suffrage upon women qualifies them as jurors is treated in the annotation following *STATE v. JAMES*, post, 1154.

STATE OF NEW JERSEY
v.
FRANK J. JAMES, Plff. in Err.

New Jersey Court of Errors and Appeals—June 20, 1921.

(— N. J. —, 114 Atl. 553.)

Jury — eligibility of women.

1. The statute of New Jersey in force at the time of the indictment and trial of the defendant, while not providing in terms that men shall be summoned as jurors, contains a distinct recognition of the common-law qualification that men only shall be impaneled, by the use of the personal pronouns of the masculine gender "he" and "his" in describing the persons who shall be selected as jurors, and is not in violation of any provision of either the state or Federal Constitution.

[See note on this question beginning on page 1154.]

— constitutional right — legislative power.

2. The provisions in the Constitution of New Jersey that the right of trial by jury shall remain inviolate, and that the accused shall have the right to trial by an impartial jury, mean trial by a jury at common law, consisting of twelve men; but these constitutional provisions in no wise trammel legislative power.

[See 16 R. C. L. 196.]

— effect of 19th Amendment.

3. The 19th Amendment to the Constitution of the United States, adopted prior to the commission of the homicide by the defendant in this case, emancipates women so far only as the

right of suffrage is concerned, and does not operate in terms or by implication to qualify them as jurors; it requires legislation to do that; and this state, since the trial of the defendant, has enacted a statute which includes within the description of persons liable to jury duty, women as well as men.

[See note in 12 A.L.R. 525.]

Appeal — summoning only male jurors as error.

4. To summon and return only men as jurors, when both men and women may be selected, is not error unless the omission to select women is made through bias, prejudice, or other improper motive.

Jury — right of accused to select.

5. A defendant has no right to say what jurors shall try him; his right extends no further than to exclude jurors by whom he objects to being tried.

Constitutional law — right to raise question of exclusion of women from jury.

6. Even if the omission of the jury commissioners to return women upon the panel were unlawful, and if the act recognizing the common-law qualification of men only as jurors were unconstitutional in that regard, still the question cannot be raised by the defendant, a man, as he was not thereby injured; as a white man cannot urge as an infraction of his rights that the rights of another race have been assailed, so a man cannot complain because women are denied the same rights as men; such rights may be demanded only by members of the proscribed race or sex.

Evidence — order of proof — discretion.

7. When the matters to be proved upon a trial are distinct, though component parts of a demand or a defense, the order of their production is wholly immaterial and always within the discretion of the court.

[See 26 R. C. L. 1037.]

— confession — corpus delicti.

8. Upon the trial of a criminal case it is not error to permit the introduction of the prisoner's confession before the corpus delicti is proved.

[See 1 R. C. L. 587.]

— method of proving corpus delicti.

9. In a prosecution for murder the corpus delicti may be proved by the confession of the prisoner which is corroborated by other evidence; the law does not require full proof of the body of the crime independent of such confession.

[See 1 R. C. L. 586 et seq.; 13 R. C. L. 739.]

Venue — death in one county from blow in another.

10. Where a man is feloniously stricken down in one county and dies as a result thereof in another county, he may, under our statute, be indicted and tried in the county where stricken; and on such trial the order of proof, whether of confession of striking the blows in the county where the trial is had is first admitted, and evidence of the corpus delicti

in the county where the dead body was found is afterwards admitted, or vice versa, is discretionary with the trial court and entirely immaterial.

[See 13 R. C. L. 882; 26 R. C. L. 1037.]

Evidence — homicide — collateral issue — insanity in family.

11. The statute (Act April 12, 1919 [P. L. 303]) which empowers a jury, as part of their verdict of murder in the first degree, "upon and after consideration of all the evidence," to recommend imprisonment of the convict at hard labor for life (in which case that punishment shall be imposed), does not permit the trial of a collateral issue, such as insanity in the family of a prisoner who does not plead insanity in himself as a defense in bar, to enable the jury to decide to render a merciful verdict for a prisoner on trial for murder; an issue must be single and certain, and an irrelevant one will not be permitted to be tried.

— burden of proving insanity.

12. A criminal defendant's mental condition need not be such as to enable him to realize the fullest extent of his acts before he may be convicted; the law presumes a man to be sane, and if the contrary exists, thereby defeating this natural presumption, it must be shown by the party who alleges it, and, when insanity is set up as a defense, the test of responsibility is the capacity of the defendant at the time of the doing of the act complained of, to distinguish between right and wrong with respect to that act.

[See 8 R. C. L. 64, 175; 13 R. C. L. 710-712; 14 R. C. L. 599-602, 624.]

Homicide — in perpetration of robbery — degree.

13. The Crimes Act makes murder which shall be committed in perpetrating or attempting to perpetrate any robbery (and certain other offenses) murder in the first degree and, while insanity is a defense to any murder, nevertheless a homicide committed in the perpetration of robbery, if murder at all, is, by the statute, made murder in the first degree, and, as the evidence justified the conviction of the prisoner, who was engaged in robbery, of the crime of murder in the first degree, the jury could not have reduced the grade of the homicide to murder in the second degree.

ERROR to the Court of Oyer and Terminer for Camden County to review a judgment convicting defendant of murder in the first degree. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Harris & Harris, for plaintiff in error:

The conduct of the jury commissioners in leaving the women off the panel under circumstances as proven in this case is a violation of the constitutional or statutory rights of the defendant.

Brown v. State, 62 N. J. L. 666, 42 Atl. 811; *Re Grilli*, 110 Misc. 45, 179 N. Y. Supp. 795; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Rogers v. Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; *Gibbs v. State*, 45 N. J. L. 379, 46 Am. Rep. 782; *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62.

Defendant, being a male citizen, was a proper person to interpose a challenge to the array.

McKinney v. State, 3 Wyo. 719, 16 L.R.A. 710, 30 Pac. 293.

On a charge of homicide, the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body.

Best, Presumptions of Law & Fact, § 201; 1 *Starkie*, Ev. 575, see *Rex v. Hogg*, 6 Car. & P. 176; 2 *Hale*, P. C. 290; *Whart. Crim. Ev.* § 324.

A confession alone ought not to be considered sufficient proof of the corpus delicti, but it may be proved by circumstantial evidence.

Stringfellow v. State, 26 Miss. 157, 59 Am. Dec. 247; *People v. Hennessey*, 15 Wend. 147; *Bines v. State*, 118 Ga. 320, 68 L.R.A. 33, 45 S. E. 376, 12 Am. Crim. Rep. 205; *Dimmick v. United States*, 70 C. C. A. 141, 135 Fed. 257; *State v. Gillis*, 73 S. C. 318, 5 L.R.A. (N.S.) 571, 114 Am. St. Rep. 95, 53 S. E. 487, 6 Ann. Cas. 993.

Until it is shown by independent testimony that a crime has been committed within the jurisdiction of the court, the confession of the defendant is inadmissible to prove the corpus delicti.

State v. Guild, 10 N. J. L. 163, 18 Am. Dec. 404; *State v. Kwiatkowski*, 83 N. J. L. 650, 85 Atl. 209; *State v. Strong*, 83 N. J. L. 177, 83 Atl. 506; *United States v. Mayfield*, 59 Fed. 118; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433; *Ryan v. State*, 100 Ala. 94, 14 So. 868; *Lambright v.*

State, 34 Fla. 564, 16 So. 582, 9 Am. Crim. Rep. 383; *Hawkins v. State*, 60 Neb. 380, 83 N. W. 198; *Com. v. Costley*, 118 Mass. 1.

The jury may recommend imprisonment for life; and testimony showing that a large number of the members of the family of the defendant had been insane, some of whom had died insane, and some had committed suicide, is admissible.

State v. Rombolo, 89 N. J. L. 565, 99 Atl. 434; *State v. Martin*, 92 N. J. L. 436, 106 Atl. 385; *State v. Palmieri*, 93 N. J. L. 195, 107 Atl. 406; *State v. Carrigan*, 93 N. J. L. 268, 108 Atl. 315.

Messrs. Charles A. Wolverton and Albert E. Burling for the State.

Walker, Ch., delivered the opinion of the court:

The plaintiff in error was indicted jointly with Raymond W. Schuck for the murder of David S. Paul, on October 5, 1920. The court ordered that separate trials be accorded to each of the defendants. The plaintiff in error was thereupon tried and convicted of murder in the first degree, without recommendation. He brings that conviction before this court for review under § 136 of the Criminal Procedure Act (2 Comp. Stat. 1910, p. 1863) on assignments of error and specifications of causes for reversal.

The assignments of error are six in number; so are the specifications of causes for reversal; and the assignments and specifications are the same in substance, although somewhat varied in words in some instances. Succinctly stated, they are as follows:

1. The said Frank J. James, the defendant, on being called to the bar, interposed a challenge to the array upon the ground that the commissioners of juries of the county of Camden deliberately failed and refused to select any women for jury duty, although there were 5,000 or more women within the county qualified for jury service, but selected only men, which was and is contrary to the rights of the defendant

under the Constitutions of the United States and the state of New Jersey and of the statute of said state of New Jersey in such case made and provided.

2. The court below erroneously admitted the alleged confession of the defendant before the corpus delicti had been proven. The state was permitted to offer the alleged confession for the purpose of proving the corpus delicti.

3. The court below erroneously refused to order the prosecutor of the pleas to furnish counsel for the defendant a copy of his alleged confession or statement before the same was offered in evidence, in order to allow counsel to inspect the same to ascertain in advance whether it contained incompetent or illegal matter.

4. The court below erroneously refused to allow plaintiff in error to prove his family history, showing that there had been in the immediate family a number of persons who were insane. That the jury was entitled to know the family history in order that they might consider that in arriving at a recommendation of imprisonment for life under the Law of New Jersey of 1919.

5. The court below overruled the motion on behalf of the defendant to direct a verdict for the reasons as therein stated: (1) Because the court overruled the challenge to the array; (2) because the corpus delicti was not proven except by the confession of the defendant; (3) because the corpus delicti was not proven; (4) because no crime was proven to have been committed in Camden county; (5) because the court overruled the offer to prove the insanity of members of the defendant's family in order that the jury might consider the same in order to arrive at a conclusion as to whether a recommendation of imprisonment for life should be made.

6. The court erroneously refused to charge the request on behalf of the defendant as follows: If his mental condition was such as to render him incapable of forming the

specific intent to kill, which is the essential ingredient of murder of the first degree, the prisoner will not be entitled to acquittal, but his offense will be murder of the second degree.

These assignments of error and specifications of causes for reversal will be considered in the order in which they are thus raised.

First. Upon being arraigned the defendant interposed a challenge to the array of jurors. The ground of the challenge was that in selecting the petit jury list of 500 names no women were chosen, and in the selection of the names from the list to be placed in the wheel no women were chosen, and that no women were on the panel. This is asserted to be an invasion of the defendant's constitutional rights, because, it is said, nowhere in the Constitution of the United States is it provided that jurors should be men, while it is therein provided that a defendant shall be tried by an impartial jury, and our state Constitution provides for trial by an impartial jury, and our statute has determined the qualifications of jurors thus: "He shall be a citizen of this state," etc.

The Constitution of New Jersey relating to jury trials (art. 1, §§ 7, 8), omitting an irrelevant provision, reads:

"Sec. 7. The right of a trial by jury shall remain inviolate.

"Sec. 8. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury."

This constitutional guaranty as to the right to jury trial has been held to be trial by a jury at common law.

State v. McCarthy, 76 N. J. L. 295, 297, 69 Atl. 1075; Brown v. State, 62 N. J. L.

666, 676, 678, 42 Atl. 811. A common-law jury consisted of "twelve free and lawful men." 3 Bl. Com. 352. Women could not serve as jurors at common law except upon a jury to try an issue under a writ of de ventre inspiciendo, whether a woman be with child or

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not. 3 Bl. Com. 362. A petit or traverse jury is a body of twelve men who are sworn to try the facts of a case as they are presented in the evidence. Cooley, Const. Lim. 7th ed. p. 455. But our constitutional provisions in no wise trammel legislative power with reference to the qualifications of jurors.

Our statute relating to the qualifications of petit jurors is found in Comp. Stat. vol. 3, p. 2965, as follows: "6a. Sec. 1. Every person summoned as a grand juror in any county in this state, and every petit juror returned for the trial of any action or suit of a civil or criminal nature, shall be a citizen of this state, and reside within the county from which *he* shall be taken, and above the age of twenty-one years and under the age of sixty-five years, and shall not, at the time of *his* selection by an official having, directly or indirectly, any official interest in or connection with the administration of justice. And if any person who is not so qualified shall be summoned as a grand juror or as a juror on the trial of any such action in any of the courts of this state, or if any person shall be summoned as a petit juror at any stated term of any court of this state, who has served as such at any of the three stated terms next preceding the day to which he may be summoned, it shall be good cause of challenge to any juror, who shall be discharged upon such challenge being verified according to law or on *his* own oath or affirmation in support thereof; provided, that no exception to any such juror on account of *his* citizenship, age or any other legal disability shall be allowed, if *he* has been sworn or affirmed."

While this statute does not provide in terms that men shall be summoned as jurors, it contains a distinct recognition of the common-law qualification that men only shall be impaneled, by the use of the personal pronouns of the masculine gender "*he*" and "*his*." And it is not perceived how the

sheriff could have summoned women under the law of this state as it stood at the time of the proceedings against the prisoner in this case, without violating the oath of office which as sheriff-elect he was required to take according to the act concerning sheriffs (4 Comp. Stat. p. 4839, § 3) that he "will truly, faithfully, and impartially and with all convenient speed, summon, impanel and return, or cause to be summoned, impaneled and returned, good and lawful men for jurors, able and sufficient and not suspected or procured, as is or shall be directed by law."

The jury commissioner appointed by the chancellor, who acts with the sheriff under the supplement to the act concerning juries (P. L. 1913, p. 828), known as the Chancellor-Sheriff Jury Act (*Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916A, 102), is required, before entering upon the discharge of his duties, to take an oath faithfully and impartially to execute the duties of his office according to the best of his skill and understanding; and he is presumed to know and understand the law. That these required oaths were taken by the sheriff and the jury commissioner, and that they were subscribed and filed as required by the acts mentioned, is to be conclusively presumed, as it is not even suggested that they were not. The jury commissioner discharged his duty when, in collaboration with the sheriff, he summoned, or rather participated in the summoning, of men as jurors; for such was the law.

At the time of this homicide (October 5, 1920) and of the indictment (November 16, 1920) and trial of the defendant (December 16, 1920), the 19th Amendment to the Federal Constitution, enfranchising women, had been adopted (August 26, 1920) and was part of the law of the land. It reads as follows:

"The right of citizens . . . to vote shall not be denied or abridged by the United States or by any state on account of sex.

—eligibility of
women.

"Congress shall have power to enforce this article by appropriate legislation."

It will be observed that this part of the organic law makes no provision whatever about jurors. It emancipates women only so far as the right of suffrage is concerned, and leaves no impediment in the way of the legislature clothing them with capacity to become and serve as jurors; and it may well be that the legislature possessed that power before the adoption of this Amendment. That, however, is a question with which we do not have to deal.

But the Amendment itself does not operate in terms or by implication to qualify women as jurors. It requires legislation to do that.

Justice Depue in *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811, went into the history of trial by jury and showed conclusively that the qualification of jurors is a matter resting in legislative enactment.

It is contended on behalf of the plaintiff in error that the jury commissioners, in drawing the jury in this case, excluded women as a class, and that therefore the panel was illegal; but, as shown, neither by the Constitution nor any statute of this state was it provided that women should or might be jurors. By the common law they are men, and such descriptions of jurors as are found in our statutes relate only to men, as already remarked.

The 19th Amendment to the Federal Constitution, as above stated, makes no provision whatever with reference to the qualification of jurors. It confers alone the right of suffrage. The spirit of equality of the sexes which it breathes moved the legislature of New Jersey in 1921 to amend our act concerning jurors so as to include within the description of persons liable to be summoned as grand and petit jurors, women as well as men. P. L. 1921, chap. 28. This is not a declaratory, but a remedial, statute, and clearly indicates that women had to be qualified by legislative en-

actment in order to be summoned, and to serve, on juries in this state.

The supreme judicial court of Massachusetts recently delivered an opinion to the senate and house of representatives of that commonwealth, that their Constitution and statutes did not operate to give that right or impose that duty. Their statute is different from ours and would be more favorable to the contention of the prisoner in this case. And the court, among other things, said:

"The words of Gen. Laws, chap. 234, § 1, to the effect that 'a person qualified to vote for representatives to the general court shall be liable to serve as a juror' are broad enough as matter of mere verbal analysis, in connection with Gen. Laws, chap. 51, § 1, conferring such right to vote upon women, to include women as well as men. Those words, however, like the words of every statute, are not to be interpreted in their simple literal meaning, but in connection with the history of the times and the entire system of which the statute in question forms a part, in the light of the Constitution, of the common law, and of previous legislation upon the same subject. The provisions of law prescribing the qualifications of those subject to jury service have been in almost the same essential words since the adoption of the Constitution. No sound ground for the contention that women could be jurors existed until after the adoption of the 19th Amendment to the Federal Constitution. It cannot be thought that the general court by re-enacting in Gen. Laws, chap. 234, § 1, the description of those liable to be drawn as jurors, in words previously used and without change, intended to include women.

"This conclusion is confirmed by the facts that the statute contains no reference to exemption of the large numbers of women who manifestly ought not to be required to serve as jurors, that no provision is made for the convenience of women in courthouses, some of which are

already overcrowded and unfit for their accommodation, and that the jury of 'men' is continued in Gen. Laws, chap. 123, § 57, as applicable to the cases there described. It is a familiar rule of statutory construction that the re-enactment of an earlier statute does not affect its meaning or enlarge its scope in the absence of definite indication of a legislative purpose to that end."

See Re Opinions of Justices, — Mass. —, 130 N. E. 685.

In the case of *People v. Manuel*, 41 Cal. App. 153, 182 Pac. 306, an error alleged was that the sheriff failed and intentionally omitted to draw men on the jury, but confined himself to a certain class of citizens, namely, women, and that in so doing he was biased and prejudiced in summoning the jury. But the court held that the persons summoned were good and lawful persons and in every way competent to act as jurors, and that that was not questioned; that there was nothing in the record which tended to show the slightest bias on the part of the officer in summoning the jurors, and, on the contrary, it appeared that he acted with entire impartiality and without prejudice to the substantial rights of the defendant; that, considered as jurors, the law makes no distinction between men and women, and, subject to qualifications applicable alike to each, they were equally competent to act as jurors; hence it could not be said that the sheriff in summoning all women confined himself to a certain class as distinguished from another class, any more than if he had summoned all men, or a mixed jury composed of a greater number of either sex than the other.

Under the act of our last legislature, permitting women as well as men to serve on grand and petit juries, it is not required that an even number of each sex shall be summoned, so that in nearly every instance hereafter there will doubtless be a preponderance of either men or women; and on traverse juries, by the exercise of the right of

challenge, in many cases our juries will in the future, as in the past, be composed wholly of men, and in other cases hereafter wholly of women. This, in and of itself, would not be error. Error would exist only if the commissioners, through improper motives, excluded members of one or the other sex in the drawing of the general panel.

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On the challenge to the array in this case, which of course was made before the trial was gone into, Sheriff Corson and Commissioner Lennon, the commissioners who drew the jury, were examined as witnesses. The sheriff testified that he put no women on the jury because he thought that they could not be properly taken care of at the courthouse; that he did not do so with the idea that he was discriminating against anybody; that the jury was drawn without any thought of the defendant, James; that the jury was drawn from the great body of citizens of the county and without bias against any citizens on account of race, creed, or sex; and that he used his best judgment. Commissioner Lennon testified that he made up the list without any regard to race, creed, color, condition, or sex; that he did not put any women on or keep any off; that he used his best judgment, which was not in any way prejudiced against the defendant.

A defendant has no right to say what jurors shall try him. His right extends no further than to exclude jurors by whom he objects to being tried. This court recently, in *State v. Langhans*, — N. J. —, 112 Atl. 191, observed, at page 192: "He [defendant] was entitled to a trial by a fair and impartial jury. He was entitled, in the selection of the jury, to exercise the right of challenge which gives to a defendant the opportunity of saying that he shall not be tried by some particular jurors. The right of challenge, however, is

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the right of exclusion, not a right of selection. It does not give to a defendant the right of saying what particular jurors shall try him."

In *Re Grilli*, 110 Misc. 45, 179 N. Y. Supp. 795, where a state constitutional amendment enfranchising women had been adopted, an application to place women's names on jury lists was made, and it was held: "For over fifty years the people generally throughout the country,—surely in this state,—the courts, and legislatures have proceeded upon the idea that women were not entitled as citizens to act as jurors. This long-continued and undisputed practical construction of a constitutional provision is, in effect, a direct judicial construction."

"While the doctrine stated may be subject to abuse and a ready refuge against the assumption of responsibility, in this case the course of conduct of the Federal and state governments in limiting jury service to males has been so unvaried, thousands upon thousands of cases, both civil and criminal, have been tried with only male jurors, with but little objection, for so many years, to adopt any other course than to follow this rule of construction would be disregarding that which is practically, if not entirely, conclusive."

See also *Harland v. Territory*, 3 Wash. Terr. 131, 13 Pac. 453; *Re Mana*, 178 Cal. 213, L.R.A.1918E, 771, 172 Pac. 986.

However, even if the omission of the jury commissioners to return women upon the panel from which the jury that tried the defendant was selected was unlawful, and our Jury Act recognizing the common-law procedure of drawing and summoning only men as jurors was unconstitutional, as contended for,

Constitutional law—right to raise question of exclusion of women from jury.

still the question cannot be raised nor the point made by the defendant, a man, as he was not thereby injured. It was long ago held that, where colored men were

not summoned and returned on jury panels, members of that race could raise the objection that they were discriminated against. See the Federal and state cases cited in *McKinney v. State*, 3 Wyo. 719, 16 L.R.A. 710, 30 Pac. 293. But white men could not object that colored men were not on the juries that tried them.

In Wyoming the constitutional provision was, like ours (art. 1, § 7), that "the right of a trial by jury shall remain inviolate," and their statute in force restricted the qualification of jurors to male citizens having the qualification of electors. There was also another constitutional provision that "the rights of citizens of the state of Wyoming to vote and hold office shall not be abridged or denied on account of sex;" also "both male and female citizens of this state shall equally enjoy political, civil, and religious rights and privileges." And the supreme court of the state, in 3 Wyo. 719, observed that no provision had been made by statute for the admission of female electors to the jury box, unless their Constitution can be so construed as to confer the right without legislation. The court said at page 726 of 3 Wyo.: "The plaintiff in error asserts a right or privilege of having members of the opposite sex, as well as those of his own sex, to determine his rights, because they are unconstitutionally excluded from enjoying a right granted to them, and not because anyone of his own sex is denied the right. If women have the right, if it is a right, to serve as jurors, and to 'assist in the administration of justice' thereby, it seems that no one but a woman—one of the class or sex whose rights have been invaded—can assert that right. It must be demanded by one who has been denied the equal protection of the law, and a civil or political right or privilege of which she, in common with her sex, has been deprived. The courts will not listen to an objection made to the constitutionality of an act by a par-

ty whose rights it does not affect, and who therefore has no interest in defeating it. Cooley, Const. Lim. 164."

And at page 728 of 3 Wyo.: "As a white man cannot urge as an infraction of his rights that the rights of another race have been assailed, so a member of one sex cannot complain because the members of another sex are denied the same rights as persons of his sex. The deprivation of the rights, privileges, or immunities of a class, race, or sex, which are guaranteed by the organic law, can only be determined in a proceeding instituted by one of the proscribed class, race, or sex, where relief may be given directly to the oppressed one in his suit and upon his demand. A woman must be on trial to demand the rights of her sex, or to assert that they have been unjustly or unconstitutionally discriminated against. A man cannot assert her right for her in his cause. He is not the party whose rights are affected, and he has no interest in defeating an unconstitutional or invalid law affecting those of the opposite sex. Without intimating, then, what our views might be as to the meaning and force of the constitutional provision providing that the members of both sexes should equally enjoy all civil, political, and religious rights and privileges, when such a question is fairly and properly presented, without passing in this case upon the right, duty, or eligibility of female citizens to serve as jurors, where they possess the same statutory qualifications as the men, without construing the various constitutional provisions bearing directly or remotely upon the matter, without attempting to say whether the constitutional provision conferring the right or privilege, if it is so conferred, requires legislation to clothe it with force and vitality,—we decide but this, and that is sufficient: That the plaintiff in error, a man, cannot claim that any civil, political, or other right or privilege of his, or of his sex, is infringed, invaded, or

annulled by a statute excluding members of the other sex from the jury which tried him, or which by its terms confines the selection of jurors trying him to those of his own sex. He has been tried by his peers. He has not been denied the equal protection of the law. He has not been discriminated against because of his sex. There was no error in the refusal of the trial court to order a removal of the cause to the Federal court, or in overruling the challenge to the array, because of the fact that the jury that tried the plaintiff in error was composed exclusively of members of his own sex, or in overruling the motion in arrest of judgment based on this ground alone."

This decision is entirely apposite on the same question here involved, namely, objection by a man that women were entitled to serve, but were not returned, upon the jury that tried him. The case is a well-considered one resting on authority and right reason, and its doctrine should be adopted and applied here. Upon the authority of *Lang v. Bayonne*, 74 N. J. L. 459, 15 L.R.A. (N.S.) 93, 122 Am. St. Rep. 391, 68 Atl. 90, 12 Ann. Cas. 961, the prisoner cannot be heard to say that our statute, which made no provision for summoning women jurors, is unconstitutional and an invasion of his rights, as he is not injured thereby.

Second. The next point to be considered is the objection that the confession of the defendant was inadmissible before the corpus delicti was proved, and that the corpus delicti was not proved otherwise than by the confession of the defendant. The first objection here stated concerns only the order of proof. That is a matter within the discretion of the court. *Donnelly v. State*, 26 N. J. L. 601; *Bodee v. State*, 57 N. J. L. 140, 30 Atl. 681. Evidence—order of proof—discretion.

And where the matters to be proved are distinct, though component parts of a demand or defense, the order of their production is wholly

immaterial. *Lusk v. Colvin*, 8 N. J. L. 62.

In the case of *West v. State*, 22 N. J. L. 212, upon a conviction for forgery, the defendant brought error, and the supreme court decided, at page 238:

"The second exception is that the court admitted evidence to show that the signature 'Caleb Shreve' as one of the subscribing witnesses to the deed charged to be forged was not the signature of Caleb Shreve, the grandfather of the witness, though the identity of the subscribing witness to the deed with the grandfather of the witness had not been established.

"The decisive answer to the objection is that the evidence is competent as far as it goes; though not an entire chain, it is a complete link in the chain. The fact stated was competent and relevant. To how much weight it might eventually be entitled would depend, doubtless, upon how strictly the state identified the subscribing witness with the person referred to."

A defendant on trial for a crime is not harmed if his confession is introduced in evidence and then the

~~—confession—~~ corpus delicti is proved; for, if the order of proof were reversed and the corpus delicti were first established, and then the confession, the result would not be different. It is the corpus delicti plus the confession, or the confession plus the corpus delicti, that makes the case. Again a defendant is not harmed if his confession is first introduced, because, if that were not followed by proof of the corpus delicti, the defendant would go acquit, if that were all there were to the case. But the objection here that the confession was admitted before the corpus delicti was proved is untrue in point of fact. The testimony of Duncan, Parker, Paul (son of deceased), and Stem, presently to be adverted to, establishing the corpus delicti, was given before any evidence of defendant's confession was introduced. The assertion that the

corpus delicti was not proved independently of the defendant's confession is not a fact. George W. Duncan testified that on October 16, 1920, he was on a hunting trip with two companions in the vicinity of Fisher's Dam, near Irick's causeway, Burlington county, where they came upon automobile tracks and footprints which looked suspicious, and upon investigation they found a spot that looked as though something had been buried there. The witness and one of his companions dug and unearthed the body of a man in a shallow grave. Ellis Parker, county detective of Burlington, testified that he knew David Paul, the deceased; that on October 16, 1920, he was notified that a body had been found near Irick's causeway, to which place he repaired and found the deceased to be David Paul. He also described certain wounds upon the body. Harry Paul that night at the morgue saw and identified the body as that of his father. Dr. Stem, the county physician of Camden, made an examination of Paul's body and testified concerning it as follows:

"The wound that caused death was a compound fracture of the skull. There was an opening in the skull about 5 inches long on the left side, about 2 inches above the ear, just about 5 inches long—extended down into the brain tissue. That was the direct cause of death. There was an incised wound on the inner side of his right arm, forearm, about 4 inches above the wrist, about an inch and a half long, quite deep. . . .

"There were five incised wounds on top of the head, on the left side, following over and into, 2 inches long, and went down to the bone; there was a contusion of the right side of the face, high up in the temple region down from the lower jaw, quite a large swelling there, a large contusion, and the crevice of the lower jaw was broken at that point."

There was much more evidence, irrespective of the defendant's con-

fession, to the effect that Paul had met a felonious death. And in this situation, namely, proof of the death of a person by foul means and the confession of a party that he murdered the man whose death is so proved, the law of this state is entirely settled; for in *State v. Kwiatkowski*, 83 N. J. L. 650, 85 Atl. 209, this court held that the only limitation upon the use as evidence against him of a prisoner's confession of murder, voluntarily made, is the want of proof of corpus delicti. If death through criminal agency be proved, and a man confesses to having caused that death, he may be convicted of murder on his confession. Furthermore, in *State v. Banusik*, 84 N. J. L. 640, 64 Atl. 994, this court held that in a prosecution for murder the corpus delicti may be proved by the confession made by the defendant which is corroborated by other evidence. The law does not require full proof of the body of the crime independent of such confession. These two authorities are entirely dispositive of the defendant's contention concerning the corpus delicti; but, if anything were wanting on that score, it is supplied by the admission of defendant's counsel on the argument, his brief containing this statement: "Nothing was heard of Paul until October 16th, eleven days after his disappearance, when his body was found by two gunners, buried in a shallow hole near Irick's causeway in the pines of Burlington county, about 30 miles from Camden. The body showed that he had been killed by blows on his head, and that his death from violence was not self-inflicted."

As seen above, the corpus delicti was proved independently of the confession, but, if it were not, as contended for by the prisoner, still the confession was so thoroughly corroborated by other evidence that both together afforded full proof of the body of the crime.

The further point, however, is made that proof of the murder in

Camden county is required before the prisoner's confession could lawfully be offered in evidence. This contention is devoid of merit.

Assuming that the death of Paul occurred in Burlington county, where he was found dead, still indictment and trial in Camden county, where he was feloniously stricken, if the proof established that fact,—and it did, was legal, and the order of proof, whether of confession first and corpus delicti afterward, or vice versa, was discretionary with the trial court and entirely immaterial.

Venue—death in one county from blow in another.

Chief Justice Beasley, in writing the opinion of the supreme court in *State v. Wyckoff*, 31 N. J. L. 65, said at page 68: "The general rule of the law has always been that a crime is to be tried in the place in which the criminal act has been committed. It is not sufficient that part of such act shall have been done in such place, but it is the completed act alone which gives jurisdiction. So far has this strictness been pushed that it has been uniformly held that if a felony was committed in one county, the accessory having incited the principal in another county, such accessory could not be indicted in either. This technicality, which, when applied to the several counties of the same kingdom or state, appears to have little to recommend it, was nevertheless so firmly established that it required the Statute of 2 & 3 Edw. VI. chap. 24, to abolish it, and this statute has been re-enacted in this state. Nixon's Dig. 199."

This act, as amended, is to be found in *Comp. Stat.* vol. 2, p. 1839, § 59, and provides that, whenever any person shall be feloniously stricken or poisoned in one county and shall die of the same stroke or poisoning in another county, the offender may be indicted and tried in either county.

That Paul was feloniously stricken in Camden county is established by the confession which was volun-

tarily made, as the prisoner's counsel conceded. This proof came after the corpus delicti in the county of Burlington was established, but, as shown above, this concerned only the order of proof, and of itself was immaterial. When the case closed, it was proved by competent evidence that the deceased had been feloniously stricken in Camden, and that his dead body was found in Burlington county. In which county he died did not appear. •He expired in the automobile in which he was feloniously stricken down and in which he was being conveyed from Camden to Burlington. If he died in Camden, the offense was complete there; if in Burlington, the culprit was, nevertheless, subject to indictment and trial in Camden under the statute. It would have been the same if he had died out of the state, as our act (2 Comp. Stat. p. 1839, § 60) provides that, where any person shall be feloniously stricken within the jurisdiction of this state, and shall die of such at any place out of the jurisdiction, an indictment found in the county in which such stroke shall happen shall be good and effectual, etc. This statute was construed and applied in *Hunter v. State*, 40 N. J. L. 495.

Third. The point that the trial judge erroneously refused to order the prosecutor of the pleas to furnish counsel for the prisoner a copy of the confession (which was verbal, although taken down stenographically and afterward written out) is neither briefed nor argued, is without the slightest legal foundation, and will not be further noticed.

Fourth. It is argued on behalf of the prisoner that it was error for the judge to refuse to admit evidence of the prisoner's family history, which it was claimed would show a taint of insanity, which the prisoner must have inherited. This was not offered as an absolute defense of insanity, but only that the jury could take it into consideration on the question whether or not to recommend imprisonment for life

under the amendment of the Crimes Act (P. L. 1919, p. 303), in which event no other punishment could be imposed. The amendment empowers the jury, as part of their verdict of murder in the first degree, "upon and after consideration of all the evidence," to recommend imprisonment at hard labor for life. This point was argued in the most general way, to the effect that the jury might have been led by the proffered testimony to have mitigated their verdict, which was practically a sentence of death, to what would have been practically a sentence of imprisonment for life. We say "practically" because the jury does not impose the sentence, but finds the verdict upon which the prisoner is sentenced by the court, which sentence, however, in a verdict of murder in the first degree, is circumscribed by the law to that following such verdict and without any discretionary power in regard thereto being vested in the judge.

The legislature could never have intended by this act to open the door to a trial of a collateral issue, such as insanity in the family of a prisoner who had not pleaded insanity in himself as a defense in

Evidence—
homicide—
collateral issue
—insanity in
family.

bar, to enable a jury to decide to render a merciful verdict for a prisoner on trial for murder, as an examination of the legislation on the subject will demonstrate. The amendment of 1919 was not the first of its kind. The provision for recommendation of life imprisonment first appeared in 1916 (P. L. p. 576), which provided that the jury at the time of rendering a verdict of murder in the first degree might recommend imprisonment at hard labor for life, in which case that punishment should be inflicted. There was no provision that the recommendation should be upon consideration of the evidence; and this court, in *State v. Martin*, 92 N. J. L. 436, 106 Atl. 385, held that the facts upon which a conviction of murder of the first degree rests had

no necessary connection with the recommendation, which was discretionary and required no consideration of the facts, and that an instruction to the jury that they might consider the testimony tending to show the character of the crime, etc., was not permissible comment on the evidence, and was error. The opinion was filed March 3, 1919. The legislature was then in session and passed the amendment of that year (P. L. 1919, p. 303, *supra*), which was approved April 12, 1919, and provided that such recommendation as is here being discussed should only be made "upon and after consideration of all the evidence," meaning, of course, all of the evidence adduced between the state and the prisoner on the issue of guilt or innocence. Here is discoverable an unmistakable legislative intent to change the law as laid down in the decision of *State v. Martin*, which construed the amendment of 1916 as not requiring consideration of the facts of a given case in order for a recommendation to be made. See also *State v. Carigan*, 93 N. J. L. 268, 108 Atl. 315.

All acts of the legislature are passed with reference to the construction put upon prior acts by the courts. 36 Cyc. 1153; *Frost v. Barnert*, 56 N. J. Eq. 290, at page 292, 38 Atl. 956.

It is a general principle that an issue must be single and certain, and that an irrelevant one will not be permitted to be tried. This rule precluded the proffered evidence, and its exclusion was correct.

Fifth. The next assignment of the prisoner is that the trial judge refused to direct a verdict at the close of the case, for the following reasons: (1) Because the court overruled the challenge to the array; (2) because the corpus delicti was not proven except by the confession of the defendant; (3) because the corpus delicti was not proven; (4) because no crime was proven to have been committed in Camden county; (5) because the court overruled the offer to prove

insanity of members of the family of the defendant.

This assignment, as such, was not briefed or argued by the prisoner's counsel, and was, consequently, abandoned. But each numbered subdivision was the subject of other assignments which were argued and have been considered and disposed of above.

Sixth and lastly. It is contended on behalf of the prisoner that the judge erroneously refused to charge the jury that, if his mental condition was such as to render him incapable of forming a specific intent to kill, his offense would be murder in the second degree. The only argument advanced to support this is that every defendant on trial must be of such mental condition that he is able to know the fullest extent of the result of his acts before he may be convicted. It is not the law that a defendant's mental condition must be such as to enable him to realize the ^{—burden of proving insanity.} fullest extent of his acts.

The full extent of the result of a murder extends far beyond the fact itself and the immediate parties to it. Its ramifications vary in various cases. In *Wilson v. State*, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428, one question was as to the effect of voluntary intoxication on the degree of the crime committed by the defendant, and this court held, at page 184 of 60 N. J. L., that if by law deliberation and premeditation are essential elements of the crime (and they are in murder), and by reason of drunkenness or any other cause it appears that the prisoner's mental state is such that he is incapable of such deliberation and premeditation, then the crime has not been committed; there is a failure on the part of the state to prove the crime into which premeditation must enter. In the case at bar intoxication was not interposed as a defense to the degree of the prisoner's crime, and, furthermore, there was no proof that the defendant was intoxicated. To

reduce the grade of the crime reliance is probably rested, in the exception under consideration, upon the theory that the jury might have found that the prisoner was not of sound mind. But this could not be, because no evidence was laid before the jury tending to show insanity in the prisoner. The law presumes a man to be sane; and if the contrary exists, thereby defeating this natural presumption, it must be shown by the party who alleges it. *State v. Hill*, 65 N. J. L. 626, 47 Atl. 814, 12 Am. Crim. Rep. 191. Even if insanity had been set up as a defense in this case, the test of responsibility would be the capacity of the defendant at the time of the doing of the act complained of, to distinguish between right and wrong with respect to that act. *Mackin v. State*, 59 N. J. L. 495, 36 Atl. 1040. By the right and wrong test, which is firmly embedded in the settled law of our state (59 N. J. L. 497, 36 Atl. 1040), the prisoner was clearly guilty, if the facts of the case made against him were true, and they were so found by the jury upon abundant evidence.

There is still another answer to this contention: It is that the Crimes Act (Comp. Stat. p. 1779, § 106) makes murder which shall be

committed in perpetrating or attempting to perpetrate any robbery (and certain other offenses) murder in the first degree; and

**Homicide—in
perpetration of
robbery—degree.**

this provision is repeated id. p. 1780, § 107, in which the degrees of murder are defined. These provisions of our criminal law are so inexorable that, if two persons agree to rob another (as in this case), and one strikes a blow that results in the death of the victim, both are guilty. *Roesel v. State*, 62 N. J. L. 216, 222, 41 Atl. 408. These statutory enactments are but declaratory of the common law. See 4 Bl. Com. 200. While insanity is a defense to any murder, nevertheless a homicide committed in the perpetration of robbery, if murder at all, is by the statute made murder in the first degree; and, as the evidence in this case justified the conviction of the prisoner, who was engaged in robbery, of the crime of murder in the first degree, the jury could not have reduced the grade of the homicide to murder in the second degree. The trial judge was therefore right in refusing to charge the instruction requested by the defendant.

Upon this whole matter we are clearly of opinion that the judgment under review should be affirmed.

ANNOTATION.

Conferring right of suffrage upon women as qualifying them as jurors.

The present annotation supplements that to *People v. Barltz*, 12 A.L.R. 525, wherein the earlier cases are treated.

There is a diversity of conclusion among the few recent cases as well as among the earlier cases which have passed upon the question under consideration.

On the one hand is the decision in *STATE v. JAMES* (reported herewith) ante, 1141, to the effect that the 19th Amendment to the Constitution of the United States does not qualify women as jurors, and that a statute defining the qualifications of jurors, which recognizes the common-law qualification

by the use of the personal pronouns of the masculine gender, cannot be held to confer upon women the right or duty to serve as jurors. However, the court also points out the fact that the legislature of New Jersey, since the trial of the prosecution under consideration, has enacted a statute which includes within the description of persons liable to jury duty, women as well as men.

And in *Re Opinion of Justices* (1921) — *Mass.* —, 130 N. E. 685, it was held that neither the Constitution of the United States, including the 19th Amendment, nor the Constitution and laws of Massachusetts,

rendered women subject to jury duty, the court being of the opinion that while no reason based on the Constitution existed why women, when they became qualified to vote, should not also be held eligible to jury service if the legislature so determined, it could not be said that they were so qualified by re-enactment without change of a statute subsequent to the adoption of the Equal Suffrage Amendment, where the whole constitutional and statutory history of the state indicated that trial by jury referred to the common-law right of trial by a jury of twelve men. And see this case as set out and quoted in *STATE v. JAMES* (reported herewith) ante, 1141, and as discussed in *COM. v. MAXWELL* (reported herewith) ante, 1134.

On the other hand, it has been held in Pennsylvania that a statute providing that the commissioners shall select juries from the whole qualified electorate of the county, qualifies

women, in view of the 19th Amendment, to serve as jurors. *COM. v. MAXWELL* (reported herewith) ante, 1134. This, of course, is an express holding that the Suffrage Amendment conferred the right upon women to serve as jurors under the then-existing Pennsylvania statutes. It is also worthy of mention that the court, in reaching this conclusion, pointed out that the provisions of the Pennsylvania Constitution guaranteeing trial by jury "as heretofore" referred to the "mode" of trial, and not to the "qualifications" of jurors, and that the term "electors" includes all who are, or may be, added to the electorate from time to time.

And that in California women are equally competent with men to serve as jurors in criminal cases, see *People v. Manuel* (1919) 41 Cal. App. 153, 182 Pac. 306, as set out in *STATE v. JAMES* (reported herewith) ante, 1141.
G. J. C.

JAMES L. SHUTE, Appt.,

v.

BIG MEADOWS INVESTMENT COMPANY, Respt.

Nevada Supreme Court—June 6, 1921.

(— Nev. —, 198 Pac. 227.)

New trial — for loss of stenographer's notes — preparation of record.

1. Loss of the stenographer's notes is not a ground for a new trial if the information necessary to the preparation of a proper record for motion for new trial in the lower court, and for appeal, may be supplied from other sources than such notes.

[See note on this question beginning on page 1158.]

— loss of stenographer's notes.

2. Loss of stenographer's notes which were relied upon for the preparation of a motion for new trial is not a ground for granting a new trial, if it is not shown that there is irregularity or error in the proceedings or trial of the case, or that injustice had been done.

[See 20 R. C. L. 288, 289; see note in 18 A.L.R. 111.]

Appeal — presumption as to justice of judgment.

3. Upon appeal from an order granting a new trial for loss of stenographer's minutes, the court will presume that the original proceeding was free from error, and that the judgment was a just one, until irregularity or injustice is made to appear.

[See 2 R. C. L. 219; 15 R. C. L. 875.]

APPEAL by plaintiff from an order of the District Court for Pershing County (McFadden, J.) granting a new trial after judgment in his favor in an action against defendant investment company. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. R. M. Hardy and T. A. Brandon for appellant.

Messrs. M. B. Moore and J. G. Brown for respondent.

Ducker, J., delivered the opinion of the court:

On May 12, 1920, the district court rendered judgment in this case in favor of appellant.

Respondent noticed his intention to move for a new trial, assigning in said notice several statutory grounds. Thereafter respondent filed a paper indorsed "Statement in Lieu of Memo. of Errors," containing the following: "Comes now the defendant above named, by its attorneys, and says: That in its notice of intention to move for a new trial, heretofore filed in said above-entitled action, one of the grounds named, and upon which defendant chiefly relies, is the ground as stated in § 5320, Nevada Rev. Laws 1912, to wit: 'Error in law occurring at the trial and excepted to by the party making the application.' That the records in said case, and particularly the stenographer's report of the evidence, has [have] all been destroyed, and that therefore defendant is without any means or information with which to prepare, serve, and file, as required by law, its memorandum of errors upon which said defendant chiefly relies on its said 'Notice of Intention to Move for a New Trial.' "

Thereafter, on motion of respondent, the court made the following order, granting a new trial: "It is hereby ordered that the motion of the defendant heretofore made for a new trial of the above-entitled action be, and the same is hereby, granted, and that a new trial of the issues in the above-entitled action be had, on the grounds that the stenographic notes of the official stenographer who reported the proceedings upon the trial of said action have been destroyed by fire,

and the defendant is therefore deprived of the use and benefit of the same, with which to prepare, serve, and file its memo. of errors herein."

The action of the trial court in awarding a new trial for this cause is assigned as error by appellant.

In support thereof it is urged: (1) That the reason given by the court for awarding a new trial is not included in the grounds enumerated in the statute for granting a new trial, and that such grounds are exclusive; and (2) that no showing whatever is made that a proper record could not have been made by respondent upon which to base its motion for a new trial, notwithstanding the loss of the stenographer's notes.

The latter contention is well taken, and we therefore conclude that it is not necessary to determine whether or not the section of the Civil Practice Act prescribing grounds for a new trial includes all the cases in which a district court may grant a new trial. Assuming, but not deciding, that the statutory enumeration of causes for a new trial is not exclusive, we are nevertheless of the opinion that the loss of the reporter's notes in the instant case did not authorize the court to grant a new trial.

New trial—loss of stenographer's notes.

If a trial court has inherent power to grant a new trial for causes other than those enumerated in the statute, it must be for some cause that was good at common law. The general rule at common law was that a new trial would be granted where an injustice had been done. 12 Enc. Pl. & Pr. 718.

This court in *Scott v. Haines*, 4 Nev. 426, speaking of the authority of courts to grant a new trial, said: "Without saying that this section embraces all cases in which a district court may grant a new trial, it may be safely said that a verdict or

other decision 'cannot be set aside where no irregularity or error whatever is shown, and the verdict or decision is in accordance with and justified by the evidence.' The court in such case has no more right to set aside a verdict or decision than it has to render a judgment without pursuing the forms prescribed by law. Error in some respects, or injustice in the result, alone authorizes an interference with a judgment or decree once rendered."

It does not appear that there has been any irregularity or error in the proceedings or trial of this case, or that any injustice has resulted, and, in the absence of any showing to the contrary, it must be presumed that the case is free from error, and that the judgment is a just one.

It is urged that injustice will result from the loss of the reporter's notes, because, by reason thereof, counsel for respondent is unable to prepare and present to the trial court a memorandum of errors upon which respondent chiefly relies on its motion for a new trial. But there has been no showing made to this effect. The errors claimed may have been few and simple, and the information necessary to the preparation of a proper record for the lower court and the

Appeal—presumption as to justice of judgment.

appeal as well supplied from other sources than the reporter's notes. The

trial judge's recollection of what transpired at the trial as to the objections made, rulings thereon, and exceptions taken, and the evidence necessary to properly present the points, or counsel's own recollection or notes, so far as the record discloses, may have been ample in this respect. It does not appear by affidavit or other appropriate way that a sufficient record could not have been obtained from these sources. In fact, counsel for respondent seems to have relied solely upon the point that, because they were de-

prived of the use and benefit of the reporter's notes to make up their memorandum of errors, respondent was entitled to a new trial. This, as appears by the order of the court, was the sole ground upon which the new trial was granted. The order was not made upon the ground that the respondent had lost the benefit of his exceptions through the loss of the stenographer's notes, but upon the ground that it was deprived of the use and benefit of the same.

The court in its opinion cites 20 R. C. L. 288, where the rule is stated that it seems to be well established as a general rule, where a party has lost the benefit of his exceptions from causes beyond his control, a new trial is properly awarded, although it has been held otherwise in a few jurisdictions. Conceding this to be the general rule in those states where the statutory grounds for a new trial are not exclusive, still it does not appear in this case that the respondent has lost the benefit of his exceptions through the destruction of the reporter's notes. The most that has been shown is that the notes have been destroyed.

In *Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027, 12 Ann. Cas. 1048, cited and discussed by the trial court, in which an order denying a new trial was reversed because a portion of the evidence, objections, and rulings of the court thereon, and exceptions, together with the depositions of witnesses read upon the trial, had been lost by the reporter who took down the shorthand notes of the trial, and could not be duplicated, it appears that both parties agreed that, because of the inability of the plaintiff in error to furnish the necessary record, a new trial should be granted. Moreover, a confession of error, signed by the attorney general, prosecuting attorney, and special attorney who assisted the latter at the trial, was filed, wherein manifest error, prejudicial to the rights of the plaintiff in error, was admitted in the proceedings of the court. These circumstances, to-

New trial—for loss of stenographer's notes—preparation of record.

gether with the fact that the defendant had been convicted of the crime of murder and sentenced to death, lead us to regard *Richardson v. State* as an extreme case. Neither does it represent the weight of authority on this point. While it has been held in other jurisdictions that the loss or destruction of the reporter's notes is ground for a new trial, yet the weight of authority upon the principle involved, in those jurisdictions where the statutory grounds for a new trial are not exclusive, is to the effect that where a record, papers, or evidence necessary to a determination of a case have been lost or destroyed without the possibility of substitution, a new trial will be granted. 20 R. C. L. 288; *Bailey v. United States*, 3

Okla. Crim. Rep. 175, 104 Pac. 917, 25 L.R.A.(N.S.) 860.

As stated in the note to the last citation: "This rule presupposes that there is no means available to appellant of restoring the record. Where such means are available, he is, of course, bound to avail himself of them."

Even though we grant, for the purposes of this decision, that the trial court was not limited in its jurisdiction by the grounds enumerated in the statute, it was without authority to order a new trial upon the mere fact of the destruction of the reporter's notes.

The order granting a new trial is reversed.

Sanders, Ch. J., and Coleman, J., concur.

ANNOTATION.

Inability to perfect record for appeal as ground for new trial.

This question is fully considered in the annotation to *State v. Ricks*, 13 A.L.R. 99. The reported case (*SHUTE v. BIG MEADOWS INVEST. CO.* ante, 1155) is in line with the cases cited in the former note to the effect that loss of parts of the record is not ground for new trial, if there is any other method of securing the desired information.

The only other case which has been found since the publication of the former note is *Larson v. Shockley* (1921) — Mo. App. —, 231 S. W. 1030, which holds, in line with cases cited on page 105 of the prior note, that a new trial will not be granted although the stenographers' notes have been lost, if the appellant has been negligent in the matter. In that case the trial took place at the April term, 1918, and the appeal was continued to the March term, 1921, when a motion was made to remand for a new trial because of loss of stenographers' notes which prevented perfection of

the record. It was not shown when the request was made to the stenographers for transcripts, although one of the stenographers, who had gone into the Army, stated that his notes were left in the vault of the clerk of the court, and no showing was made of any attempt to find them there. The court says: There is no evidence of any showing that any effort was ever made to get a transcript of the testimony taken by the soldier. There is no showing when the stenographers' notes were first discovered to have been misplaced, or that any effort had ever been made to prepare a bill of exceptions without them. "It also seems to us that proper diligence would have required appellants to have learned whether or not a transcript of the evidence could have been secured, long before they knew, or claim they did learn that fact."

H. P. F.

SHERMAN KELLOGG
v.
FRED A. WINCHELL et al.

District of Columbia Court of Appeals — June 6, 1921.

(— App. D. C. —, 273 Fed. 745.)

Appeal — individual right of attorney to protection.

1. An attorney employed on a contingent fee, who is dismissed after appealing from an adverse decision, may be permitted by the court to prosecute the appeal on his own account for the protection of his rights in the case.

[See note on this question beginning on page 1162.]

Attorney and client — power to dismiss attorney without permission of court.

2. After an attorney regularly employed to prosecute an action has docketed an appeal from an adverse judgment, a client has no authority, without permission of the court, to substitute another attorney or appear personally to move for the dismissal of the appeal.

— conditions of dismissal.

3. Where no charge of misconduct

is made, the court will permit the dismissal of an attorney only upon such conditions as will protect the attorney's interests, where his services were to be compensated for only by a percentage of the recovery.

Parties — right of attorney to intervene.

4. An attorney employed on a contingent fee is vested with an interest in the cause of action which entitles him to intervene in the action to protect it.

MOTION to dismiss an appeal taken by complainant's attorney from a decree of the Supreme Court dismissing a bill filed for the construction of a will. *Motion overruled on condition.*

The facts are stated in the opinion of the court.

Messrs. Henry E. Davis and Edmond S. Fletcher for plaintiff.

Messrs. Frank J. Hogan, George E. Hamilton, and John J. Hamilton, for defendants:

Either party to a suit may question an attorney's right to represent his alleged client.

6 C. J. 634.

The authority of an attorney being revocable at the pleasure of his client, he cannot object to any course the client may choose to take; he does not acquire any vested interest in the cause which is affected by the dismissal of the suit.

6 C. J. 643; Swanson v. Chicago, St. P. & K. C. R. Co. 35 Fed. 638.

The mere fact that an attorney has an agreement for a contingent fee gives him no right to force upon his clients a continuance of litigation which the latter wishes ended.

Re Paschal (Texas v. White) 10 Wall. 483, 19 L. ed. 992; 6 C. J. 677; Manning v. Clark, 40 Fed. 125; Ronald

v. Mutual Reserve Fund Life Asso. 30 Fed. 228.

An attorney has no right to continue in the name of his former client or himself the prosecution of an appeal.

Kappler v. Sumpter, 33 App. D. C. 404; Hallam v. Oppenheimer, 3 App. D. C. 329.

Smyth, Ch. J., delivered the opinion of the court:

Mr. Sherman Kellogg, the appellant, on April 19, 1919, entered into a written contract with Mr. Edmond C. Fletcher, a practising attorney, by which the latter was authorized to commence and prosecute such suits, actions, and proceedings as he might think proper to protect the interests of Kellogg in the estate of his brother, William Pitt Kellogg, who had died in this District some time before, and which provided that Fletcher was to receive for his

services a sum equal to 50 per cent of any amount obtained by his client, either directly or indirectly, through his efforts. It was further provided that he should not be entitled to any fees unless he recovered money or property over and above that to which Kellogg was entitled under the terms of the will. Fletcher, pursuant to this contract, did certain things, among them being the institution of this suit in the supreme court of the District to have construed "the provisions of the will." On motion the bill was dismissed, and thereupon Fletcher took this appeal. Kellogg executed the necessary undertaking on appeal, and paid the surety company for signing it. On December 2 the record was docketed here.

Some days afterwards Kellogg wrote Fletcher a letter, saying he canceled the contract, and directing him to proceed no further in the case. Fletcher refused to concur in the cancelation, saying he expected to recover \$46,000 or \$50,000 "out of one item" of the will. Kellogg insisted upon the cancelation, but Fletcher refused to recognize his right to cancel, claiming that he had, by his contract, acquired an interest in the subject of the litigation. On April 13 Fletcher, in association with Mr. Henry E. Davis, another member of our bar, who claims no authority in this matter except as he derives it from Fletcher, filed a brief in support of the appeal. May 2 some of the appellees interposed a motion calling on Fletcher to show by what right he prosecuted the appeal, and demanding, in the event that he failed to show any right, that the brief be stricken out and the appeal dismissed. Two days thereafter, Kellogg, acting by Mr. W. C. Clephane, an attorney, filed a paper in which it was stated that Kellogg appeared specially for the purpose only of consenting to the motion to dismiss, that he had never authorized the docketing of the appeal, and that he did not desire that it should be further prosecuted. In

answer to this motion Fletcher showed the facts related above and many others, and moved to strike from the files the so-called special appearance of Kellogg.

We cannot doubt that, on the facts disclosed, Fletcher had full authority to docket the appeal, and, as an incident, the power to do all the things necessary to prosecute it. Kellogg had no right to appear personally (Mott v.

Foster, 45 Cal. 72), Attorney and client—power to dismiss attorney without permission of court. or to substitute Mr. Clephane for Fletcher in the case,

without the court's permission (Curtis v. Richards, 4 Idaho, 434, 95 Am. St. Rep. 134, 40 Pac. 57; Walton v. Sugg, 61 N. C. (Phill. L.) 98, 93 Am. Dec. 580; Sloo v. Law, 4 Blatchf. 268, 269, Fed. Cas. No. 12,958; Wilkinson v. Tilden (C. C.) 14 Fed. 778). Orderly procedure requires this.

Where an attorney is dismissed for misconduct, the permission is usually granted as a matter of course; but where, as in the present case, no charge of that kind is made against him, the court may, in its discretion, impose such conditions upon the client as

will protect the at- —conditions of dismissal. torney's interest, especially where his services were to be compensated for only by a percentage of a fund to be created through his efforts. Kappler v. Sumpter, 33 App. D. C. 404; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Yuengling v. Betz, 58 App. Div. 8, 68 N. Y. Supp. 574; New York Phonograph Co. v. Edison Phonograph Co. (C. C.) 150 Fed. 233; Du Bois v. New York, 69 C. C. A. 112, 134 Fed. 570; Re Herman (D. C.) 50 Fed. 517; Wilkinson v. Tilden, 14 Fed. 778; Curtis v. Richards, 4 Idaho, 434, 95 Am. St. Rep. 134, 40 Pac. 57; Silverman v. Pennsylvania R. Co. (C. C.) 141 Fed. 382; Ronald v. Mutual Reserve Fund Life Asso. (C. C.) 30 Fed. 228.

In Kappler v. Sumpter, *supra*, we said: "Where it is possible, under

the circumstances of a particular case, to protect the former counsel by imposing some condition for that purpose, it seems that courts usually exercise their discretion to do so."

Circuit Judge Wallace, in the Wilkinson Case, 14 Fed. 778, ruled that, where a litigant seeks to dismiss his attorney, "the court will hold the client to fair dealing, and will refuse its assistance to any attempt to take an unfair advantage of one of its officers. In this behalf courts have frequently and usually required the client to discharge the attorney's claim for services in the suit as a condition of substitution. . . . Ordinarily, when there is an agreement that the attorney shall get his fees out of the fund in suit, there is an implied condition that he is to be continued in charge until an available fund is realized."

As we understand the decision of the Supreme Court of the United States in *Re Paschal* (Texas v. White) 10 Wall. 483, 19 L. ed. 992, it does not conflict with these views. The client there was the state of Texas. The opinion proceeded upon the theory that public policy required that the state should have a right, without condition, to substitute one attorney for another, but it was careful to declare that the rule announced was not one of universal application. It said: "Whether in any case, in virtue of an agreement made, an attorney may successfully resist an application of his client to substitute another in his place, we need not stop to inquire."

In the recent case of *Barnes v. Alexander*, 232 U. S. 117, 58 L. ed. 530, 34 Sup. Ct. Rep. 276, the court held that an attorney, acting under a contingent fee contract, had a lien upon the fund created through his effort, and intimated that the lien attached to the right vested in the attorney "to earn a fee contingent upon success." The trend of the modern decisions of the court is to protect the right of the attorney to receive compensation for his services. *Ingersoll v. Coram*, 211 U. S.

335, 365-368, 53 L. ed. 208, 228-230, 29 Sup. Ct. Rep. 92; *McGowan v. Parish*, 237 U. S. 285, 35 Sup. Ct. Rep. 543, 59 L. ed. 955.

Fletcher, by his return to the rule, shows that he has performed much service under the contract for which he is entitled to compensation. It was undoubtedly the intention of the parties that he should be permitted to prosecute the case to a final determination. Only by this means could he earn the fees contemplated by the contract. While there are no words of grant in the contract, it is a "principle even of the common law that words of covenant may be construed as a grant, when they concern a present right." *Barnes v. Alexander*, 232 U. S. 121, 58 L. ed. 533, 34 Sup. Ct. Rep. 276, *supra*; *Sharington v. Strotton*, 1 Plowd. 298, 308, 75 Eng. Reprint, 454; *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253; *Ladd v. Boston*, 151 Mass. 585, 588, 21 Am. St. Rep. 481, 24 N. E. 858. Fletcher was given a present right "to try to earn a fee contingent upon success." *Barnes v. Alexander*, *supra*. Hence he was vested with an interest in the cause of action.

Parties—right of attorney to intervene.

Gulf, C. & S. F. R. Co. v. Miller, 21 Tex. Civ. App. 609, 53 S. W. 709. Having this interest, he may, in accordance with the principle announced in *Sullivan v. Tobin*, 42 App. D. C. 430, intervene in the suit to protect it.

This is a proceeding in equity, where forms may be disregarded. He may, therefore, if he desires, prosecute the appeal, the same as if he had formally intervened, for the purpose of having his interest in the litigation determined. Whatever he does, however, must be done on his own account, for he has no longer any right to represent Kellogg. That right was terminated by the latter's letter revoking his authority. *Wilkinson v. Tilden* and *Kappler v. Sumpter*, *supra*. To say that Kellogg had

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a right to put an end to his authority to represent him is quite different from saying that the court is not required to aid Kellogg in doing so. The brief filed on behalf of Kellogg may be considered from now on as Fletcher's brief. If Fletcher elects to proceed as just indicated, he must signify his inten-

tion to do so by a writing filed within ten days from the handing down of this opinion. If he does so elect, the motion of the appellees to dismiss will be overruled; if he does not, the motion will be sustained, and the appeal dismissed, without further action of the court, at appellant's cost.

ANNOTATION.

Right of an attorney to prosecute an appeal to protect his contingent fee notwithstanding desire of client to dismiss appeal or to substitute attorneys.

For revocability of power of agency to collect interest in estate, see the annotation to *Todd v. Superior Ct.* 7 A.L.R. 938.

For agreement for contingent fee as assignment of interest in judgment, see the annotation to *Nichols v. Orr*, 2 A.L.R. 449.

The reader is reminded that the rights of an attorney under a particular contract for a contingent fee, particularly whether under it he may prosecute the original case for his own benefit, are matters in great apparent confusion, notwithstanding the efforts that have been made to reduce them to rules.

It will be seen that in the reported case (*KELLOGG v. WINCHELL*, ante, 1159) it is held that an attorney had a right to prosecute an appeal already taken from a judgment dismissing a suit brought by the attorney for the construction of a will, the undertaking on appeal having been executed by the client, although the client later informed him that he canceled the contract between them, and directed him to proceed no further in the case. The contract authorized the attorney to commence and prosecute such suits, actions, and proceedings as he might think proper to protect the interest of the client in the estate of his deceased brother, and provided that the attorney was to receive for his services a sum equal to 50 per cent of any amount obtained by his client, either directly or indirectly, through his efforts. It was further provided that he should not be entitled to any fees unless he

recovered money or property over and above that to which the client was entitled under the terms of the will. The attorney, pursuant to this contract, did certain things, among them being the institution of this suit, and it was held that he "was vested with an interest in the cause of action."

In Georgia, cases have arisen under a statute which in substance declares that "attorneys at law shall have a lien upon suits, judgments, and decrees for money, and no person shall be at liberty to satisfy said suit, judgment, or decree until the lien, or claim of the attorney for his fees, is fully satisfied, and attorneys at law shall have the same right and power over said suits, judgments, and decrees, to enforce their liens, as their clients had, or may have, for the amount due thereon to them." Thus, in *Kimbrough v. Pitts* (1879) 63 Ga. 496, where counsel asserted a contingent fee and had filed a bill of exceptions alleging error, it was held that "counsel have a lien on a suit undertaken by them for fees, and may prosecute such suit in this court in the name of the client for the recovery of such fees, without regard to the objections of the client and his direction to dismiss the writ of error."

So, in *Walker v. Equitable Mortg. Co.* (1902) 114 Ga. 862, 40 S. E. 1010, where counsel alleged that their fees were contingent on the result of the litigation, it was held that "a plaintiff in error in this court cannot withdraw a writ of error over the objection of his counsel, when it appears

that the litigation is such that it would, if successful, result in a recovery of property on which counsel would have a lien for fees earned in the case."

(It may be noted that it was similarly held, under a similar statute in Alabama, in a case where it does not appear whether the fee was contingent or not. *Fuller v. Lanett Bleaching Co.* (1914) 186 Ala. 117, 65 So. 61.)

In *Ingram v. Johnson* (1918) — Okla. —, 176 Pac. 241, however, where an appeal by defendants was dismissed, the court said: "The attorneys cannot be heard to object to a dismissal of the appeal, for the sole reason that they had a contract with one of the defendants below for a contingent fee. Section 249, Revised Laws, 1910: 'Should the party to any action or proposed action, whose interest is adverse to the client contracting with an attorney, settle or compromise the cause of action or claim wherein is involved any lien as mentioned in the preceding sections hereof, without a satisfaction of the attorney's claim, such adverse party shall thereupon become liable to such attorney for the fee due him or to become due him under his contract of employment, to the extent of reasonable compensation for all services performed by him in connection with said action or contemplated suit.'"

In *Delaney v. Husband* (1899) 64 N. J. L. 275, 45 Atl. 265, it was held that "the fact that an attorney has a disputed agreement with his client, which, if established, would entitle him to a share of whatever money might be recovered in a certain cause, will not warrant the attorney in prosecuting as attorney of record for his client, but against her will, a writ of error to reverse a judgment rendered in the cause." The court said that an attorney may, "by lawful agreement with his client, obtain an interest in the cause of action, or in any recovery to be had thereon, which he will be entitled to protect and enforce by such remedies as would be available to other persons having the same interest. But as these rights do not legally grow out

of, or depend upon, his position as attorney of record in an undecided cause, so that position cannot be used to maintain them. The opposite doctrine would tend to subvert that confidence between attorney and client, during litigation with the client's adversary, which public policy so strongly favors.

In *State ex rel. Ryan v. Miller* (1918) 82 W. Va. 490, 96 S. E. 791, it was held that "where the plaintiff in a civil suit secures the services of an attorney to prosecute the same upon the basis of receiving compensation out of any recovery had, and a trial of such suit results in a verdict and judgment in favor of the defendant, the plaintiff is under no obligation to such attorney to prosecute a writ of error to such judgment, and if satisfied with the judgment of the lower court may refuse to prosecute such writ of error."

In *Counsman v. Modern Woodmen* (1903) 69 Neb. 713, 98 N. W. 414, a controversy as to who was the beneficiary under an insurance policy, the money having been paid into court, it was held that "attorneys who have undertaken to establish, for a contingent fee, a client's right to a fund in court, and who, after rendering valuable services, have been defeated in the district court, and who have furnished a supersedeas bond to retain the fund and are taking steps to have the decision against their client reviewed on error, are entitled, when their client under these circumstances refuses to pay them, and instructs them to proceed no further on her behalf, to prosecute error proceedings in her name, on their own behalf, in order to collect their contingent fee out of the fund still in court, if they can establish their client's right to it." The terms of the contract do not appear. It was said by the court that the client's statement to her attorneys was that she had received nothing, but did not wish to prosecute the case further.

Where several plaintiffs, heirs of a decedent, joined in an action to set aside an order admitting to probate a will of such decedent, and to have the will decreed to be revoked by an alleged subsequent will, and for leave

to probate the posterior will, three of the plaintiffs, after an appeal from a judgment adverse to the plaintiffs, moved to dismiss the action, as to themselves, upon the payment of such proportion of the costs as the court found just and equitable, stating that they had received nothing, and did not believe they had a good cause of action, which motion was resisted by their former attorneys, who had a contract with them and the other plaintiffs by which they were to receive for their services and expenses a proportionate share of whatever might be recovered by judgment, or received in settlement or compromise, or otherwise, it being further agreed "that no settlement or compromise can or shall be made by any of the parties hereto, unless consented to by all the parties hereto, and unless consented to by" a certain one of such attorneys. Such former attorneys had, under such contract, expended considerable money in the prosecution of the suit, and earned attorneys' fees for services of considerable value. It was held that such three plaintiffs were entitled to dismiss the action, as to their interests therein, upon payment of a proportionate amount of taxable costs, and that the liability of the plaintiffs moving to dismiss, for expenses incurred by their attorneys and for the value of their services under a contract for contingent fees, could not be litigated or determined in this action, on a motion to dismiss the action as to such plaintiffs. The court observed: "We are not asked to dismiss the action or the appeal. It is only asked that the three parties filing the motions to dismiss be allowed to discontinue the litigation as it affects them, and that the cause of action stated in the petition as to them be dismissed upon the payment of costs, on terms to be fixed by the court as just and equitable. This is a right which should not be denied them. Whether the attorneys representing the moving plaintiffs prior to the time of filing their motions to dismiss have obtained any lien on, or interest in, the cause of action, which will permit of their prosecution of the proceeding to final

determination and judgment in their own name, or in the name of the parties to the original action, for the enforcement of their rights under their contract of employment, and the protection of the interests, if any, which they possess in the subject-matter of the action, presents a question not now properly before us, and which we need not here discuss or determine." *Williams v. Miles* (1902) 63 Neb. 851, 89 N. W. 455.

In *Marshall v. Smith* (1913) — *Tex.* Civ. App. —, 158 S. W. 1047, where pending an appeal and prior to the filing by the appellants' attorneys of their power of attorney in the papers of the cause transferring to them an interest in the suit, the parties had fully compromised all matters at issue between them, wherein it was agreed that appellants, in consideration of such settlement, would dismiss the appeal, the appellees having no notice actual or constructive of the interest of said attorneys in said cause of action at the time of such agreement, it was held that the appeal must be dismissed notwithstanding the opposition of said attorneys for the appellants.

Reference may be made to *Gage v. Atwater* (1902) 136 Cal. 170, 68 Pac. 581 (not a very clearly reported case), where it appears from the report that a decision in favor of the plaintiffs in ejectment was rendered June 29, that on July 6 the defendants notified their attorney that they would apply for an order substituting another attorney in his stead; that judgment for the plaintiffs was entered July 17, and that on August 4 an order substituting the said other attorney was made. After the court's decision in the cause the client informed the attorney that he did not desire to proceed any further with the litigation, and conveyed his interest in the land to the plaintiffs. The court in affirming the order of substitution stated, *inter alia*, that it appeared that the attorney did not claim "any interest in the land involved in the action, and that the terms of his employment as attorney in

the cause were that he should receive a reasonable compensation for his services in case of success, and should receive no compensation unless he should be successful. It also appears that he had advanced to Atwater [the client] certain moneys with which to defray the expenses incurred in the action, a portion of which, however, had been repaid, and that owing to the pecuniary inability of Atwater he is unable to collect from him the compensation to which he

claims to be entitled; or the amount unpaid for the advances made during the continuance of the proceeding." The court said further as to the appeal: "No objection has been made to the hearing of the appeal herein, and we have considered it as if the order were appealable. We do not, however, wish our silence upon that question to be taken as indicating any opinion upon the question, or as a precedent to be hereafter relied upon."

B. B. B.

ALBERT E. WHITE

v.

EASTERN MANUFACTURING COMPANY et al., Appts.

Maine Supreme Judicial Court — March 15, 1921.

(— Me. —, 112 Atl. 841.)

Workmen's compensation — injury as member of volunteer fire department — arising out of employment.

An injury to an employee by turning his ankle when he, as a member of the village volunteer fire department, is hastening from the plant to respond to a fire alarm, does not arise out of or in the course of his employment within the meaning of the Workmen's Compensation Act, although it occurred within the plant and the employee was given the time necessarily expended in performing his duties as fireman.

[See note on this question beginning on page 1169.]

TRANSFER by the Supreme Judicial Court for Penobscot County for the opinion of the Law Court of an appeal by respondents from a decision of the Industrial Accident Commission in favor of petitioner in a proceeding by him under the Workmen's Compensation Act, to recover compensation for an injury arising out of and in the course of his employment. *Appeal sustained.*

The facts are stated in the opinion of the court.

Messrs. Andrews & Nelson and W. T. Gardiner, for respondents:

It was error for the chairman of the industrial accident commission to find that the accident arose out of and in the course of the employment.

Mailman's Case, 118 Me. 172, 106 Atl. 606; Westman's Case, 118 Me. 133, 106 Atl. 532; William Sinclair v. Carlton, 7 B. W. C. C. 937, 51 Scot. L. R. 759; Pierce v. Boyer-Van Kuran Lumber & Coal Co. 99 Neb. 321, L.R.A. 1916D, 970, 156 N. W. 509; Urban v. Topping Bros. 184 App. Div. 633, 172

N. Y. Supp. 432; Inland Steel Co. v. Lambert, 66 Ind. App. 246, 118 N. E. 162, W. C. L. J. 347; Rochford's Case, 234 Mass. 93, 124 N. E. 891; O'Toole's Case, 229 Mass. 165, 118 N. E. 303; Mann v. Glastonbury Knitting Co. 90 Conn. 116, L.R.A.1916D, 363, 12 N. C. C. A. 891; Carnahan v. Mailometer Co. 201 Mich. 153, 167 N. W. 9; Clark v. Clark, 189 Mich. 652, 155 N. W. 507; Berg v. Great Lakes Dredge & Dock Co. 173 App. Div. 82, 153 N. Y. Supp. 718; Ocean Acci. & G. Co. v. Industrial Accident Commission, 173 Cal. 313,

L.R.A.1917B, 336, 159 Pac. 1041; *Hatter v. Payne*, 1 Cal. Ind. Acci. Com. 482.

Mr. Albert E. White in propria persona.

Spear, J., delivered the opinion of the court:

This case comes before the law court on an appeal from a decision of the chairman of the industrial accident commission of Maine, rendered and filed in the office of said commission October 27, 1920.

On August 3, 1920, the claimant was employed as a cleaner by the Eastern Manufacturing Company at their mill in South Brewer, Maine. He was also a member of the volunteer fire department of South Brewer, and received from that organization a salary of \$65 per year, dependent upon his attendance at fires. It was the custom of the Eastern Manufacturing Company to allow their employees who belonged to the municipal fire department to leave their work for the purpose of attending fires, and no deduction was made from their wages for time so lost. At 11 A. M., August 3, 1920, the city fire alarm sounded, and the claimant left his work inside his employer's building and started for the fire. He ran down a platform, and on reaching a flight of five or six steps at the end jumped entirely over the steps, receiving a slight injury to his ankle on striking the ground. He continued to the fire, but was incapacitated for his work at the Eastern Manufacturing Company for the next thirteen days. His petition requested compensation for an injury arising out of and in the course of his employment. Hearing was held on the same, and the commissioner awarded compensation for a period of three days commencing ten days after the accident.

At the hearing before the chairman of the industrial accident commission there was no conflict of testimony or dispute as to the manner in which the accident occurred and the injury received.

The decision of the chairman in

favor of the petitioner is based upon the following finding in which it is said: "Universally compensation has been awarded an employee, injured accidentally while going to his work or leaving his work, if he be still on the company's premises and conducting himself in a proper manner. In the case at bar Mr. White was leaving his work, as he had a right to do. Under such circumstances he was still on the company's premises. Had he been injured similarly on the way out to lunch or at the close of the day, there can be no doubt he would have been entitled to compensation."

Upon the foregoing statement of facts, the finding of the chairman, the only question presented upon the appeal is whether or not upon the undisputed facts, as a matter of law, the accident arose "out of" and "in the course of" the employment.

There is no doubt whatever that, when an accident occurs to an employee, conducting himself properly, upon the premises of the employer while coming to or departing from his work, such accident falls within the provisions of the statute, as it is absolutely necessary that an employee must come and go in order to engage in an employment at all. Consequently an accident happening to him under such conditions both arises "out of" and "in the course of" his employment. But that is not the case at bar.

In *Westman's Case*, 118 Me. 133, 106 Atl. 532, it was decided that under the terms of the statute and the rules of evidence it was incumbent upon the claimant for compensation to assume the burden of proof that his injury occurred:

(a) By accident.

(b) That the accident arose out of the employment.

(c) That the accident arose in the course of the employment.

Then the opinion proceeds to differentiate between the meaning of the phrases "arises out of" and "in the course of," as follows: "Even if there be an accident which occurred in the course of the employment, if

it did not arise out of the employment, there can be no recovery; and even though there be an accident which arose out of the employment, if it did not arise in the course of the employment, there can be no recovery."

Under the above distinction, an accident must both "arise out of" and be "in the course of" the employment.

The petitioner was employed to do certain work in the mill of the respondents. He was engaged in this work when the fire alarm sounded. At that moment he ceased to work for the respondents, and started on the run from the mill to begin work in the pay of the fire department. The work in the fire department was no part of, and had no connection with, his duties of employment in the mill.

It is perfectly evident that at some point and some moment his employment ended with the mill and commenced with the fire department. By no process of reasoning can the point of separation between these two employments be fixed, except at the time he left his employment for the respondent and began his employment for the fire company. He could not be working for both at the same time.

The fact that he was upon the premises when the accident occurred can have no bearing upon the question, unless the accident arose out of or in the course of his employment.

The interpretation of the phrases "out of" and "in the course of" have been fully reviewed in Westman's Case, 118 Me. 133, 106 Atl. 532, and Mailman's Case, 118 Me. 172, 106 Atl. 606.

In the former case the court says:

"The great weight of authority sustains the view that these words 'arising out of' mean that there must be some causal connection between the conditions under which the employee worked and the injury which he received. . . . It excludes an injury which cannot fairly

be traced to the employment as a contributing, proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment."

"The accidents arising out of the employment . . . are those in which it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business exposes the employee."

It might with safety be said that, in order for the accident to "arise out of" the employment, the employment must have been the proximate cause of the accident.

In Westman's Case it is said: "An injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform."

In Mailman's Case, 118 Me. 172, 106 Atl. 606, the court says: "Both of these elements must appear. The accident must have arisen out of and in the course of the employment. In other words, it must have been due to a risk to which the deceased was exposed while employed and because employed."

We are of the opinion that, in the present case, the accident of which the petitioner complains did not arise "out of" nor "in the course of" his employment.

Workmen's compensation—
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It did not "arise out of" because, when the petitioner dropped his broom in the mill, he left his work for the time being for the respondents, and when he started for the fire began his work, for the time being, for the fire department. He was responding to the call of a different employer and on his way to engage in the new employment. His work in the mill did not at all require him to leave the mill at the time he started for the fire. It was because of the fire, and not because of his work in the mill, that he proceeded to leave the building. He happened to be in the mill when the

alarm sounded, and hence had to leave the mill, not, however, in doing a mill duty, but a fireman's duty.

The accident did not "arise out of" his employment, because there was no causal connection between the petitioner's work—what he was doing at the time of the accident—and the injury which he received. Not his employment in the mill, but his employment in the fire department, in which he was engaged when leaping over the steps, was the proximate cause of the accident.

Nor do we think the risk arose "in the course of" the employment. Westman's Case states the rule under this head as follows: "An injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform."

The risk did not arise in the present case because the petitioner was "doing the duty which he was employed to perform." The risk was due to the call of the fire department. It would have been precisely the same, under the contract with the fire department, had he been working in any other employment, whatever it might have been. His work in the fire department had no connection with his work in the mill. Wherever he was or whatever he was doing, at the sound of the alarm it was his duty to drop his employment and forthwith assume his duties as a fireman. He happened to be in the mill at the time, but upon the alarm his duty by contract began with the fire department.

Accordingly, the risk to which the petitioner was exposed in going to the fire was not at all "because he was employed" by the defendant, but because he was employed by the fire department, in the important duty which that connection imposed upon him of at once leaving his regular work to engage in the fire department work in protecting the community against the ravages of fire.

Analogous to the case at bar is

Pierce v. Boyer-Van Kuran Lumber & Coal Co. 99 Neb. 321, L.R.A. 1916D, 970, 156 N. W. 509, in which it is said: "There is no doubt, under the many authorities cited by both parties, that if the workman abandons his employment, even for a short time, and engages in play, or some occupation entirely foreign to his employment, he is not entitled to compensation for an accident by which he is injured while so doing."

See also *Urban v. Topping Bros.* 184 App. Div. 633, 172 N. Y. Supp. 432; *Inland Steel Co. v. Lambert*, 66 Ind. App. 246, 118 N. E. 162; *Rochford's Case*, 234 Mass. 93, 124 N. E. 891.

The rule seems to be well stated by the associate legal member of the Maine industrial accident commission, in *Doughty v. Sargent Denison Co.*, in a decision rendered March 18, 1920, as follows: "Clearly compensation is not recoverable where an employee is injured while doing something solely for his own benefit; where, although the injury arises from the risk of the occupation, it is received while the employee has turned aside from the employment for his own purpose."

See also cases cited under the above decision.

We discover no rule of law or reason in view of which it can be said that the accident and the injury for which the petitioner claims compensation arose "out of" and "in the course of" his employment. This case is of little consequence in the amount involved (\$6.43) either to the employer or to the employee, but it is important in arriving at a proper interpretation of the statute applicable to such a case.

In arriving at the above conclusion, we do not lose sight of the well-settled rule that the Compensation Act (Rev. Stat. 1916, chap. 50) should receive a liberal construction, so that its beneficent purpose may be reasonably accomplished. Its provisions, however, cannot be justly or legally extended to the degree of making the employer an insurer

of his workmen against all misfortunes, however received, while they happen to be upon his premises. Such was not the intent of the statute.

The employer has rights as well as the employed. Their rights stand upon an equality in the eye of the law. Perversion of the law, either to benefit the employee or protect the employer, has the tend-

ency only to bring the law into contempt. This Compensation Act, therefore, should be administered with great care and caution, with judicial discretion and impartial purpose, striving only to discover the spirit and the letter of the law, and to apply them without fear or favor.

Appeal sustained.

Compensation denied.

ANNOTATION.

Workmen's compensation: injury while leaving place of employment at unusual time for purposes not connected with the employment.

This annotation does not include cases where a seaman went ashore with leave, for his own purposes.

It will be observed that in the reported case (*WHITE v. EASTERN MFG. Co. ante*, 1165), it was decided that an injury to an employee, who was a member of the village volunteer fire department, by turning his ankle in hurrying from the plant at an unusual time in response to a fire alarm, did not arise out of, nor in the course of, his employment within the meaning of the Workmen's Compensation Act, although he was given the time necessarily expended in performing his duties as volunteer fireman. The court stated that he left his work for his regular employer when he dropped his broom, and that when he started for the fire he began his work for the fire department; that his work at the mill did not require him to leave the plant at the unusual time he started for the fire; that it was because of the fire, and not because of his work in the mill, that he proceeded to leave the plant where he happened to be when the alarm sounded, and from which he started to do a fireman's duty. Had the employee been injured while leaving the employer's premises at the regular time when the other employees ceased work, at noon, or at night, compensation might have been allowed, but in the instant case, as the court states, the stopping of work for the employer at the unusual time, and the

hurrying from the plant, in the course of which the injury occurred, were not required or demanded by his regular employer, but were done solely to fulfil his duty as a fireman. It will be observed that the injury was due to the circumstances of his leaving, i. e., his hurrying to respond to the alarm, rather than to the fact that he was leaving at an unusual time.

The court apparently attaches no importance to the fact that the occasion of his leaving was the performance of a duty to the public as a fireman. That feature has been considered in other cases, in which, however, the injury did not, as in the reported case (*WHITE v. EASTERN MFG. Co.*), occur while the employee was on the employer's premises.

Thus, in *Kennelly v. Stearns Salt & Lumber Co.* (1916) 190 Mich. 628, 157 N. W. 378, it was held that the injury did not arise out of, or during the course of, the employment, where it appeared that an employee of a lumber company, while engaged in work for his employer, was ordered by the state fire warden to go and assist in extinguishing a forest fire, and that while so doing, and while under the warden's orders, he received an injury, although he was paid for the time by his employer, who was reimbursed by the state. The court here stated that the statute authorized the warden to call able-bodied men to his assistance, and that it could not be said that, while the claimant was

working under the warden's orders in putting out the fire, he was engaged in his regular employment.

But in *McPhee's Case* (1915) 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257, a finding was held justified that the injury resulting in the employee's death arose out of, and in the course of, his employment, where it appeared that he was the superintendent of an amusement park, for which he had organized a fire department; that he was also a volunteer member of the town fire department; that a fire broke out in a garage 40 feet from the employer's plant, and that he and a member of the company's department took the employer's chemical, with the general manager's consent, and used it to put out the fire; that he stayed until the fire was out, and that, after having done all possible with the chemical, he went onto a ladder and assisted in putting out the fire, and that, as a consequence of getting wet and inhaling smoke, pneumonia and death followed. The court said: "While the deceased was a member of the town fire department, and as such required to attend the fire, it well might be that his paramount duty was owed to the subscriber to protect its property from destruction by fire and to prevent thereby a panic among its patrons and the disaster which might ensue. It does not seem to us possible to say as matter of law that, when he had exhausted the chemical of the subscriber and began working in connection with the fire apparatus of the town, he ceased

acting primarily in the interests of his employer, who was the subscriber, and began working exclusively for the town. The interests of his general employer in the extinguishment of a fire in such threatening proximity to its property well may have been found to have been so dominant as to absorb the exclusive attention of *McPhee*, and to have rendered him in the direction of his own conduct, chiefly concerned to act for its interests as to the means employed and the result to be achieved in the particular service of extinguishing the fire. If this was so, then his efforts were directed to the promotion of the business of that general employer, even though it happened that at the same time he was acting in accordance with his obligation to the town fire department. But under such circumstances the latter would be accidental and subsidiary, while the substantial and preponderant factor controlling his action would be the duty owed to his employer, who was the subscriber."

It has been held that the accident did not arise out of the employment in a case where one left work at a railroad roundhouse during working hours for the purpose of getting his pay check cashed, in violation of a special prohibition that men should not leave work, especially for the purpose of obtaining money on their pay checks, and to avoid being seen by the time checker he crossed the railroad yards, where he was forbidden to go, and was killed while so doing. *Lavery v. Grand Trunk R. Co.* (1915) Rap. Jud. Quebec 48 C. S. 278. J. T. W.

WIRELESS SPECIALTY APPARATUS COMPANY

v.

MICA CONDENSER COMPANY, Limited, et al.

(Two cases.)

Massachusetts Supreme Judicial Court — June 3, 1921.

(— Mass. —, 131 N. E. 307.)

Master and servant — right to servant's invention.

1. An invention made by an employee in the course of his employment

and at his employer's expense is the property of the inventor unless he has, by the terms of his employment or otherwise, agreed to transfer to his employer its ownership as distinguished from its use.

[See note on this question beginning on page 1177.]

— employment to make invention — effect.

2. One employed to devise or perfect an instrument or process cannot, after accomplishing the work, assert title thereto as against his employer.
[See 18 R. C. L. 500.]

— invention in experimental work supervised by employer.

3. Inventions made by an employee while wholly engaged in experimental work to develop a process for the employer under the direction of the employer's superintendent cannot be claimed by the employee, although there was no agreement as to the title to future inventions.

— right of employee leaving employment — trade secrets.

4. An employee leaving his employment has a right to use in other business his general knowledge, experience, memory, and skill, so long as he does not use or disclose any of the

secret processes which his former employer was entitled to keep for his own use and as to which he had exclusive property rights.

[See 18 R. C. L. 501, 502.]

Trade secrets — involving patent — right to restrain use of.

5. The fact that an invention is patentable does not bar its owner from equitable relief against those disclosing its existence and details in violation of trust and confidence, nor as against those who obtain knowledge through such violation with notice and purpose to make use thereof.
Injunction — against disclosing trade secrets.

6. Former employees and those who employ them with notice may be enjoined from disclosing secret processes pertaining to the former employer's business, knowledge of which they gained while in his employ.

[See 18 R. C. L. 501.]

RESERVATION and report by the Superior Court for Suffolk County (Lawton, J.) for consideration of the full court, of consolidated suits to compel the assignment to plaintiff of applications for patents and inventions covered thereby, to establish its rights in certain alleged trade secrets, and to enjoin the use or disclosure by defendants of secret processes and apparatus belonging to plaintiff. *Decree for plaintiff.*

The facts are stated in the opinion of the court.

Messrs. R. G. Dodge and H. F. Lyman, for plaintiff:

Plaintiff, whose business in magnetto condensers has been practically ruined as a result of the defendant's conspiracy to steal its secret processes and information, is entitled to a remedy.

Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; American Stay Co. v. Delaney, 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913B, 509; Essex Trust Co. v. Enwright, 214 Mass. 507, 47 L.R.A.(N.S.) 567, 102 N. E. 441; Aronson v. Orlov, 228 Mass. 1, 116 N. E. 951.

Former employees of the plaintiff should be restrained from divulging or making use of information of various kinds, which they themselves had, in whole or in part, collected for it.

Lamb v. Evans [1893] 1 Ch. 218, 62 L. J. Ch. N. S. 404, 2 Reports, 189,

68 L. T. N. S. 131, 41 Week. Rep. 405; Empire Steam Laundry Co. v. Lozier, 165 Cal. 95, 44 L.R.A.(N.S.) 1159, 130 Pac. 1180, Ann. Cas. 1914C, 628; Grand Union Tea Co. v. Dodds, 164 Mich. 50, 31 L.R.A.(N.S.) 260, 128 N. W. 1090; Stevens & Co. v. Stiles, 29 R. I. 399, 20 L.R.A.(N.S.) 933, 71 Atl. 802, 17 Ann. Cas. 140; Westervelt v. National Paper & Supply Co. 154 Ind. 673, 57 N. E. 552; Luckett v. Orange Julep Co. 271 Mo. 289, 196 S. W. 740; Pomeroy Ink Co. v. Pomeroy, 77 N. J. Eq. 293, 78 Atl. 698; Baldwin v. Von Micheroux, 5 Misc. 386, 25 N. Y. Supp. 857, 83 Hun, 43, 31 N. Y. Supp. 696; MacBeth-Evans Glass Co. v. Schnelbach, 239 Pa. 77, 86 Atl. 688.

Plaintiff acquired property rights in the inventions in question, either by virtue of an express agreement entered into at the conference of March 18, 1919, or by virtue of the implied

agreement to be inferred from the relation of the parties, their conduct, and all the surrounding circumstances.

Luckett v. Orange Julep Co. 271 Mo. 289, 196 S. W. 740; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698; *Baldwin v. Von Micheroux*, 5 Misc. 386, 25 N. Y. Supp. 857; *Silver Spring Bleaching & Dyeing Co. v. Woolworth*, 16 R. I. 729, 19 Atl. 528; *American Stay Co. v. Delaney*, 211 Mass. 232, 97 N. E. 911, Ann. Cas. 1913B, 509; *American Circular Loom Co. v. Wilson*, 198 Mass. 202, 126 Am. St. Rep. 409, 84 N. E. 133; *Salamons v. United States*, 137 U. S. 342, 34 L. ed. 667, 11 Sup. Ct. Rep. 88; *Gill v. United States*, 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322; *Dowse v. Federal Rubber Co.* 254 Fed. 308; *Ingle v. Landis Tool Co.* 262 Fed. 150; *Annin v. Wren*, 44 Hun, 352.

Messrs. Stuart C. Rand and Archibald MacLeish, for defendants:

In the absence of an express agreement to the contrary, the inventions of an employee are his own property, and the employer has no title to the inventions and no right to an assignment of patents thereon.

American Circular Loom Co. v. Wilson, 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133; *Pressed Steel Car Co. v. Hansen*, 2 L.R.A. (N.S.) 1172, 71 C. C. A. 207, 137 Fed. 403; *Dalzell v. Dueber Watch Case Mfg. Co.* 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886; *Gill v. United States*, 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322; *Johnson Furnace & Engineering Co. v. Western Furnace Co.* 102 C. C. A. 267, 178 Fed. 819; *Wilson v. J. G. Wilson Corp.* 241 Fed. 494; *Dowse v. Federal Rubber Co.* 254 Fed. 308; *Joliet Mfg. Co. v. Dice*, 105 Ill. 649; *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. ed. 369, 1 Sup. Ct. Rep. 193; *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913B, 509.

An employer has no standing in equity to prevent, or recover damages for, the use by third persons of inventions, improvements, or processes which are the property of his employee.

Cincinnati Bell Foundry Co. v. Dodds, 19 Ohio L. J. 84; *Hamilton Mfg. Co. v. Tubbs Mfg. Co.* 216 Fed. 401; *Bell & B. Soap Co. v. Petrolia Mfg. Co.* 25 Misc. 66, 54 N. Y. Supp. 663; *Macbeth-Evans Glass Co. v.*

Schnelbach, 239 Pa. 76, 86 Atl. 653; *Morison v. Moat*, 9 Hare, 241, 168 Eng. Reprint, 492; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *American Circular Loom Co. v. Wilson*, 198 Mass. 205, 126 Am. St. Rep. 409, 84 N. E. 133.

Equity will neither restrain, nor give damages for, the use or disclosure of trade secrets by one who has acquired them lawfully and without breach of trust or confidence.

Chadwick v. Covell, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068; *Stewart v. Hook*, 118 Ga. 445, 63 L.R.A. 255, 45 S. E. 369; *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913B, 509; *Goldstein v. Burrows*, 237 Mass. 79, 129 N. E. 389; *Aronson v. Orlov*, 228 Mass. 1, 116 N. E. 951; *Lindsay v. Swift*, 230 Mass. 407, 119 N. E. 787; *Walker v. Cronin*, 107 Mass. 555.

The facts shown by the record do not afford grounds for any injunction in the secret process suit.

Pickard v. Clancy, 225 Mass. 89, 113 N. E. 838.

Jenney, J., delivered the opinion of the court:

The Wireless Specialty Apparatus Company is the plaintiff in two suits, both relating to the same subject-matter and tried together. During the Great War the plaintiff made radio condensers for the United States government. On the signing of the Armistice, it became apparent that this industry would be seriously affected, if not ended, and the plaintiff's officers conceived the idea of producing magneto condensers to be sold to manufacturers of electrical apparatus. By June, 1919, the six employees then remaining in the plaintiff's condenser department were employed in experimental work in developing a method of manufacturing such condensers. This work was continued until about October, 1919, when the production of the condensers began. The work was substantially all performed in the plaintiff's shop, with its tools, at its expense, and under the general direction and supervision of one Priess, its chief engineer. Some examinations had been made

by the chief engineer, and by other persons, of the methods in use to accomplish the desired result. The judge found that in course of the experimentation, "in at least three respects, important changes, improvements, or inventions . . . [had] been made," which, "combined with others of minor importance, . . . constitute a change, improvement, or invention in the . . . general process" of manufacture of magneto condensers. It is noticeable that the findings characterized the result of this experimental work as "changes, improvements, or inventions," but they also are declared to be "substantial and valuable, tending to reduce the cost of production and to improve the quality of the product." Later they are several times expressly described by the judge as inventions; applications were made by the defendant McPherson for the issuance of letters patent upon these inventions, which applications have been assigned by him to Watson Brothers, Inc., and by it to the Mica Condenser Company, Ltd., who are defendants in both suits. The plaintiff in one suit seeks to compel the assignment to it of said applications and of the inventions covered thereby; and in the other to enjoin their publication, manufacture, or use by the corporations who are defendants in the first suit, and by certain former employees of the plaintiff, on the ground that the inventions constitute secret processes of which the plaintiff was the owner. In the second suit other relief of a kindred nature also is sought.

We consider the findings of the judge on the basis that they determine that the changes and improvements were in fact inventions which must be considered as patentable. The parties have so treated them.

These inventions, as found and described by the judge, are as follows: "(1) In the machine for applying varnish to the sheets of mica used in the condenser, and by the use of copal varnish in the process;

(2) the method of using so-called telltale light for detecting defects while building up the condenser stacks; (3) the process of rehealing a defective condenser without dismembering the same. These changes, improvements, or inventions, combined with others of minor importance, may be fairly said to constitute a change, improvement, or invention in the (4) general process."

The three inventions first named were in the main those of the defendant McPherson,—who was one of the six employees of the plaintiff hereinbefore referred to,—"qualified only by the statement that the use of copal varnish was the suggestion of Goodwin," a defendant in the second suit. The general process invention was the joint production of McPherson, Goodwin, and Priess. The latter is still in the employ of the plaintiff.

It is found on conflicting evidence that there was no express contract that any invention made by these employees was to be the plaintiff's property; and the evidence did not satisfy the judge that there was any understanding to that effect.

The principles governing relationship between employer and employee, so far as property in invention is involved,—using that word in the sense in which it is used in the statutes relating to patents,—are well established. An invention made by an employee in the course of his employment, and at his employer's expense, is the property of the inventor unless he has, by the terms of his employment or otherwise, agreed to transfer to his employer its ownership as distinguished from its use. It matters not how valuable the invention, or how vital its control may be for the success of the business in which it has been conceived. American Circular Loom Co. v. Wilson, 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133; American Stay Co. v. Delaney, 211 Mass. 229, 97 N. E. 911, Ann.

Master and servant—right to servant's invention.

Cas. 1913B, 509; Hapgood v. Hewitt, 119 U. S. 226, 30 L. ed. 369, 7 Sup. Ct. Rep. 193; Dalzell v. Dueber Watch Case Mfg. Co. 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886; Pressed Steel Car Co. v. Hansen, 2 L.R.A. (N.S.) 1172, 71 C. C. A. 207, 137 Fed. 403; Dempsey v. Dobson, 174 Pa. 122, 32 L.R.A. 761, 52 Am. St. Rep. 816, 34 Atl. 459.

However, as was said in *Solomons v. United States*, 137 U. S. 342, at 346, 34 L. ed. 667, 669, 11 Sup. Ct. Rep. 89: "If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer."

The inventions here in controversy were made while the inventors were wholly engaged in "experimental work to develop a method of manufacturing magneto condensers." That, for the time being, was their sole employment. They were under the direction of the plaintiff's superintendent who aided and furnished information to them.

" . . . The persons concerned understood, or ought to have understood, that the plaintiff intended to keep the processes secret, and that any information received by them in the course of their employment was confidential information."

To justify a claim of property in the inventions, it must be held that the plaintiff had no interest in that which its workmen created while engaged in this special work, except the ownership of the actual things produced considered merely as chattels, and except a nonexclusive right to use them or the processes discovered. Such a result defeats the purpose in which they were engaged. In a case like this the nature of the employment impresses

on the employee such a relationship of trust and confidence as estops ^{-invention in experimental work supervised by employer.} him from claiming as his own property that which he has brought into being solely for the benefit, and at the express procurement, of his employer. The want of an express agreement that the ownership shall be in the employer is not fatal under such circumstances. This result is supported by authority. *Gill v. United States*, 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322; *Silver Spring Bleaching & Dyeing Co. v. Woolworth*, 16 R. I. 729, 19 Atl. 528. Said the court in *Gill v. United States*, supra, 160 U. S., at page 435: "There is no doubt whatever of the proposition laid down in *Solomons's Case*, that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property, than any other proprietor would have. On the other hand, it is equally clear that, if the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do."

See also *McAleer v. United States*, 150 U. S. 424, 430, 37 L. ed. 1130, 1132, 14 Sup. Ct. Rep. 160; *Dowse v. Federal Rubber Co.* (D. C.) 254 Fed. 308; *Ingle v. Landis Tool Co.* (D. C.) 262 Fed. 150; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 297, 78 Atl. 698; *Portland Iron Works v. Willett*, 49 Or. 245, 89 Pac. 421, 90 Pac. 1000. The question was expressly left open in *American Circular Loom Co. v. Wilson*, supra. The opinion states (198 Mass. 202): "How far the rule will be held to be applicable where it appears that by the express terms of the hiring the employee was to exercise his inven-

tive faculties with reference to the specific inventions in question for the sole benefit of his employer, we need not now consider, for that question does not arise in this case."

So, in *American Stay Co. v. Delaney*, supra, 211 Mass., at page 232, it was noted that the defendant was not "employed to originate inventions for the plaintiff's benefit."

The finding that there was no understanding as to future inventions does not prevent us from giving the relief to which the plaintiff is entitled on the facts found. It does not negative them or weaken their effect. A careful examination of the evidence—reported by commissioners—convinces us that no such construction can be maintained.

Goodwin, Barkley, Arthur Watson, and Elbridge Watson, who are defendants in the second suit, while Goodwin was still in the plaintiff's service, formed the plan of engaging in the manufacture of magneto condensers to compete with the plaintiff, "to take advantage of the secret processes and machines which had been developed, and of the confidential information Goodwin had of the plaintiff's costs of production and other details of its business, so as to start the manufacture and sale of such condensers immediately."

Although the invention was first assigned to Watson Brothers, Inc., it appears that the Mica Condenser Company, Ltd., was shortly thereafter organized by Goodwin, Barkley, and the Watsons, who were its only stockholders. While no express finding is made as to whether these corporations took with notice of the facts upon which the plaintiff's rights depended, it is apparent that they did so take. The Mica Condenser Company, Ltd., does not argue that it has any greater rights in, or to, the inventions than that which McPherson had against the plaintiff.

The bill in the second suit relates to the same condensers, alleges that they are manufactured by the use of certain secret processes and apparatus, and avers that all the in-

dividual defendants therein named, except Barkley and the Watsons, were employees of the plaintiff, by whom said processes and apparatus were developed, and that they became acquainted therewith by reason of their employment. It further alleges the wrongful disclosure by Goodwin, and wrongful use by the Mica Condenser Company, Ltd., for the purpose of their wrongful appropriation; that Goodwin without right took from the plaintiff's files, and is improperly using, many documents and plans belonging to the plaintiff, comprising blue prints, charts, cost sheets, reports of tests and experiments, correspondence, and other engineering and office data or copies thereof, all having to do with the manufacture of said condensers; and that he has either disclosed, or intends to disclose, the information contained therein to the wrongful use and benefit of the defendants.

Apart from the facts already stated, some of which bear upon this subject, no finding is made that Goodwin took from the plaintiff any of the papers or plans referred to. As the burden was on the plaintiff, the result is that it has not sustained its allegations relating to this subject. Goodwin, upon leaving the plaintiff's employ, had a right to use his general knowledge, experience, memory, and skill so long as he did not use or disclose any of the secret

—right of
employee leaving
employment
—trade secrets.

processes which the plaintiff was entitled to keep for its own use, and as to which it, as against him, had exclusive property rights. *Aronson v. Orlov*, 228 Mass. 1, 116 N. E. 951; *H. W. Gossard Co. v. Crosby*, 132 Iowa, 155, 6 L.R.A. (N.S.) 1115, 109 N. W. 483; *Westervelt v. National Paper & Supply Co.* 154 Ind. 673, 57 N. E. 552.

When Goodwin and McPherson left the plaintiff's employ, they took with them the four other employees with whom they had been associated in experimental work for the purposes hereinbefore defined. These

four are defendants in the second suit. There is no finding that they have wrongfully disclosed or used any secret processes or confidential communications, and no relief can be given against them.

Although the first suit is decided on the basis that the plaintiff is entitled to relief because it is the equitable owner of the inventions already considered, it does not follow that it can get nothing under the second bill. It may be that no patent will issue, because of lack of novelty or other reason, and that the plaintiff will in fact receive nothing of value under any decree entered in the first suit. The fact that an invention is patentable does not compel the taking out of a patent, nor prevent the person entitled

Trade secrets—
involving patent
—right to re-
strain use of.

to it from keeping it secret, nor bar him from equitable relief against those disclosing its existence and details in violation of trust and confidence, nor as against those who obtain knowledge through such violation with notice and purpose to make use thereof. *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913B, 509; *Aronson v. Orlov*, supra; *Bates v. Coe*, 98 U. S. 31, 25 L. ed. 68; *Macbeth-Evans Glass Co. v. Schnelbach*, 239 Pa. 76, 86 Atl. 688. The fundamental requirement for relief is a violation of trust and confidence. Anyone who gets the knowledge honestly can use it, provided he is not restrained by the relationship under which he acquired it. *Chadwick v. Covell*, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068.

The defendants *Barkley*, *Elbridge Watson*, *Charles E. Watson*, and *Goodwin*, as found by the judge, "formed the plan . . . to take advantage of the secret processes and machines which had been developed [as hereinbefore stated], and of the confidential information that *Goodwin* had of the plaintiff's costs of production and other details

of its business." Inasmuch as the allegations as to the wrongful taking and disclosure by *Goodwin* of plans, records, and other tangible property of the plaintiff have not been proved, the plaintiff is not entitled to relief as to such property; but it is entitled to injunctive relief as against these defendants and as against the *Mica Condenser Company, Ltd.*, of which they are the only stockholders, and which—the findings inferentially but clearly show—has acted with notice to its officers and agents. *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000.

Injunction—
against
disclosing
trade secrets.

The question of damages, for which the defendants are liable, has not been tried.

In the first suit a decree with costs to the plaintiff is to be entered, ordering the *Mica Condenser Company, Ltd.*, to assign to the plaintiff the inventions and applications for patents hereinbefore considered, and enjoining it from assigning or otherwise disposing of such inventions, and enjoining both defendants from using said inventions or any of them. If it is deemed advisable, in order to describe and identify said inventions so that a definite decree may be entered, the first suit may be further heard for that purpose. See *Walker, Patents*, § 275.

In the second suit there must be an interlocutory decree enjoining all the defendants except *Keene*, *Danahy*, *Martin*, and *Illingsworth*, as to whom the bill should be dismissed, from using or in any way disclosing the processes, changes, or inventions to which the plaintiff is entitled under this decision. The decree is to include costs in this court in favor of the plaintiff as against the defendants, as to whom relief is given; the question of other costs is to stand for action in the Superior Court when the case is ripe for final decree, after it has been heard upon the question of damages.

So ordered.

ANNOTATION.

Right to inventions as between employer and employee.

- I. Introduction, 1177.
- II. Rules in general, 1178.
- III. Rules as affected by various considerations:
 - a. Inventions made partly or wholly at employer's expense; use of employer's tools, materials, etc., 1181.
 - b. Employment for the purpose of inventing or improving, 1184.
 - c. Mechanical improvement by employee, or embodiment of employer's conception, as distinguished from invention, 1189.
 - d. Trust relationship, 1195.
 - e. Acquiescence of employee, 1196.

I. Introduction.

As indicated by the title, the present annotation purports to include, in general, only those cases which present the question of the right to inventions as between master and servant, and not as between parties to contracts generally. In a few cases, however, the courts have treated the relationship as that of employer and employee, although the facts stated would not seem to show the existence of such a relationship in general, and these cases have been included. The annotation does not, of course, cover questions as to patent rights, even though the invention was by an employee, if the fact of employment was merely incidental, and the respective rights of employer and employee were not involved.

The question under consideration is not one of easy solution, and general rules are difficult to formulate as well as to apply. It is clear that the law does not easily include the inventive genius of an employee in the contract of employment. Ordinarily, doubtless, the employer does not contemplate that he shall have the benefit of the inventive faculties of the employee. Mechanical skill and ability to invent should not be confused. In the absence of special contract, the law, while giving the employer the benefit of all the employee's mechanical skill, draws the line when inven-

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- f. Duress, 1196.
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- IV. Express contract that employer shall have invention:
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tive talent enters, and gives the result to the inventor, although his employer may, under certain circumstances, have an implied license to use, and perhaps to make and sell, the invention.

Keeping in mind the fact that the law does not regard the ordinary contract of employment as including a right on the part of the employer to the products of the inventive genius of the employee, the reader should note, however, that the solution of the present question depends upon the terms of the particular contract of employment. Parties may contract that the employer shall be entitled to inventions made by the employee, and the terms of the contract may be such that such a stipulation will be implied.

It was said in *Imperial Supply Co. v. Grand Trunk R. Co.* (1912) 11 East. L. R. 340, 14 Can. Exch. 88, 7 D. L. R. 504, that "the law on the rights of master and servant to patents obtained by the employee is intricate, and each case has to be decided upon the facts of the particular case."

The annotation does not include cases on the question of implication, from the use of a patented article, of a promise on the part of the employer to pay a royalty, where it is assumed that the invention belongs to the employee. Nor does it include cases turning on the fact that one of the

parties was first in applying for a patent.

II. Rules in general.

It is well settled that the mere fact of the relationship of employer and employee does not necessarily entitle the former to inventions made by the latter along the line of, or related to, the particular employment; and a contract to assign or transfer to the employer the patent, or whatever other rights the employee may have in the invention, as distinguished from a mere license to use the same, is not to be implied in law merely from the relation of the parties. In support of this rule may be cited, first, those cases in which the invention has been considered, under the particular circumstances, as belonging to the employee.

United States.—Hapgood v. Hewitt (1886) 119 U. S. 226, 30 L. ed. 369, 7 Sup. Ct. Rep. 193, affirming (1882) 11 Biss. 184, 11 Fed. 422; Dalzell v. Dueber Watch Case Mfg. Co. (1893) 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886, reversing (1889) 38 Fed. 597; Pressed Steel Car Co. v. Hansen (1905) 2 L.R.A.(N.S.) 1172, 71 C. C. A. 207, 137 Fed. 403, affirming (1904) 128 Fed. 444; Whiting v. Graves (1878) 3 Bann. & Ard. 222, Fed. Cas. No. 17,577; Brickill v. New York (1880) 18 Blatchf. 273, 7 Fed. 479; Damon v. Eastwick (1882) 14 Fed. 40; Locke v. Lane & B. Co. (1888) 35 Fed. 289; Johnson Furnace & Engineering Co. v. Western Furnace Co. (1910) 102 C. C. A. 267, 178 Fed. 819; Wilson v. J. G. Wilson Corp. (1917) 241 Fed. 494; Ingle v. Landis Tool Co. (1921) — C. C. A. —, 272 Fed. 464, reversing (1919) 262 Fed. 150. See also Barber v. National Carbon Co. (1904) 5 L.R.A.(N.S.) 1154, 64 C. C. A. 40, 129 Fed. 370, and American Stoker Co. v. Underfeed Stoker Co. (1910) 182 Fed. 642, affirmed in (1911) 110 C. C. A. 292, 188 Fed. 314.

District of Columbia.—Robinson v. McCormick (1907) 29 App. D. C. 98, 10 Ann. Cas. 548; McKeen v. Jerdone (1909) 34 App. D. C. 163; Smith v. Phelps (1910) 35 App. D. C. 360; Ladoff v. Dempster (1911) 36 App. D. C. 520; Eshleman v. Shantz (1912)

39 App. D. C. 434. See also Sendelbach v. Gillette (1903) 22 App. D. C. 168.

Illinois.—Joliet Mfg. Co. v. Dice (1883) 105 Ill. 649, affirming (1882) 11 Ill. App. 109.

Indiana.—Ft. Wayne, C. & L. R. Co. v. Haberkorn (1896) 15 Ind. App. 479, 44 N. E. 322.

Massachusetts. — Hopedale Mach. Co. v. Entwistle (1882) 133 Mass. 443; Burton v. Burton Stock Car Co. (1898) 171 Mass. 437, 50 N. E. 1029 (point conceded); American Circular Loom Co. v. Wilson (1908) 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133; American Stay Co. v. Delaney (1912) 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913B, 509.

Missouri.—Green v. Willard Improved Barrel Co. (1876) 1 Mo. App. 202.

New Jersey.—Eustis Mfg. Co. v. Eustis (1893) 51 N. J. Eq. 565, 27 Atl. 439.

New York.—Clark v. Fernoline Chemical Co. (1889) 25 Jones & S. 36, 5 N. Y. Supp. 190.

Wisconsin.—Fuller & J. Mfg. Co. v. Bartlett (1887) 68 Wis. 73, 60 Am. Rep. 838, 31 N. W. 747.

England.—Ex parte Scott (1871) L. R. 6 Ch. 274, 19 Week. Rep. 425.

Canada. — Imperial Supply Co. v. Grand Trunk R. Co. (1912) 11 East. L. R. 340, 14 Can. Exch. 88, 7 D. L. R. 504.

But the mere fact that the contract of employment does not contain an express provision to the effect that inventions made by the employee shall become the property of, or belong to, the employer, does not necessarily preclude the latter from asserting a right to such inventions. This is shown by the cases in which, without apparently such an express contract provision, the employer has been considered as entitled to the invention.

United States.—Agawam Woolen Co. v. Jordan (1869) 7 Wall, 583, 19 L. ed. 177; Sparkman v. Higgins (1846) 1 Blatchf. 205, Fed. Cas. No. 13,208; Wellman v. Blood (1856) 1 MacArth. Pat. Cas. 432, Fed. Cas. No. 17,385; King v. Gedney (1856) MacArth. Pat. Cas. 444, Fed. Cas. No.

7,795; *Blandy v. Griffith* (1869) 3 Fisher, Pat. Cas. 609, Fed. Cas. No. 1,529; *United Shirt & Collar Co. v. Beattie* (1906) 79 G. C. A. 442, 149 Fed. 736, petition for writ of certiorari denied in (1907) 205 U. S. 547, 51 L. ed. 924, 27 Sup. Ct. Rep. 795; *Dowse v. Federal Rubber Co.* (1918) 254 Fed. 308. See also *Minerals Separation v. Hyde* (1916) 242 U. S. 261, 61 L. ed. 286, 37 Sup. Ct. Rep. 82.

California.—*Famous Players-Lasky Corp. v. Ewing* (1920) — Cal. App. —, 194 Pac. 65.

District of Columbia. — *Miller v. Kelley* (1901) 18 App. D. C. 163; *Tyler v. Kelch* (1902) 19 App. D. C. 180; *Orcutt v. McDonald* (1906) 27 App. D. C. 228; *Neth v. Ohmer* (1908) 30 App. D. C. 478; *Broadwell v. Long* (1911) 36 App. D. C. 418; *Summers v. Clark* (1912) 38 App. D. C. 537; *Moody v. Colby* (1913) 41 App. D. C. 248; *Gammeter v. Neidich* (1916) 45 App. D. C. 170. See also, among other cases in which the relationship does not seem strictly to have been that of employer and employee: *Gallagher v. Hastings* (1903) 21 App. D. C. 88; *Kreag v. Geen* (1906) 28 App. D. C. 437; *Braunstein v. Holmes* (1908) 30 App. D. C. 328; *McKillop v. Fetzner* (1908) 31 App. D. C. 586; *Laughlin v. Burry* (1921) — App. D. C. —, 270 Fed. 1013.

Iowa.—*Bryan & Co. v. Scurlock* (1918) 184 Iowa, 378, 168 N. W. 144.

Massachusetts.—*WIRELESS SPECIALTY APPARATUS Co. v. MICA CONDENSER Co.* (reported herewith) ante, 1170.

Missouri.—See *Meissner v. Standard R. Equipment Co.* (1908) 211 Mo. 112, 109 S. W. 730.

New York.—*Annin v. Wren* (1887) 44 Hun, 355; *Baldwin v. Von Micheroux* (1893) 5 Misc. 386, 25 N. Y. Supp. 857, affirmed in (1894) 83 Hun, 43, 31 N. Y. Supp. 986.

Rhode Island. — *Silver Spring Bleaching & Dyeing Co. v. Woolworth* (1890) 16 R. I. 729, 19 Atl. 528.

England. — *Makepeace v. Jackson* (1813) 4 Taunt. 770, 128 Eng. Reprint, 534, 14 Revised Rep. 664; *Worthington Pumping Engine Co. v. Moore* (1903) 19 Times L. R. 84, 20 Rep. Pat. Cas. 1.

Canada. — *Bonathan v. Bowmanville Furniture Mfg. Co.* (1871) 31 U. C. Q. B. 413.

Newfoundland. — *Fox v. McKay*, Newfoundland Rep. (1864-74) 35.

In the absence of an express contract giving him the right to the invention, the employer may have a right to it on the grounds, among others, of a special trust relationship, of acquiescence on the part of the employee, of a contract of employment for the special purpose of inventing the particular device, and of original conception of the idea which has merely been mechanically perfected by the employee. And if the employer cannot successfully assert a claim to the property in the invention on any of these grounds, he may still have a license to use the invention without compensation, if it has been made in the course of the employment, and with his materials, tools, etc., and by the aid of his workmen. These matters are treated under proper subdivisions infra.

One who is not employed to originate inventions for his employer's benefit, while precluded from appropriating the employer's trade secrets, is under no obligation to forego the exercise of his inventive powers, even though they are incited because of knowledge necessarily derived from the performance of his contractual duties; and it is legitimate for him, under these conditions, to invent and perfect improvements which are embodied in new machines of greater capacity and efficiency. *American Stay Co. v. Delaney* (1912) 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913B, 509.

The mere fact that a servant makes inventions while in the service and pay of the master, and in the line of his employment, in the absence of an agreement to that effect, gives the master no right to the ownership of patents therefor. *Eustis Mfg. Co. v. Eustis* (1893) 51 N. J. Eq. 565, 27 Atl. 439.

And in *Pressed Steel Car Co. v. Hansen* (1905) 2 L.R.A.(N.S.) 1172, 71 C. C. A. 207, 137 Fed. 403, affirming (1904) 128 Fed. 444, the court

said: "We have been referred to no case, nor have we been able to discover one, in which, apart from express contract or agreement, and upon the mere general relation of employer and employee and of the facts and circumstances attending it, the employer has been vested with the entire property right in the invention and patent monopoly of the employee, or with anything other than a shop right, or irrevocable license, to use the patented invention. Such a right in the employer the employee may be estopped to deny by the fact of his employment and his conduct in relation to the use of his inventions by his employer; and to that extent, and no further, have the cases gone." A petition for a writ of certiorari is denied in (1905) 199 U. S. 608, 50 L. ed. 331, 26 Sup. Ct. Rep. 749.

The court also in *Pressed Steel Car Co. v. Hansen* (Fed.) supra, held that a contract on the part of an employee to assign to the employer all patents taken out by the former on improvements made by him in the course of his employment is not necessarily to be implied from the fact that he does assign several of such patents to the employer.

In *Johnson Furnace & Engineering Co. v. Western Furnace Co.* (1910) 102 C. C. A. 267, 178 Fed. 819, the court said it was settled that, in the absence of an express contract or agreement, the relation of employer and employee, under whatever circumstances short of a specific employment to make an invention, does not invest the employer with the entire property rights in an invention of the employee. Of course, there are circumstances under which the employer will be entitled to the invention of an employee, even though there is no express agreement to this effect, so that the above statement seems susceptible of too broad an interpretation.

In the absence of any agreement to give to the employer the benefit of his inventive genius during the time of the employment, the court in *Johnson Furnace & Engineering Co. v. Western Furnace Co.* (Fed.) supra, held that the employer had no interest in

patents issued to one who was in its employ as director and manager.

And the rule is approved, also, in *Dowse v. Federal Rubber Co.* (1918) 254 Fed. 308, that the obligation of an employee to assign to the employer an invention made in the course of the employment does not arise from the mere existence of the relation of employer and employee, but there must be, in addition, a contract to assign.

In *Joliet Mfg. Co. v. Dice* (1883) 105 Ill. 649, the court laid down the broad doctrine applicable to this class of cases as follows: "The general rule is that where a mechanic, in laboring for an employer in the construction of a machine, invents a valuable improvement, the invention is the property of the inventor, and not that of his employer. It may be true that where the employer hires a man of supposed inventive mind to invent for the employer an improvement in a given machine, under a special contract that the employer shall own the invention when made, and under such employment such improvement is invented by the person so employed, such invention may, in equity, become the property of the employer. But the law inclines so strongly to the rule that the invention shall be the property of its inventor that nothing short of a clear and specific contract to that effect will vest the property of the invention in the employer to the exclusion of the inventor."

It was conceded in *Burton v. Burton Stock Car Co.* (1898) 171 Mass. 437, 50 N. E. 1029, that inventions in the construction of stock cars, made and patented by an employee of a stock-car company, belonged to the employee, where it was found that the latter had attended regularly to his duties, that he did not use the material or means of the employer in taking out the patents, but that he personally paid all the expenses of procuring them and constantly asserted his right to personal ownership thereof.

So, where the work on the invention did not interfere with, and was no part of, the duties of the inventor,

the general manager of the employer company, but was done by him outside of business hours, and it appeared that he himself paid the corporation for services rendered by its employees on his device when they had nothing else to do, it was held in *Doscher v. Phelps Guardant Time Lock Co.* (1915) 89 Misc. 561, 153 N. Y. Supp. 710, affirmed without opinion in (1916) 172 App. Div. 954, 157 N. Y. Supp. 1123, which is affirmed without opinion in (1918) 224 N. Y. 718, 121 N. E. 865, that the corporation could not compel an assignment to it of the patent which he had taken out.

And the doctrine that, in the absence of an express contract or agreement to invent, the relation of employer and employee does not vest the employer with the entire property right of an invention of the employee and to the patent monopoly thereof, or to anything more than a shop right to use the invention, was approved and followed in *Ingle v. Landis Tool Co.* (1921) — C. C. A. —, 272 Fed. 464, where the inventor was a draftsman employed by a machine company at a specified weekly salary, his work consisting in making drawings for machines built by the company, and he was not employed to design any particular machine or to use his inventive faculties in any way, and was under no contract to assign to his employer any invention, although, before he applied for a patent, he permitted the employer to use his inventions in building some machines. The suit was for infringement, and it was held unnecessary to decide whether the employer had a shop license.

It was held in *Summers v. Clark* (1912) 38 App. D. C. 537, that the evidence failed to show that an employee, who claimed priority in an invention consisting in an improvement in a door for dump cars, had a conception of the invention in mind prior to his employment as a draftsman by one engaged in the development and manufacture of railway cars, who also claimed to have invented the same, and who had made drawings thereof which he kept in a cabi-

net in his office, to which the employee had access.

Where a patentee conveyed his patent rights in respect to a secret chemical preparation, on condition of his being paid a certain royalty and being employed by his grantee at a specified salary so long as his services were rendered solely in his employer's interests and were satisfactory, it was held that he was justified in terminating the contract on the failure of the employer to perform his obligations under it; and that a court of equity, therefore, would not restrain him from revealing the secret of his preparation to persons with whom he formed a partnership, after exercising his right of leaving the employment. *New York Chemical Co. v. Halleck* (1891) 15 N. Y. Supp. 517.

III. Rules as affected by various considerations.

a. Inventions made partly or wholly at employer's expense; use of employer's tools, materials, etc.

For cases where the servant was employed for the purpose of inventing, and used the tools, materials, etc., of the master, see III. b, *infra*.

In *WIRELESS SPECIALTY APPARATUS CO. v. MICA CONDENSER CO.* (reported herewith) ante, 1170, the court held that an invention made by an employee in the course of his employment, and at his employer's expense, is the property of the inventor, unless he has, by the terms of his employment or otherwise, agreed to transfer to his employer its ownership as distinguished from its use. The weight of authority appears to support this rule. *Hapgood v. Hewitt* (1886) 119 U. S. 226, 30 L. ed. 369, 7 Sup. Ct. Rep. 193, affirming (1882) 11 Biss. 184, 11 Fed. 422; *Dalzell v. Dueber Watch Case Mfg. Co.* (1893) 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886, reversing (1889) 38 Fed. 597; *Damon v. Eastwick* (1882) 14 Fed. 40; *Withington-Cooley Mfg. Co. v. Kinney* (1895) 15 C. C. A. 531, 37 U. S. App. 117, 68 Fed. 500; *Wilson v. J. G. Wilson Corp.* (1917) 241 Fed. 494; *Riley v. Barnard* (1892) 59 Off. Gaz. (Fed.) 1919; *Dice v. Joliet Mfg.*

Co. (1882) 11 Ill. App. 114, affirmed in (1883) 105 Ill. 649; *Clark v. Fernoline Chemical Co.* (1889) 25 Jones & S. 36, 5 N. Y. Supp. 190; *Fuller & J. Mfg. Co. v. Bartlett* (1887) 68 Wis. 73, 60 Am. Rep. 838, 31 N. W. 747; *Piper v. Piper* (1904) 3 Ont. Week. Rep. 451.

In *Hapgood v. Hewitt* (U.S.) *supra*, an inventor was hired by a corporation to devote his time and services to getting up, improving, and perfecting plows. He was paid a salary of \$3,000 a year in view of the expected value of his services for that purpose. He made certain improvements, working on the corporation's time and at its expense, and then had them patented in his own name. The corporation, in the absence of an express agreement, was held not entitled to an assignment of the title to the letters patent. The court said it had nothing more than a license to use the new plows, which, upon the dissolution of the corporation, was not assignable to a new corporation formed by the same stockholders.

And, on the authority of the above case, the court in *Clark v. Fernoline Chemical Co.* (1889) 25 Jones & S. 36, 5 N. Y. Supp. 190, held that a master employing a servant as a chemical expert to work with the master's products, and to endeavor to develop and discover new processes for the benefit of the master, was not entitled to an assignment of patents taken out by the servant for his discoveries; that the master in such a case acquired only a license to use them. In this case action was brought by the servant for salary, and the defense was that the servant refused to assign his patents. This was held untenable.

In *Dalzell v. Dueber Watch Case Mfg. Co.* (1893) 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886, reversing (1889) 38 Fed. 597, a skilled workman was hired by a watch company to make and devise tools to be used in the construction of watchcases. While so employed he got up improvements for making cores for watchcases, working on the company's time and having the assistance of employees of the company. He then took

out patents at the company's expense. The company claimed an oral contract to assign patent rights, but the testimony as to it was conflicting. The court refused to decree a specific performance, because of uncertainty. The question whether the company had the right, as by an implied license, to use the patents in its establishment, was not presented by the records. The court apparently assumed in this case that, in the absence of an express agreement, the employer had no right to an assignment, laying down the rule that "a manufacturing corporation which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect."

In *Withington-Cooley Mfg. Co. v. Kinney* (1895) 15 C. C. A. 531, 37 U. S. App. 117, 68 Fed. 500, the court said that, in the absence of evidence of an agreement by which the employer should have an interest in any patentable improvement invented by an employee, it would seem that the title to the invention made by the employee, or to any patent afterwards obtained by him, would be unaffected by the fact that he was in the service of the employer, and had the use of his shop and materials and of the services of his employees while devising and perfecting his invention.

In *Dice v. Joliet Mfg. Co.* (1882) 11 Ill. App. 114, affirmed in (1883) 105 Ill. 649, the court said: "The mere facts . . . that the appellant was in the employment of appellee, and received wages, and even used the material of appellee in the manufacture of his models, and even received assistance in making models from the latter's employees, would not give it the property in the invention, to the exclusion of the former."

In *Piper v. Piper* (1904) 3 Ont. Week. Rep. 451, the court referred with approval to the doctrine that the

mere existence of a contract of service does not, per se, disqualify a servant from patenting for his own benefit an invention made by him during his term of service, even though the invention may relate to a subject-matter germane to and useful for his employers in their business, and even though the servant may have made use of his employer's time, and servants, and materials, in bringing his invention to completion, and may have allowed his employers to use the invention while in their employment.

In *Edmunds on Patents*, p. 265, it is said that a servant, if really the inventor, may often patent his invention, though it be made in the employer's time, with the use of the employer's materials, and at the expense of the employer; for in such a case it is said the invention is not necessarily the property of the employer—citing *Heald's Patent* (1891) 8 Rep. Pat. Cas. 429; *Saxby v. Gloucester Wagon Co.* (1883) Griff A. P. C. 56. To the same effect is *Nicolas on Patent Law*, p. 27, citing, among other cases, *Re Marshall* (1900) 17 Rep. Pat. Cas. 553.

Where an engineer, in charge of certain departments of a manufacturing corporation at a high salary, made certain inventions which were patented in his name at the expense of the company, the cost of making models, etc., being also borne by the company, which was permitted for more than twenty years to use the invention without any claim for royalty, the court in *Wilson v. J. G. Wilson Corp.* (1917) 241 Fed. 494, held that the patentee was the beneficial owner, subject to the free and unlimited use of the patent by a corporation which had succeeded the employer, although stating that under the circumstances there was much force in the position of the defendant that the employer became the owner of the patent, and that the complainant was merely the legal owner, holding a naked trusteeship therein.

In *Riley v. Barnard* (1892) 59 Off. Gaz. (Fed.) 1919, it was held that an employee of the government was entitled to a patent for an invention

made at the expense, and while in the employ, of the government, in the absence of an express agreement or assent that the property in the invention should be the property of the government. That there is no distinction between government and other employees, so far as the present question is concerned, see III. h, *infra*.

A chemist of a salt company, who at its request, and apparently at its expense, conducted experiments which led to the discovery by him of a process for manufacturing a certain product, was held in *Damon v. Eastwick* (1882) 14 Fed. 40, entitled to a patent therefor as against the employer. The court said that the only question was that of priority, both the employer and employee having applied for a patent, and that it could not enter upon a consideration of the question of the justice or injustice of the employee's taxing the company, if he proposed to do so, for the use of a process disclosed by experiments made at its request and expense, with its material, while in its employment.

In *Fuller & J. Mfg. Co. v. Bartlett* (1887) 68 Wis. 73, 60 Am. Rep. 838, 31 N. W. 747, it was contended that the plaintiff, a manufacturing company, had expended several thousand dollars in perfecting a device conceived by its superintendent and in bringing it into public use, upon the faith of an implied contract that the superintendent would, upon completion, assign to the company the invention and his right to letters patent therefor. But it was held that the company was not entitled to an assignment of letters patent, although it had a perpetual license to manufacture the machine embodying the patent, and to sell it anywhere on the market, free from any claim to royalty.

It was said, however, in *Gill v. United States* (1896) 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322, that the fact that the employee made use of the time and tools of his employer, put at his service for the purpose, raises either an inference that the work was done for the benefit of the employer, or an implication of

bad faith on the patentee's part in claiming the fruits of labor which, technically, he had no right to enlist in his service. In this case it was held merely that the employee could not recover upon an implied contract on the part of the employer to pay for the use of the invention.

And in *Pape v. Lathrop* (1897) 18 Ind. App. 633, 46 N. E. 154, the court said it was settled law that "where a servant, during his employment, and while using the time and material of his employer, invents new devices, compounds, or machinery, or any useful appliances in connection with the business of his employer, and which are used in the business of the employer, with the intention or understanding that they shall belong to the employer, the same become his absolute property, and such inventor has no interest therein." In this case, however, the employee was obliged by the terms of his express contract to assign to the employer patents which he procured, the employee stipulating to render services "as inventor."

See also in this connection, III. d, *infra*, where in several cases the employer was held entitled to the invention, on the theory of a trust relationship between the parties.

b. Employment for the purpose of inventing or improving.

For cases where one is employed to perfect mechanical details or put an invention into practical form, in other words, merely to carry out the inventor's ideas, see III. c, *infra*.

If one is employed for the express purpose of using his inventive faculty for his employer, the latter is entitled to inventions made by the employee in performance of the contract. The rationale of the cases governed by this rule is that there is a special employment for the limited and definite purpose of inventing. The employee is regarded as having hired out to his employer the whole of his inventive powers, natural and acquired, so far as regards the particular improvements to the attainment

of which his experiments are to be directed. The rule finds support in the holdings, or at least in the language of the court, in the following cases:

United States.—*Solomons v. United States* (1890) 137 U. S. 342, 346, 34 L. ed. 667, 669, 11 Sup. Ct. Rep. 88; *Gill v. United States* (1896) 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322. See also *Dental Vulcanite Co. v. Wetherbee* (1866) 2 Cliff. 575, 3 Fisher, Pat. Cas. 87, Fed. Cas. No. 3,810.

California. — *Famous Players-Lasky Corp. v. Ewing* (1920) — Cal. App. —, 194 Pac. 665.

Illinois.—*Bates Mach. Co. v. Bates* (1901) 192 Ill. 138, 61 N. E. 518. See also *Joliet Mfg. Co. v. Dice* (1883) 105 Ill. 649.

Iowa.—*Bryan & Co. v. Sturlock* (1918) 184 Iowa, 378, 168 N. W. 144.

Massachusetts.—*WIRELESS SPECIALTY APPARATUS Co. v. MICA CONDENSER Co.* (reported herewith) ante, 1170.

Missouri.—*Meissner v. Standard R. Equipment Co.* (1908) 211 Mo. 112, 109 S. W. 730.

New Jersey.—*Connelly Mfg. Co. v. Wattles* (1891) 49 N. J. Eq. 92, 23 Atl. 123.

New York.—*Annin v. Wren* (1887) 44 Hun, 355; *Baldwin v. Von Micheroux* (1893) 5 Misc. 386, 25 N. Y. Supp. 857, affirmed in (1894) 83 Hun, 43, 31 N. Y. Supp. 696.

Oregon.—*Portland Iron Works v. Willett* (1907) 49 Or. 245, 89 Pac. 421, 90 Pac. 1000.

Rhode Island. — *Silver Spring Bleaching & Dyeing Co. v. Woolworth* (1890) 16 R. I. 729, 19 Atl. 528.

England.—See *Bloxam v. Elsee* (1825) 1 Car. & P. 558, *Ryan & M.* 187, 9 Dowl. & R. 215, 6 Barn. & C. 169, 108 Eng. Reprint, 415, 5 L. J. K. B. 104, 30 Revised Rep. 275.

Canada.—*Bonathan v. Bowmanville Furniture Mfg. Co.* (1871) 31 U. C. Q. B. 413.

Newfoundland.—*Fox v. McKay*, Newfoundland. Rep. (1864-74) 35.

One employed to devise or perfect an instrument or process cannot, after accomplishing the work, assert title thereto as against his employer. *WIRELESS SPECIALTY APPARATUS Co. v.*

MICA CONDENSER CO. (reported herewith) ante, 1170.

The rule applicable to that class of cases where the employment of the servant is for the express purpose of making inventions for the master's benefit was thus stated in *Solomons v. United States* (U. S.) supra: "If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers and that which they are able to accomplish, he has sold in advance to his employer."

And the proposition that, if the patentee is employed to invent or devise improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do, is stated, *arguendo*, in *Gill v. United States* (1895) 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322. This rule was approved and applied in *Meissner v. Standard R. Equipment Co.* (1908) 211 Mo. 112, 109 S. W. 730.

So, the conclusion that the employer, rather than the employee, was entitled to the invention, appears to rest, in *Famous Players-Lasky Corp. v. Ewing* (1920) — Cal. App. —, 194 Pac. 65, partly on the ground that the contract of employment contemplated the inventive service of the employee, although there was also the circumstance that the general idea of the invention was that of the general manager of the employer corporation, and the employee who obtained the patent had merely carried out this general idea. In this case the patent was obtained by an expert electrician employed by a motion picture corporation, the invention consisting in a "light dissolve," the principle of which, it appears, was suggested by the manager of the company. It ap-
16 A.L.R.—75.

peared also that the electrician was employed to improve the light in every way possible, and to use his expert knowledge and ability in that direction. Under these circumstances, it was held that the corporation could compel him to assign to it the title to the invention.

The doctrine that, where the employee is hired for inventive purposes, the resulting invention made in the course of his employment belongs to the employer, is supported also by *Bryan & Co. v. Sturlock* (1918) 184 Iowa, 378, 168 N. W. 144, where the contract of employment contemplated the use of the inventive ability of the employee to create a device for transmission of power in motor vehicles; and the court held that, the employee having made such an invention during the course of his employment, he could assert no interest in shares of stock in a corporation which he had organized to capitalize the invention, for which he had obtained a patent.

And in *Connelly Mfg. Co. v. Wattles* (1891) 49 N. J. E. 92, 23 Atl. 123, the court said that the doctrine was settled that where one person agrees to invent for another, or to exercise his inventive ability for the benefit of another, the inventions made and patents procured during the time of service covered by the contract belong in equity to the employer, and not to the employee. An injunction restraining the use of patents by the employee was denied, however, in this case, on the ground that the alleged contract was not satisfactorily proved.

Also in *Annin v. Wren* (1887) 44 Hun (N. Y.) 355, where the right of a servant to take out letters patent in his own name was denied, it was said: "The special service of inventing, under a special employment to invent, gives the master the servant's invention which results from that service. . . . There is no room left within the employment for inventing on his own hook. The servant has no right to think or invent for himself on the particular subject-matter in hand. He must get out of such a relation before he can claim the product of his

work under such an employment. He cannot carry off both his salary and the only valuable product of his work under such an employment, leaving his master with his useless models, the results of his uselessly spent money on tools, machinery, time, labor of self and employees, with only a license, or shop right, which is not assignable or useful in any way save to himself. Such a result would necessarily defeat the whole purpose of the contract and the contracting parties. The cases resulting in mere license were those of general employment; at all events they were not special employments for the limited service of inventing."

And in *Portland Iron Works v. Willett* (1907) 49 Or. 245, 89 Pac. 421, 90 Pac. 1000, the court said that it seems to be conceded by all the decisions that when there is a special service of inventing, under a special employment to invent for a consideration, the employer becomes the owner of the servant's invention.

Where a person was employed by an inventor to experiment upon an invention, and through such employee it was conducted to a successful issue, it was held in *Dental Vulcanite Co. v. Wetherbee* (1866) 2 Cliff. 575, 3 Fisher, Pat. Cas. 87, Fed. Cas. No. 3,810, that the employer was entitled to the patent as the original and sole inventor.

It was held that secret processes and compounds, invented by an employee of a firm, belonged to the latter, where he was employed for that purpose and used the firm's materials in making them, the intent of all parties being that the firm should be the owner, and the employee knowing that the only value of the invention to the firm would be in its absolute ownership of the formula, and in its being kept a trade secret. *Baldwin v. Von Micheroux* (1893) 5 Misc. 386, 25 N. Y. Supp. 857, affirmed in (1894) 83 Hun, 43, 31 N. Y. Supp. 696.

And where a discovery of a dyeing process was made by an employee, a part of whose work was to make experiments in such processes with a view to discovery and improvement,

the employee using the employer's time, materials, and machinery, and working under the latter's direction, for the purpose of making the discovery, the court in *Silver Spring Bleaching & Dyeing Co. v. Woolworth* (1890) 16 R. I. 729, 19 Atl. 528, said that it followed, independently of any special contract to that effect, that the resulting discovery was as much the property of the employer as if, instead of being the formula of a secret process, it had been a material product; so that the employee, in refusing to make disclosure of the formula, was refusing to give up to the employer that which belonged to it. The employer was held, in this case, entitled to a decree of disclosure, without further compensation to the employee.

Also in *Makepeace v. Jackson* (1813) 4 Taunt. 770, 128 Eng. Reprint, 534, 14 Revised Rep. 664, where the head color man in a calico-printer's shop brought trover against his employer for a book which contained entries of processes for mixing colors, and which was essential to the employer's trade, claiming that several of the processes were the plaintiff's own invention, the court held that there could be no recovery, it being said that the book was the property of the master, even though there might be inventions of the plaintiff in it; that the master had a right to something besides the mere manual labor of the servant in the mixing of the colors; and that, though the plaintiff invented the processes, yet they were to be used for the master's benefit. That color recipes made by an employee may be subject to use by the employer, although they have been patented by the employee, see the decision of the Pennsylvania court in *Dempsey v. Dobson*, under VI a, *infra*.

In *Bloxam v. Elsee* (1825) 1 Car. & P. 558, Ryan & M. 187, 9 Dowl. & R. 215, 6 Barn. & C. 169, 108 Eng. Reprint, 415, 5 L. J. K. B. 104, 30 Revised Rep. 275, it is stated in the head-note that if a servant, while in the employ of his master, makes an invention, that invention belongs to the

servant, and not the master; but that, it seems, if the master employs a skillful person for the express purpose of inventing, the inventions made by him will so much belong to the master as to enable him to take out a patent for them. But the case turned more on other points, and, although it has been cited to the proposition, it appears to be of little value on the present question.

Attention is called, also, to the following statement in *Bonathan v. Bowmanville Furniture Mfg. Co.* (1871) 81 U. C. Q. B. 413: "The master cannot claim an invention made by a workman in his employment. . . . But it may be different when the workman is employed for the express purpose of devising improvements. . . . It appears to me the law must be that if a person be expressly engaged to invent or improve a machine or process of any kind for another, the invention or process is the property of the one for whom it was done. The skill and labor of the employee are then bargained for, for the production of a particular article, or the elimination of an idea to which practical effect is to be or can be given. The master would have no right to claim an article found by his servant, apprentice, or workman; but if the master expressly employed such persons to make search for particular articles for him, I have no doubt the finding of any such articles by them would be for the benefit of the master."

There is apparently, however, a lack of uniformity in the decisions on the question whether the contract should be so construed as to require the employee to use his inventive faculty for the employer's benefit. And there are authorities which seem in conflict with the holdings, or at least with the language of the opinions, in some of the above cases. In other words, the courts have in several cases construed the contract of employment, apparently, as one which did not require the employee to use his inventive faculty for the employer's benefit, although he was to devise and improve machinery for the latter. And there

are intimations that nothing scarcely, short of an express contract on the part of the employee to use his inventive faculty for the benefit of the employer, would be sufficient.

Thus, it is held in *Pressed Steel Car Co. v. Hansen* (1905) 2 L.R.A. (N.S.) 1172, 71 C. C. A. 207, 137 Fed. 403, affirming (1904) 128 Fed. 444, that the facts that one is engaged, at a large salary, to take charge of the engineering and manufacturing department of a corporation, and assumes the duty of improving its product and devising and designing articles for its benefit, do not require him, as matter of law, to assign to the corporation the patents for articles so designed. The court referred to the statement in *Gill v. United States* (1895) 160 U. S. 426, 40 L. ed. 680, 16 Sup. Ct. Rep. 322, supra, that "it is equally clear that, if the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do," as dictum, and as properly confined to cases where the patentee is employed specifically to invent or devise the particular improvements in question. So viewed, the court said, an express contract to assign the patent might well be inferred from the acceptance by the employee of the specific employment. There is a dissenting opinion, however, in this case, based on the ground that it came within the rule in the cases above cited, where there was an employment for the purpose of inventing. A petition for a writ of certiorari in this case is denied in (1905) 199 U. S. 608, 50 L. ed. 331, 26 Sup. Ct. Rep. 749.

In *Dalzell v. Dueber Watch Case Mfg. Co.* (1893) 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886, the Federal Supreme Court said: "A manufacturing corporation which has employed a skilled workman, for a stated compensation, to take charge of its works and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made

by him while so employed, in the absence of express agreement to that effect." The court cited, in support of the above, *Hapgood v. Hewitt* (1886) 119 U. S. 226, 30 L. ed. 369, 7 Sup. Ct. Rep. 193.

And the proposition that the mere fact that one is employed to construct and improve certain machinery for the employer does not, of itself, necessarily preclude the employee from obtaining a patent on such inventions as he may make in connection with his work, and that the employer cannot plead the obtaining of such a patent by the employee as a breach of the contract of employment so as to reduce the latter's damages in an action for his wages, is supported by *Green v. Willard Improved Barrel Co.* (1876) 1 Mo. App. 202.

So, although a superintendent of the manufacturing department of a company was, under the terms of the contract of employment, under obligation to look after its machinery and to make improvements therein, it was held in *American Circular Loom Co. v. Wilson* (1908) 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133, that the company did not have a right to an assignment of a patent on a machine invented by the employee to turn out the same products which the company was already producing by another patented machine for which it held an exclusive right; and that this was true although the expense of procuring the patent was paid by the employer, and many machines embodying the invention and built under the patent were constructed under the direction and supervision of the employee, at the employer's expense, and were used in its business with the former's knowledge and consent, and the success of the company's business largely depended upon its use of these machines. The court said that these circumstances and the other facts found did not show that the employer was entitled to a property right in the invention itself and in the letters patent securing that right; that the invention and the patents thereon belonged to the inventor, to whom the patent had been issued,

unless he had made either an assignment of his right or a valid and enforceable agreement for such an assignment, even though it was his duty to use his skill and inventive ability to further the interests of his employer, by devising improvements generally in the appliances and machinery used in the employer's business. The court said that the question did not arise as to how far the rule would be applicable where it appeared that, by the express terms of the hiring, the employee was to exercise his inventive faculties with reference to the specific invention in question, for the sole benefit of the employer.

And where a machinist was employed by one about to start a factory, at a salary of \$21 a week, to make what machinery was necessary and to keep it in repair, it was held in *Whiting v. Graves* (1878) 3 Bann. & Ard. 222, Fed. Cas. No. 17,577, that there was nothing in the contract of service which would give the employer any legal or equitable title to any letters patent for any inventions which the employee might make. The court said that it was no part of the original employment to invent machinery for general use, but only in the factory of the employer; that this was a factory not for making and selling machinery, but for manufacturing fancy dry goods with the aid of machinery; and that the employment to invent and perfect machinery for that purpose, while it would operate as a license to the employer to use machines invented by the employee and put in use, under such employment, would not, of itself, confer upon the employer any legal title to the invention itself, or to letters patent protecting it.

So, the proposition that the employment of a skilled workman for a stated compensation, to devote his time and services to devising and making improvements in articles manufactured by his employer, does not operate so as to vest in the employer an inchoate legal title to the inventions, is supported by *Whiting v. Graves* (Fed.) supra.

ANNO.—EMPLOYEE'S INVENTIONS.

In *Barber v. National Carbon Co.* (1904) 5 L.R.A.(N.S.) 1154, 64 C. C. A. 40, 129 Fed. 370, a plea that the complainant agreed to give his skill, attention, and inventive ability to the service of the defendant carbon company in and about cheapening and improving the process of electroplating, and other processes in the manufacturing of carbons, concluding by claiming that the defendant was entitled, and had the right, to the perpetual use, in its business and for its purposes, of the improvements and inventions claimed, was construed as one of license only. The court refused to hold it a good plea of title, where there was no averment that there was an agreement that the company should have title to the inventions, or to any patent that complainant might obtain for them.

c. Mechanical improvement by employee, or embodiment of employer's conception, as distinguished from invention.

As to presumptions in this class of cases, see V. *infra*.

The rule appears to be well settled that one who discovers a new principle or improvement in a machine or composition is not to be deprived of the benefits of that discovery because he employs others to perfect the details and put his conception into practical form; and this is true even though the workmen, in carrying out the employer's design, suggest valuable mechanical improvements, so long as such improvements do not amount to a departure from the original principle and purpose of the employer. This rule, which will be more clearly understood from the statements below in the various decisions, is supported by numerous cases.

United States.—*Minerals Separation v. Hyde* (1916) 242 U. S. 261, 61 L. ed. 286, 37 Sup. Ct. Rep. 82; *Agawam Woolen Co. v. Jordan* (1869) 7 Wall. 583, 19 L. ed. 177; *Union Paper Collar Co. v. Van Dusen* (1874) 23 Wall. 530, 23 L. ed. 128; *Pennock v. Dialogue* (1825) 4 Wash. C. C. 538, Fed. Cas. No. 10,941; *Watson v. Bladen* (1826) 4 Wash. C. C. 580, Fed. Cas. No. 17,277; *Sparkman v. Higgins*

(1846) 1 Blatchf. 205, Fed. C. 13,208; *Wellman v. Blood* (1856) Arth. Pat. Cas. 432, Fed. C. 17,385; *King v. Gedney* Arth. Pat. Cas. 444, Fed. Cas. 795; *Blandy v. Griffith* (1869) er, Pat. Cas. 609, Fed. Cas. 529; *Smith v. Stewart* (1893) 481, affirmed in (1893) 7 C. C. 17 U. S. App. 217, 58 Fed. 580; *Shirt & Collar Co. v. Beattie* (1900) C. C. A. 442, 149 Fed. 736, petition for writ of certiorari denied in 205 U. S. 547, 51 L. ed. 924, 2 Ct. Rep. 795; *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.* 164 Fed. 47. See also *Goodyear v. Day* (1852) Fed. Cas. No. 10,941 (recognizing principle); *Dental Canite Co. v. Wetherbee* (1866) 555, 3 Fisher, Pat. Cas. 87, Fed. No. 3,810; and *Yoder v. Mills* 25 Fed. 821.

California.—*Famous Players Corp. v. Ewing* (1920) — Cal. A. 194 Pac. 65.

District of Columbia.—*Laughlin v. Burry* (1921) — App. D. C. 1013; *Huebel v. Bernard* 15 App. D. C. 510; *Miller v. [unintelligible]* (1901) 18 App. D. C. 163; *Gallagher v. Hastings* (1903) 21 App. D. C. 163; *Sendelbach v. Gillette* (1903) 22 App. D. C. 168; *Orcutt v. McDonald* 27 App. D. C. 228; *Kreag v. [unintelligible]* (1906) 28 App. D. C. 437; *Larson v. Richardson* (1906) 28 App. D. C. 437; *Robinson v. McCormick* (1907) App. D. C. 98, 10 Ann. Cas. 101; *Braunstein v. Holmes* (1908) 30 App. D. C. 328; *Neth v. Ohmer* (1908) App. D. C. 478; *McKillop v. [unintelligible]* (1908) 31 App. D. C. 586; *McKillop v. [unintelligible]* (1909) 34 App. D. C. 586; *Broadwell v. Long* (1911) 36 App. D. C. 418; *Ladoff v. Dempster* (1911) App. D. C. 520; *Moody v. Colby* (1911) App. D. C. 248; *Gammeter v. Neidich* (1916) 45 App. D. C. 531. See also *Milton v. Kingsley* (1891) App. D. C. 531; *Lloyd v. [unintelligible]* (1901) 17 App. D. C. 491; *Tyler v. Kelch* (1902) 19 App. D. C. 180; *[unintelligible] v. Cromwell* (1902) 19 App. D. C. 180; *Corry v. McDermott* (1905) 25 App. D. C. 305; *Jameson v. Ellis* (1913) 40 App. D. C. 164.

Illinois.—*Fraser v. Gates* (1885) 118 Ill. 99, 1 N. E. 817.

New York.—See also *Burden v. Burden Iron Co.* (1903) 39 Misc. 559, 80 N. Y. Supp. 390.

England.—*Allen v. Rawson* (1845) 1 C. B. 551, 135 Eng. Reprint, 656.

Newfoundland.—*Fox v. McKay*, Newfoundland Rep. (1864-74) 35.

The above doctrine appears to be supported by cases other than those involving the relation of employer and employee. And several of the cases cited *supra* do not strictly, it appears, involve that relationship. The broad principle is stated in *Gedge v. Cromwell* (1902) 19 App. D. C. 192, as follows: "The rule is that one, who, by way of partnership or contract, or in any other, empowers another person to make experiments upon his own conception for the purpose of perfecting it in its details, is entitled to the ownership of such improvements in the conception as may be suggested by such other persons."

In a leading case (*Agawam Woolen Co. v. Jordan* (1869) 7 Wall. (U. S.) 685, 19 L. ed. 177) the Federal Supreme Court said: "Where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they, in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle, and may be embodied in his patent as a part of his invention. . . . Persons employed, as much as employers, are entitled to their own independent inventions, but, where the employer has conceived the plan of an invention and is engaged in experiments to perfect it, no suggestions from an employee, not amounting to a new method or arrangement which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement."

The doctrine laid down in the above case was approved in *Union Paper Collar Co. v. Van Dusen* (1874) 23 Wall. (U. S.) 530, 23 L. ed. 128.

And the rule applicable to cases in which an employee is hired to render assistance in perfecting the mechanical details and arrangements requisite for the complete elaboration of an invention of which the general idea has been conceived by the employer was stated in an important English case (*Allen v. Rawson* (1845) 1 C. B. 551, 135 Eng. Reprint, 656) as follows: "If a person has discovered an improved principle, and employs engineers, . . . and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent; and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle."

Each case, it was said by Tindal, Ch. J., in *Allen v. Rawson* (Eng.) *supra*, must depend upon its own merits, it being difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent incorporating them, taken out by his employer.

Attention is called also to the well-considered statement in *Frost on Patents*, p. 14: "There is nothing in law to prevent an inventor from availing himself of the assistance of workmen or servants in the prosecution of his search after a new manufacture. Indeed, many processes cannot be conducted by the unaided exertions of a single individual, and in almost all cases actual experiments are a necessity in order to find out how a desired end may be best obtained. It would, therefore, be absurd to confine the rewards given to inventors to that small class of them, only, who have entirely, and without any assistance whatever,

brought their discoveries to perfection, and it is grave matter of doubt whether, strictly speaking, any such could be found. The law, therefore, considers workmen and servants merely as tools of the inventor, and instruments in his hands, carrying out the ideas which originate in the master mind; and a person who has invented a main and leading idea remains the true and first inventor, and, as such, entitled to apply for a patent notwithstanding that he avails himself of the assistance and suggestions of workmen and servants in bringing his invention to a state of perfection."

The rights as the original and real inventor of one who has devised the general plan as well as the operative principle of a machine, not only in rudiment but in practically completed conception, are not affected by the fact that he employs another to carry out and put his ideas into working shape, although the latter perfects mechanical details and makes modifications which do not go to the substance of the invention, but contribute to its efficiency. *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.* (1908) 164 Fed. 47.

And the rule was laid down in *Wellman v. Blood* (1856) MacArth. Pat. Cas. 432, Fed. Cas. No. 17,385, that if the employer conceives the result embraced in the invention, or the general idea of a machine upon a particular principle, and in order to carry his conception into effect it is necessary to employ manual dexterity, or even inventive skill, in the mechanical details and arrangements requisite for carrying out the original conception, the employer will be the inventor, and the servant will be a mere instrument through which he realizes his idea.

And in *United Shirt & Collar Co. v. Beattie* (1907) 79 C. C. A. 442, 149 Fed. 736, it was held that one who conceived an invention and employed another to carry it out was entitled to the patent rights as sole inventor, a distinction being made between one who supplies the inventive faculty and another who furnishes merely mechanical skill. The court quoted

the doctrine that every machine, before it can be used, must be constructed as well as invented; and that if one man does all the inventing, and another all the constructing, the first is the sole inventor. A petition for a writ of certiorari was denied in (1907) 205 U. S. 547, 51 L. ed. 924, 27 Sup. Ct. Rep. 795.

The rule was laid down, also, in *Huebel v. Bernard* (1899) 15 App. D. C. 510, that an inventor who employs a mechanic to embody his conception in practical form retains his exclusive right to the perfected improvement, notwithstanding the perfection is partly due to the exercise of the mechanical skill of the employee; and that the latter must invent something, not merely improve, by the exercise of his mechanical skill, upon a conception which he has been employed to work out.

In a suit for infringement of a patent, the court in *Blandy v. Griffith* (1869) 3 Fisher, Pat. Cas. 609, Fed. Cas. No. 1,529, in denying the claim of a draftsman in the complainant's foundry that he was the inventor, said: "Invention is the work of the brain, and not of the hands. If the conception be practically complete, the artisan who gives it reflex and embodiment in a machine is no more the inventor than the tools with which he wrought. Both are instruments in the hands of him who sets them in motion and prescribes the work to be done. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought, and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law, it always subsists. The mechanic may greatly aid the inventor, but he cannot usurp his place. As long as the root of the original conception remains in its completeness, the outgrowth, whatever shape it may take, belongs to him with whom the conception originated."

The employee must invent something, not merely improve, by the exercise of mechanical skill, upon a con-

ception which he has been employed to work out. *Robinson v. McCormick* (1907) 29 App. D. C. 98, 10 Ann. Cas. 548.

And in *Watson v. Bladen* (1826) 4 Wash. C. C. 580, 1 Robb, Pat. Cas. 510, Fed. Cas. No. 17,277, it was said: "If a contrary doctrine were to be maintained, very few, if any, patents could be upheld, unless in those cases where the inventor is also the mechanic who constructs the machine. His genius may be equal to the task of conceiving all the principles, as well as the general structure and form of the machine. But he may be unacquainted with the use of tools, and be quite unable to anticipate in what manner the contemplated form of any particular part of the machine may affect its operation, until the work is in progress, and the materiality of form can then be practically discerned. That some alteration of the contemplated form or proportions should be found necessary would be, in most instances, to be expected; and who so likely to perceive the necessity of it, and to suggest it, as the workman who is engaged in constructing the machine? But if such suggestions are sufficient to invalidate the patent, few patents would stand the test of such a principle."

That a mechanic employed for the purpose of enabling the employer to carry his original conception into effect is not an inventor was assumed by *Alderson, B.*, in his direction to the jury in *Barker v. Shaw* (1832) 1 Webster, Pat. Cas. (Eng.) 126.

In *Sparkman v. Higgins* (1846) 1 Blatchf. 205, Fed. Cas. No. 13,208, the court said that to constitute an inventor it is not necessary that he should have the manual skill and dexterity to make the drafts; but that, if the ideas are furnished by him for producing the intended result, he is entitled to avail himself of the mechanical skill of others to carry out practically his contrivance.

And in *Meth v. Ohmer* (1908) 30 App. D. C. 478, the court said it was well settled that if one conveys to his employee information and instructions to proceed and manufacture a piece

of mechanism which, with the instructions imparted, can be constructed by the application of ordinary mechanical skill, such employer is entitled to the benefit of the skill and ingenuity of the employee in successfully completing the device; an inventor being entitled to avail himself of the mechanical skill of others in reducing his inventive ideas to practice.

And the above rule was applied in *Meth v. Ohmer* (D. C.) *supra*, where a manufacturer of carfare registers directed skilled employees to construct a new registering machine, which they did, the new machine including an invention which was an addition to the machine then in use, and it appeared that the employer was present almost daily while they constructed the machine, assisted in preparing the drawings and inspecting the work as it progressed, and it was shown that he had not only a general idea of the desired results, but a definite conception of the means to accomplish those results, and that he imparted to the employee sufficient knowledge of what he wanted constructed to enable anyone with reasonable mechanical skill and knowledge of the art to work out the invention.

In *Moody v. Colby* (1913) 41 App. D. C. 248, the court said the case came clearly within that large class of decisions which hold that, where one employs another to perfect the details of an invention of which the employer has conceived the general principle or plan, even though the employee, to realize the employer's conception, devises valuable improvements, so long as the improvements are ancillary to the plan and preconceived designs of the employer, the improvements will belong to the employer, and not to the employee.

Where an employee, as a part of his duties, made and tested a tire tool devised by the employer, it was held in *Broadwell v. Long* (1911) 36 App. D. C. 418, that even if the suggestion of a roller in the device to reduce the friction first came from the employee, it was a change within the skill of the mechanic, and should inure to the benefit of the employer.

It is held in *Minerals Separation v. Hyde* (1916) 242 U. S. 261, 61 L. ed. 286, 37 Sup. Ct. Rep. 82, that patentees are none the less discoverers of the process patented because an employee happened to make the analyses and observations which resulted immediately in the discovery, where the patentees planned the experiment in progress when the discovery was made, directed the investigations day by day, conducted them in large part personally, and interpreted the results.

And in *Kreag v. Geen* (1906) 28 App. D. C. 437, the court said that, the relation of employer and employee being established, the law is well settled that where one conceives the principle or plan of an invention, and employs another to perfect the details and realize his conception, although the latter may make valuable improvements therein, such improved results belong to the employer. In this case, notwithstanding the improvements upon the combinations of form and materials shown in the old brushes (the subject-matter of the invention being an improvement in brushes for polishing shoes) had been declared the exercise of inventive talents, the court said that it was undoubtedly within the conception of the employer, in a crude form at least, and that he disclosed it to the employee, who was hired to make a new brush.

In *Braunstein v. Holmes* (1908) 30 App. D. C. 328, the rule as between employer and employee that where the employer conceives the principle or plan of an invention and the employee is directed to perfect the details, though the employee may make valuable improvements therein, the improved results belong to the employer, was held applicable to a principal and assistant, although they were fellow employees.

And the rule was held applicable also in *Ladoff v. Dempster* (1911) 36 App. D. C. 520, to the case of a principal and assistant engaged in the work of a common employer.

In *Burden v. Burden Iron Co.* (1903) 39 Misc. 559, 80 N. Y. Supp. 390, where the invention was made

by a president of a corporation who had formerly been a partner in the firm which the corporation succeeded, the court held that the invention was the property of the inventor, and not of employees of the company who had carried out his ideas. The court, however, said that the inventor was not in any sense an employee.

Suggestions made by a mechanic engaged to construct a machine, as to its form or proportions, are not sufficient to invalidate the patent, although they may be incorporated in the specifications. *Pennock v. Dialogue* (1825) 4 Wash. C. C. 538, Fed. Cas. No. 10,941.

But, while one is not precluded from claiming an invention by the mere fact that the mechanical details have been worked out by his employees, there are cases which illustrate the complementary rule that if the employee goes further and does more than the work of a mere mechanic and originates a new feature or device, amounting in itself to a complete patentable invention, the employer cannot claim title thereto.

Thus, while an employer is to be protected from the bad faith of his employee, the latter is equally entitled to protection from the rapacity of his employer; if, therefore, he goes farther than mechanical skill enables him to do, and makes an actual invention, he is entitled to its benefits. *McKeen v. Jerdone* (1909) 34 App. D. C. 163; *Robinson v. McCormick* (1907) 29 App. D. C. 98, 10 Ann. Cas. 548.

And it was held in *McKeen v. Jerdone* (D. C.) *supra*, that invention did not lie in the idea of an employer of a steel railway car as to the thing to be desired, but did lie in the conception of the means by which the desired result could be obtained; and that consequently, in order to claim the benefit of work done by an employee independently of descriptions and sketches furnished by the employer, the latter must show that he had in mind and communicated to the former some specific means of accomplishing his desired end and that the employee's independent work con-

sisted of nothing more than improvements thereon which might have been accomplished by any mechanic or designer skilled in the art.

If the suggestions communicated by the employee constitute the whole substance of the improvement, the patent, if granted to the employer, is invalid, because the real invention or discovery belongs to the person who made the suggestions. *Union Paper Collar Co. v. Van Dusen* (1874) 23 Wall. (U. S.) 530, 23 L. ed. 128. See to a similar effect, *Agawam Woolen Co. v. Jordan* (1869) 7 Wall. (U. S.) 602, 19 L. ed. 181.

And where, because of an inadvertent departure from the model or the drawings, workmen engaged in the manufacture of a gun made certain changes in the design without consultation with the inventor and without his knowledge, it was held in *Berdan Fire-Arms Mfg. Co. v. Remington* (1873) 3 Off. Gaz. 688, Fed. Cas. No. 1,336, that, if anything in the way of invention pertained to such new design or device, the original inventor was not entitled thereto.

In *Sendelbach v. Gillette* (1903) 22 App. D. C. 168, the court stated the rule to be that where one claims an invention, and also communication of that invention to another, who has applied mechanical work thereto and put the invention into practice, the communication, in order to be effectual, must be shown to have been full and clear as to all the essential elements of the invention, and such as was sufficient in itself to enable the party to whom the disclosure was made to give the invention practical form and effect without the exercise of invention on his part; in other words, the work of the employee in giving form and effect to the invention communicated must be nothing more than the exercise of mechanical skill, and if the work embodies invention, as distinguished from mechanical skill, it cannot be successfully claimed by another, except where there has been an agreement that such completed invention, or the patent therefor, shall issue for the bene-

fit of the party making the communication.

And in *Smith v. Phelps* (1910) 35 App. D. C. 360, the rule that, for the employer to claim the benefit of the employee's skill and achievements, it is insufficient that the employer had in mind a desired result and employed one to devise means for its accomplishment, but he must also show that he had an idea of the means to accomplish the particular result, which he communicated to the employee in such detail as to enable the latter to embody the same in some practical form, was applied in a case where the superintendent of the mechanical department of a spring-cushion company was directed by the manager to build a spring cushion in which the main coil springs would be separate from the auxiliary springs, without conflict in the working of the two, no definite form by drawing, or explanations as to how the intended result should be accomplished, being furnished to the superintendent.

The above rule was approved, also, in *Ladoff v. Dempster* (1911) 36 App. D. C. 520. And it was accordingly held that, where a chemist in the research laboratory of an electrical company, who was engaged in experiments to improve a magnetite electrode, assigned to an assistant, who was also a chemist, the work of mixing, firing, and testing the same according to the express directions of the former, who had not conceived the idea of treating the oxides in such a way as to reduce them to iron, the assistant, who first conceived the idea of such a reduction, was entitled to the invention therein, since it was not the mere mechanical improvement of a thing which he was employed to perfect, but was a departure in principle from the results contemplated by his superior.

And it was held in *Eshleman v. Shantz* (1912) 39 App. D. C. 434, that the relation of employer and employee did not deprive the latter of his right to claim an invention as his own, where no means were suggested by the employer to him by which the result could be accomplished, the

communication to the employee going no further than to evince a desire on the part of the employer for a certain result.

d. Trust relationship.

The doctrine that the invention is held in trust for the employer, in view of special, confidential, or trust relationships between it and the inventor, has obtained in several cases. But it seems that, to warrant the application of this doctrine, the inventor must be more than a mere employee, or the circumstances must be such that it would be clearly inequitable to permit him to assert ownership. Two English decisions proceed upon the principle that an employee may be declared a trustee for his employer in respect to any patent which, under the circumstances, he cannot take out in his own name without violating his obligations as a fiduciary agent of his employer.

In a case where a chemist employed in a factory had discovered certain processes, Kekewich, J., thus stated his reasons for a decision in favor of the employers: For all purposes, except that of being the first and true inventor, he was the agent of his employers. His labors were theirs; he worked in their laboratory with their materials, as well as their assistance; and the benefits of his discovery, morally and equitably belonged to them. *Kurtz v. Spence*, 5 Rep. Pat. Cas. (Eng.) 181. Other rulings of the English Patent Office to the same effect are cited in *Frost, Patents*, 2d ed. p. 14.

And the decision in *Worthington Pumping Engine Co. v. Moore* (1903) 19 Times L. R. (Eng.) 84, 20 Rep. Pat. Cas. 1, that a confidential manager of the English business of an American corporation could not, as against the corporation, hold a patent taken out during his contract of service, appears to turn on the special, confidential relations of the manager to the corporation and the fact that he procured the patent as a result of information and materials furnished by the company. It appeared that the manager was a vice president of the

corporation, receiving a large salary, was a stockholder, and was, the court said, the "alter ego" of the plaintiff corporation outside of the United States. It is said, also, that the basis and foundation of all the designs and drawings settled and approved in the London office were the drawings and information furnished from the head office in America. Details and modifications were worked out, as occasion required, by confidential correspondence and interviews. And the court said that the manager would not have been acting in accordance with the good faith implied in his contract had he kept back new ideas or details of construction suggested or carried out in the ordinary course of business between the parties, with a view to his personal profit at the expense of the corporation. The court, however, said that it recognized and appreciated the principle of those cases which have established that the mere existence of a contract of service does not, per se, disqualify a servant from taking out a patent for an invention made by him during his term of service, even though the invention may relate to subject-matter germane to, and useful for, his employers in their business, and even though the servant may have made use of his employers' time and servants and materials in bringing his invention to completion, and may have allowed his employers to use the invention while in their employment.

In *Dowse v. Federal Rubber Co.* (1918) 254 Fed. 308, where the question was as to the right of one employed by a manufacturing company to an invention, the court said that the patentee did not expressly contract, as a part of his duties, to assign this invention; but that if he did so agree in substance, and was more than a mere employee, having the main responsibility to make the business successful, then he should be compelled to assign the patent; and that the real test was whether he occupied such a relation to the corporation that he was its alter ego in such a capacity that it was only consistent with good faith that he should recog-

nize its ownership of the patent issued to him, and whether, without breach of his obligation toward his employer, he could insist upon retaining and enforcing against it the patent which he had obtained. In this case, where the inventor, who was not a mere employee, but was president, and general manager, and one of the directors of the company, and was, the court said, practically the corporation, and the patent was essential to the existence of the corporation, and was developed by the corporate force under the supervision of the president, the court held that it would be grossly inequitable for the inventor to retain title, that a shop right would be insufficient, and that a decree should be entered for an assignment.

Generally, as to the right to inventions made at the employer's expense, see III. a, *supra*.

e. Acquiescence of employee.

If a servant surrenders to his master his rights as an inventor by expressly or impliedly permitting him to incur the trouble and expense of obtaining a patent, it cannot be said that the master obtained the patent surreptitiously, or in fraud of the servant's discovery. See *Dixon v. Moyer* (1821) 4 Wash. C. C. 68, Fed. Cas. No. 3,931, where the question arose in connection with the contention of a third party, who was sued by the master for infringement, that the invention belonged to an employee of the plaintiff.

Acquiescence of the employee in the use by the employer of inventions made by the former is a frequent feature in those cases which discuss the question of the employer's right to a license to continue the use of the invention. See VI. *infra*.

f. Duress.

On general principles, it is manifest that an employer cannot, as against his employee, retain the benefit of letters patent which the latter has been prevented from applying for, by coercive conduct of his superior which amounts to actual duress. But duress will not be inferred from the

mere fact that the employee feared he would lose his employment if he asserted his rights. *Barr Car Co. v. Chicago & N. W. R. Co.* (1901) 49 C. C. A. 194, 110 Fed. 972, petition for writ of certiorari denied in (1902) 186 U. S. 484, 46 L. ed. 1261, 22 Sup. Ct. Rep. 943.

g. Joint invention.

In *Re Russell* (1857) 2 DeG. & J. 130, 6 Week. Rep. 95, 44 Eng. Reprint, 937, where the evidence indicated that a manufacturer and his foreman were the joint inventors of the improvement in question, and the master sought letters patent the granting of which was opposed by the foreman, it was held that they ought to be granted only on the terms of their being vested in trustees for the benefit of both the master and the foreman.

h. Government employees.

So far as regards the application of the principles here considered, there appears to be no difference between the rights of persons working for the government and those working for other employers. It is not the purpose, at this point, to collect the various cases involving the rights of government employees, but merely to point out the fact that the same rule is applicable to them as to other employees, in view of which fact the cases of this kind are more appropriately classified under the particular subdivision of the note to which the case relates.

It was said by Brewer, J., in *Solomons v. United States* (1890) 137 U. S. 342, 34 L. ed. 667, 11 Sup. Ct. Rep. 88: "The government has no more power to appropriate a man's property invested in a patent than it has to take his property invested in real estate; nor does the mere fact that an inventor is, at the time of his invention, in the employ of the government, transfer to it any title to, or interest in it. An employee performing all the duties assigned to him in his department of service may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may

thus conceive and perfect is his individual property."

And in *Gill v. United States* (1896) 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322, the court said that there was no doubt whatever of the proposition that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor as his individual property; and that in such case the government has no more right to seize upon and appropriate such property than any other proprietor would have.

The annotation does not purport to cover cases such as *Page v. Holmes Burglar Alarm Teleg. Co.* (1880) 17 Blatchf. 485, 1 Fed. 304, involving the question of the right of an employee in the Patent Office to obtain a patent after his employment has ceased.

IV. Express contract that employer shall have invention.

a. In general.

It is not uncommon for the master to require, as a part of the contract of employment, that the servant shall expressly agree that any inventions or improvements made by the latter during the employment shall belong to the former. And various cases involve express contract provisions to this effect.

United States.—*Appleton v. Bacon* (1863) 2 Black, 699, 17 L. ed. 338; *Continental Windmill Co. v. Empire Windmill Co.* (1871) 8 Blatchf. 295, Fed. Cas. No. 3,142; *Wilkens v. Spafford* (1878) 3 Bann. & Ard. 274, Fed. Cas. No. 17,659; *Hulse v. Bonsack Mach. Co.* (1895) 13 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864, affirming (1893) 57 Fed. 519; *Mallory v. Mackaye* (1898) 86 Fed. 122; *Thibodeau v. Hildreth* (1903) 63 L.R.A. 480, 60 C. C. A. 78, 124 Fed. 892, affirming (1902) 117 Fed. 146; *Mississippi Glass Co. v. Franzen* (1906) 74 C. C. A. 135, 143 Fed. 501, 6 Ann. Cas. 707; *Hildreth v. Duff* (1906) 143 Fed. 139, affirmed in (1906) 78 C. C. A. 410, 148 Fed. 676; *Wright v. Vocalion Organ Co.* (1906) 79 C. C. A. 183, 148 Fed. 209; *Standard Plunger Elevator Co. v. Stokes*

(1914) 129 C. C. A. 413, 212 Fed. 893; *Thompson v. Automatic Fire Protection Co.* (1914) 128 C. C. A. 22, 211 Fed. 120; *Triumph Electric Co. v. Thullen* (1915) 225 Fed. 293; *Wege v. Safe-Cabinet Co.* (1918) 161 C. C. A. 606, 249 Fed. 696.

Indiana.—*Westervelt v. National Paper & Supply Co.* (1900) 154 Ind. 673, 57 N. E. 552; *Pape v. Lathrop* (1897) 18 Ind. App. 633, 46 N. E. 154.

Massachusetts.—*Binney v. Annan* (1871) 107 Mass. 94, 9 Am. Rep. 10.

Michigan.—*Detroit Lubricator Co. v. Lavigne Mfg. Co.* (1908) 151 Mich. 650, 115 N. W. 988.

New Jersey.—*Connolly Mfg. Co. v. Wattles* (1891) 49 N. J. Eq. 92, 23 Atl. 123.

New York.—*Universal Talking Mach. Co. v. English* (1901) 34 Misc. 342, 69 N. Y. Supp. 813.

Oregon.—*Portland Iron Works v. Willett* (1907) 49 Or. 245, 89 Pac. 421, 90 Pac. 1000.

Pennsylvania.—*Sharples v. McCornack* (1916) 254 Pa. 535, 19 Atl. 153; *White Heat Products Co. v. Thomas* (1920) 266 Pa. 551, 109 Atl. 685.

Although there was in this case no express agreement that the invention should become the property of the employer, the court in *American Circular Loom Co. v. Wilson* (1908) 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133, called attention to the fact that cases involving such an express agreement stand upon a different basis from other cases, and that even such agreements have been construed somewhat strictly against the employer.

And it is said in the syllabus by the court in *Valley Iron Works Mfg. Co. v. Goodrick* (1899) 103 Wis. 436, 78 N. W. 1096, that if there is an express contract, pursuant to which the invention is produced and the machine perfected by the aid of the employer, that he shall have all property rights in the invention, a court of equity will compel specific performance of such contract.

To warrant a decree for specific performance of an alleged express agreement that the employer is to be

the owner of any invention or improvement made by the employee, it has been said that the contract must be clearly and unequivocally proven, and its terms, as to subject-matter, consideration, and all other essentials, must be specific and unambiguous. *Portland Iron Works v. Willett* (1907) 49 Or. 245, 89 Pac. 421, 90 Pac. 1000.

And specific performance of a contract by which the employer company was to have the assignment of any patentable design which the employee discovered in the line manufactured by the employer was denied in *Triumph Electric Co. v. Thullen* (1915) 225 Fed. 293, on the ground that a clear right to the relief sought was not shown, as against the claim that the invention in question was outside of the employer's line of manufacture.

In *Westervelt v. National Paper & Supply Co.* (1900) 154 Ind. 673, 57 N. E. 552, where there was an express contract that inventions and discoveries of the employee regarding certain machines should belong to the employer, the parties not contemplating that a patent should be taken out, but that the inventions and discoveries should be kept secret, the rule was laid down as settled by the great weight of authority that, when one invents or discovers, or procures another to invent and discover for him, and to keep secret, a process of manufacture, whether a proper subject for a patent or not, he has such a property in it as a court of chancery will protect against one who, in violation of an express or implied contract, or in breach of confidence, undertakes to apply it to his own use, or to disclose it to third persons.

In *Continental Windmill Co. v. Empire Windmill Co.* (1871) 8 Blatchf. 295, Fed. Cas. No. 3,142, a suit for infringement was held not to be maintainable by the assignee of a patent, with notice, against a former employer of the patentee, which had engaged him on a salary with the understanding that it was to receive \$500 for any patentable improvement he might make. It was unsuccessfully contended that, whatever might be the

equitable title of the defendant, the legal title was not in it, and that therefore the defense, based on the special contract could not prevail, but that the defendant should file a bill setting up its equitable title, and compel a transfer of the patent. The court said that this suggestion overlooked the fact that the suit was brought in a court of equity, where an equitable title was as good as a legal title as to all parties affected by the equity.

It was held in *Binney v. Annan* (1871) 107 Mass. 94, 9 Am. Rep. 10, that a state court has jurisdiction to compel specific performance of an agreement by an employee to assign to his employer the patents for any inventions which he may make while the employment continues. The court held that there was no question raised as to the legality of the issue of the patent, or as to the propriety of the action of the Commissioner of Patents; but that relief was asked on the theory that the patents were rightfully obtained by the servant, and ought to be assigned to the plaintiff in accordance with the agreement.

The construction of these express contracts, of course, depends upon the special provisions involved in the particular case.

Where a contract of employment between a corporation engaged in the manufacture of lubricating devices for automobile and other machinery, and a master mechanic, contained a provision by which the latter agreed that "any invention which may result from such employment in the nature of machinery, tools, or devices, to be used in connection" with the business, should be protected by patents which were to become the sole property of the employer, it was held that the contract did not include merely such machinery, tools, or devices as could be used in the employer's shops in the manufacture of such articles as it desired to put upon the market, but included inventions made by the employee in the final product, such as a force-feed oil pump, a carbureter, and valve devices. *Detroit Lubricator Co.*

v. Lavigne Mfg. Co. (1908) 151 Mich. 650, 115 N. W. 988.

Where a contract between a candy manufacturer and a mechanic recited that the former was "desirous of having perfected and manufactured a certain machine or machines for use in the manufacture of candy," and especially for the sizing, shaping, etc., and also the pulling of molasses candy, and that the employee was desirous of entering the employment for the purpose of "constructing, improving, and perfecting such machinery," and provided that the employee should give the employer the full benefit and enjoyment of all inventions and improvements which the employee might make "relating to machines or devices pertaining to" the employer's business, it was held that the contract should not be construed as covering a machine not then known to the business of candy making, and radically different in principle and result from any known machine; but that the employee had the right to understand that it related to the employer's business as then conducted; and that consequently the employee should not be required to assign to the employer a candy-pulling machine which he invented and had patented, of a kind unknown in the business at the time the contract was made. *Hildreth v. Duff* (1906) 143 Fed. 139, affirmed in (1906) 78 C. C. A. 410, 148 Fed. 676.

It was held, also, in *Hildreth v. Duff* (Fed.) supra, that the terms of the contract by which the employee agreed to give the employer "the full benefit and enjoyment" of all of his inventions or improvements relating to machines or devices pertaining to the employer's business imported merely a shop right or license to use an invention, and did not bind the employee to assign his inventions to the employer.

In *Joliet Mfg. Co. v. Dice* (1883) 105 Ill. 649, affirming (1882) 11 Ill. App. 109, where a mechanic agreed to work for a manufacturing company for a specified term, in such capacity "pertaining to the manufacturing of shellers and powers, and disposing of

the same, as the company may consider for their best interests; . . . that he will work for the best interest of the company in every way that he can, and in whatever way such aid can be given shall belong to the company—that is, improvements . . . that he may make or cause to be made," it was held that this did not entitle the company to an assignment of a patent for an improvement of a "check rower," invented by the employee during his service. The court said that no specific contract was shown that the employee should invent an improved "check rower," the invention of which should be the property of the employer; that the only specific contract was that which provided in substance that future improvements in the manufacture of "shellers and powers," to be made by the employee, should belong to the employer.

It was also held in *Joliet Mfg. Co. v. Dice* (Ill.) supra, that the fact that an employee consented to devote part of his time to superintending the manufacture of "check" rowers, and also a part of his time to the making of an improved "check rower," did not necessarily imply that he contracted that the invention, when perfected, should be the exclusive property of the employer.

Where a corporation engaged in the manufacture of silica products, including bricks for wainscoting, etc., employed an expert at a specified salary, who, by the contract of employment, assigned to the company his entire right, title, and interest in and to every invention "relating to the manufacture of bricks, stone products, earthenware products, and analogous and collateral products," which he then had or might thereafter make during the period of employment, it was held that the contract did not include an abrasive wheel afterwards invented by the employee, for grinding iron, steel, and other hard metals. *White Heat Products Co. v. Thomas* (1920) 266 Pa. 551, 109 Atl. 684.

The terms of the special contract controlled, also, in *Frick Co. v. Geiser*

Mfg. Co. (1900) 40 C. C. A. 291, 100 Fed. 94, where at the time the contract was made the employer was the exclusive licensee of certain machinery, among which was the "New Peerless" threshing machine, paying royalty to the employee thereon, and the latter, by the contract, assigned to the employer the exclusive right to use "all inventions and improvements in said machinery hereafter made" by him, also "all new designs of such machinery hereafter made by . . . [him] while in the employ" of the employer, and "all inventions and improvements hereafter made by . . . [him] in the machinery covered by such new designs." It was held that certain patents obtained by the employee after he left the employment constituted a "new design," and not an improvement on the "New Peerless," and that the employer was not, by the contract, entitled to the exclusive use of the same. A petition for a writ of certiorari was denied in (1900) 177 U. S. 694, 44 L. ed. 945, 20 Sup. Ct. Rep. 1028.

b. Validity.

Contracts by which employees have agreed that an employer should have inventions made by the former have in various cases been sustained, as against objections that they were void as against public policy, that they were without consideration, were unconscionable, or lacked in mutuality. *Hulse v. Bonsack Mach. Co.* (1895) 13 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864, affirming (1893) 57 Fed. 519; *Thibodeau v. Hildreth* (1903) 63 L.R.A. 480, 60 C. C. A. 78, 124 Fed. 892; *Mississippi Glass Co. v. Franzen* (1906) 74 C. C. A. 135, 143 Fed. 501, 6 Ann. Cas. 707; *Wright v. Vocalion Organ Co.* (1906) 79 C. C. A. 183, 148 Fed. 209; *Thompson v. Automatic Fire Protection Co.* (1914) 128 C. C. A. 22, 211 Fed. 120, affirming (1912) 197 Fed. 750; *Wege v. Safe-Cabinet Co.* (1918) 161 C. C. A. 606, 249 Fed. 696 (cited *infra*, IV. c); *Detroit Lubricator Co. v. Lavigne Mfg. Co.* (1908) 151 Mich. 650, 115 N. W. 988. See also *Connelly Mfg. Co. v. Wattles* (1891) 49 N. J. Eq. 92, 23 Atl. 123.

In *Hulse v. Bonsack Mach. Co.* (Fed.) *supra*, the contract of employment at a stated monthly salary, to set up and operate cigarette machines, contained a provision that the employee "agrees to do all in his power to promote the interests of the said company, and in case he can make any improvement in cigarette machines, whether the same be made while in the employment of the said company or at any time thereafter, the same shall be for the exclusive use of the said company." It was held that this stipulation was not an independent covenant, but was merely one of the provisions of an indivisible contract, and that it was therefore supported by the same consideration as the agreement to render the specified services; also, that the stipulation was not invalid as against public policy, either in a general sense, or as being in restraint of trade. And a decree was rendered declaring improvements made by the employee to be the property of the employer, and the former was ordered to convey to it his interest therein, or in any patent for the same.

So, it is held in *Thibodeau v. Hildreth* (1903) 63 L.R.A. 480, 60 C. C. A. 78, 124 Fed. 892, affirming (1902) 117 Fed. 146, that a contract by one about to enter another's employ for the purpose of improving machinery used in the latter's business that the employer shall have the benefit of all inventions made by him during the term of the employment, and that, in case patents shall not be applied for, the employee shall keep the information forever secret, is not unconscionable, nor against public policy; and that the employee is not entitled to its cancellation on that ground, after he has left the employment.

And a contract by which one, on entering a certain employment, agreed to assign his inventions made during the term of the employment, was held valid and enforceable, in *Mississippi Glass Co. v. Franzen* (1906) 74 C. C. A. 135, 143 Fed. 501, 6 Ann. Cas. 707, as against the objection that there was a lack of consideration and of mutuality. In this case

the employee had remained in the service for more than a year, until he left of his own accord, and the court took the position that he was, therefore, in no position to question the right of the employer to equitable relief by decree for specific performance, referring to the rule that the doctrine of nonenforceability, in equity, of a contract for lack of mutuality, has no application to an executed contract.

It was held also in *Wright v. Vocalion Organ Co.* (1906) 79 C. C. A. 183, 148 Fed. 209, that a contract was not contrary to public policy by which one who became superintendent of a corporation engaged in the manufacture of musical instruments, at a stipulated annual salary, agreed that the company should have a half interest in all inventions or improvements with respect to organs made by him during the term of the employment, and that the company should have the exclusive right to purchase and use inventions or improvements made by him in self-playing pianos, and that he would not sell or in any way dispose of any such invention or improvement to any other corporation or person.

And the validity of a contract by which an employee of a corporation agreed to undertake to perfect inventions which had already been started by its president, and to assign to the latter whatever might be discovered or invented, the work to be performed outside of regular hours, for compensation, was sustained in *Thompson v. Automatic Fire Protection Co.* (1914) 128 C. C. A. 22, 211 Fed. 120, affirming (1912) 197 Fed. 750. The court said that the contract was, perhaps, a hard one, but there was nothing extraordinary about it, many such contracts doubtless being made with employees; that it did not, as contended, mortgage the employee's inventive genius for all time, for he could cease doing the extra work any time he pleased, and thus terminate the contract.

It was held also in *Detroit Lubricator Co. v. Lavigne Mfg. Co.* (1908) 151 Mich. 650, 115 N. W. 988, that specific

enforcement of a contract, by which a mechanic in the employ of a manufacturing corporation agreed that it should be entitled to any invention resulting from the employment, was not subject to the objections that it lacked mutuality, was without consideration, was inequitable, ambiguous, unconscionable, and against public policy.

That one may make a valid contract to serve another for the express purpose of making inventions, which are to be the property of the employer, is recognized in *Connelly Mfg. Co. v. Wattles* (1891) 49 N. J. Eq. 92, 23 Atl. 123, where, however, an injunction to restrain the employee from selling certain patents was denied, because of the uncertainty of the evidence to establish such a contract. The court said: "It is thus seen that the contract upon which the complainant rests its right to relief is a contract for the special service of making inventions for the purpose of improving and perfecting a machine belonging to the complainant. There can be no doubt that such a contract is clearly within the contracting capacity of any two persons possessing the requisite capacity to make other valid agreements."

c. Inventions made after term of employment.

The question whether the master is entitled to inventions made by the servant after the expiration of the term of employment, or during an extension of that term by mutual consent, depends, of course, upon the provisions of the particular contract. In several cases the servant has been held entitled to the invention, the master having no right thereto, and no license to use the same without compensation.

A person engaging the services of an inventor, under an agreement that he shall devote his ingenuity to the perfecting of a machine for the employer's benefit, can lay no claim to improvements conceived by the inventor after the expiration of such agreement. *Appleton v. Bacon* (1863) 2 Black (U. S.) 699, 17 L. ed. 338 (case involving merely an examination of

evidence bearing upon the date of the invention).

In *Hopedale Mach. Co. v. Entwistle* (1882) 133 Mass. 443, a servant agreed to work for a master for a year at a given compensation per month, and to assign all inventions made by him to the master "while in the master's service." After the expiration of the year the servant continued in the employment and made certain inventions; and it was held that the master could not compel an assignment of these, the words, "while in the master's service," being interpreted to apply only to the year's service provided for in the contract.

See also *Dow Chemical Co. v. American Bromine Co.* (1920) 210 Mich. 262, 177 N. W. 996, where the court reached the conclusion that the patent, which was applied for by the employee more than a year after he left the employment, was, as claimed by him, based upon investigation and invention subsequent to the termination of the employment, and was not, therefore, subject to the terms of the employment contract, by which he agreed that all inventions and discoveries made by him while in the particular employment should become the property of the employer, and that he would promptly, on conception of any patentable idea or invention pertaining to the business, disclose the same to the employer.

And *Sharples v. McCornack* (1916) 254 Pa. 535, 19 Atl. 153, turns upon the sufficiency of the evidence to sustain the conclusion of the referee that the invention in question was not made during a period of time in which the defendant was in the plaintiff's service under an agreement which bound him to assign to the plaintiff everything which he might invent or produce during that period, it being held that under the evidence there was no obligation to make an assignment.

In *Hulse v. Bonsack Mach. Co.* (1893) 57 Fed. 519, affirmed in (1895) 13 C. C. A. 190, 25 U. S. App. 239, 65 Fed. 864, where the improvements in controversy were worked upon and perfected by the employee after he

left the service of the employer, and the contract of employment contained a provision that any improvements made by the employee "while in the employment of the said company, or at any time thereafter," should be for the exclusive use of the company, it was held that the contract did not entitle the employer to the use of such improvements without making just and reasonable compensation to the employee.

But in *Wilkens v. Spafford* (1878) 3 Bann. & Ard. 274, Fed. Cas. No. 17,659, a contract that the employer should have the "exclusive use" of the inventive faculties of the employee, and of such inventions in machinery as he should make during the term of service, was held to entitle him, without any new agreement, to the exclusive use of the machines invented by the employee during the prolongation of his service, after the expiration of the term of his original engagement.

Several other decisions turn upon the special contract provisions, and the particular situation of the parties in view of which the contract should be interpreted.

Thus, where parties who were about to acquire a certain corporation made a contract of employment with an inventor, by which the latter granted to the corporation the exclusive license to use "all other future patents and inventions devised or acquired by him with relation to elevators and their appliances," the term of the license to commence when the corporation began business and to terminate when certain persons ceased to be directors thereof, it was unsuccessfully contended in *Standard Plunger Elevator Co. v. Stokes* (1914) 129 C. C. A. 413, 212 Fed. 893, that the contract should be broadly construed so that all inventions of the kind referred to, the first conception of which came to the employee only after his employment had ceased, passed to the company as exclusive licensee. In view of the fact that the parties contemplated that between the date of signing the contract and the date of acquisition of the corporation, and the employment of the inventor, there would be a

period of time which might last for days or months, it was held that the provision of the contract relating to future improvements or inventions should be construed as applying to improvements or inventions which might be made by the prospective employee during this intervening period. The court said that if the broad construction contended for were accepted, the contract would be an extremely hard one, and might even be found unconscionable, for it would mortgage the inventive faculties of the employee for an indefinite period subsequent to employment; and that so harsh a construction should not be given to the contract unless its language precluded a more reasonable construction.

Where one engaged as superintendent of a safe-cabinet company, in consideration of certain shares of stock in the company, agreed to turn over to it all his "present and future mechanical improvements of the safe-cabinet," and all of his inventions embodying any of the principles involved in safe-cabinet construction, it was held in *Wege v. Safe-Cabinet Co.* (1918) 161 C. C. A. 606, 249 Fed. 696, that the company was entitled to an assignment of a patent for which the superintendent had applied after he left the company's service, included within the class referred to in the contract. And it was held that this interpretation of the contract did not render it opposed to public policy. See *supra*, IV. b.

The question in the above case is analogous to that in such cases as *Reece Folding Mach. Co. v. Fenwick* (1905) 2 L.R.A.(N.S.) 1094, 72 C. C. A. 39, 140 Fed. 287, in which the court held that an agreement to assign to the purchaser of a patent future inventions relating thereto is not against public policy. Of course, this class of cases is not within the scope of the annotation.

V. Presumptions.

The general question as to whether the work of the employee is to be considered as a mere mechanical improvement upon the invention of the

employer, or as an independent invention, is treated in III. c, *supra*, and it is this class of cases, apparently, in which the question has generally been discussed as to whether the employer or the employee is presumptively the inventor.

The annotation, it may be observed, does not consider the question of presumption as affected by the fact that one of the parties may have been the first patentee, since this question is not distinctive to cases involving employment relations. For example, in cases where the employee was the senior party and a patentee, as in *Sendelbach v. Gillette* (1903) 22 App. D. C. 168, the burden of proof was held to be upon the employer, the subsequent applicant, and this burden, it was held, could only be discharged by establishing by proof, beyond any reasonable doubt, that he was the real prior inventor.

But generally, as between employer and employee, the burden of proving that he was the inventor has been held to be upon the employee, the presumption of inventorship being in favor of the employer.

The rule was laid down in *Miller v. Kelley* (1901) 18 App. D. C. 163, that, "when, in the course of experiment by an employer with an invention, a device is suggested for its improvement which in itself would reach the dignity of independent invention, and a dispute arises between employer and employee as to its conception, the presumption is justly in favor of the employer, and it is incumbent on the employee to overcome that presumption by satisfactory proof."

And where a chemist, employed in the laboratory of a powder company, was assigned to assist another chemist in carrying on certain experiments, and the evidence showed that the latter had been directed to make the investigation which resulted in the invention, and that, when he had proceeded to a point where he had made important discoveries along the line that ultimately led to the invention, the assistant was assigned to him to aid in carrying on the work, it was held that, although the actual work

which resulted in reducing the invention to practice was done by the assistant, the burden was upon him, in claiming that he was the inventor, to overcome the presumption that what he accomplished was done under the direction of his superior. *Braunstein v. Holmes* (1908) 30 App. D. C. 328.

The doctrine that the relationship of employer and employee ordinarily imposes upon the latter the burden of showing that he in fact made the invention, and that the employer did not communicate to him such information as would enable him, by the mere application of mechanical skill, to put into practical form the conception of the employer, is supported also by *Robinson v. McCormick* (1907) 29 App. D. C. 98, 10 Ann. Cas. 548.

And in *Famous Players-Lasky Corp. v. Ewing* (1920) — Cal. App. —, 194 Pac. 65, the court quoted with approval the rule that, as between an employer and a party employed for a special purpose, matters merely auxiliary or tributary to the main invention can give to the employee no claim as an inventor, and, in regard to such features as amount to independent inventions, a presumption exists in favor of the employer as the author of the same, which can only be overcome by conclusive and unequivocal proof.

In *Laughlin v. Burry* (1921) — App. D. C. —, 270 Fed. 1013, the court, in discussing the question of an employee's alleged right to an invention, said that, "the relation of employer and employee having been established, the burden shifts heavily" upon the employee.

And where applicants for a patent admitted that they began the construction of a machine devised by another, at his request, in the course of which they claimed to have made the invention in question, it was held in *Corry v. McDermott* (1905) 25 App. D. C. 305, that they were charged with the burden of proving that they had not been employed to give practical form to a conception of the employer, but merely to accomplish the general purpose of the latter, in attempting which they had an independent conception of a novel means by which

that purpose was given practical effect.

And in *Gallagher v. Hastings* (1903) 21 App. D. C. 88, which is treated as a case of employer and employee, although not apparently involving this relationship in a general sense, the court held that the burden of showing that the employment was not to give practical form to a conception of the employer, but merely to provide means to answer a general purpose, and that in doing so he had an independent conception of the way to accomplish that purpose, was upon the employee, where it was shown that the relation of employer and employee existed in respect of a construction in the course of which the invention in question was made. The court said it would be unreasonable to give one who holds himself out as a manufacturer of machines, castings, etc., the advantage of position in a claim of invention in any such construction over the one who ordered and paid for it, and that it was but just that in establishing such a claim he should be charged with the burden of proving that he had not received the general plan or conception from his customer, and merely perfected it.

But it was held in *Jameson v. Ellsworth* (1913) 40 App. D. C. 164, that there was no presumption of inventorship in favor of the employer, as against the employee, until it was shown that the latter was engaged in perfecting a device under the general direction of the former, and that the broad idea of the invention was disclosed by the employer to the employee.

It may be noted that the annotation does not cover cases involving the question of presumption as to who is the inventor where the relation of employer and employee did not exist, as in cases of a contract to construct a machine of a certain type.

VI. License or shop right.

a. In general.

As before stated, cases are not included on the question of implication, from the use of a patented article, of

a promise on the part of the employer to pay royalty, it being assumed that the invention belongs to the employee.

A master who stands the expense of an invention, puts the materials used in getting it up into the servant's hands, provides helpers for him when necessary, or pays for obtaining the patent, is not wholly precluded from partaking of the fruits of the servant's genius. He cannot own the patent, but he may use it, and in some cases may sell the thing patented. The courts have not yet attempted fully to define the general limits of this license, but have been satisfied with applying the rule to the facts of the particular case. In addition to the cases touching upon this question in other subdivisions of this annotation, the following are cited in support of the rule:

United States.—*M'Clurg v. Kingsland* (1843) 1 How. 202, 11 L. ed. 102; *Hapgood v. Hewitt* (1886) 119 U. S. 226, 30 L. ed. 369, 7 Sup. Ct. Rep. 193; *Dable Grain Shovel Co. v. Flint* (1890) 137 U. S. 41, 34 L. ed. 618, 11 Sup. Ct. Rep. 8; *Solomons v. United States* (1890) 137 U. S. 342, 34 L. ed. 667, 11 Sup. Ct. Rep. 88, affirming (1886) 21 Ct. Cl. 482; *Lane & B. Co. v. Locke* (1893) 150 U. S. 193, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78; *McAleer v. United States* (1893) 150 U. S. 424, 37 L. ed. 1130, 14 Sup. Ct. Rep. 160, affirming (1890) 25 Ct. Cl. 238; *Keyes v. Eureka Consol. Min. Co.* (1895) 158 U. S. 150, 39 L. ed. 929, 15 Sup. Ct. Rep. 772; *Gill v. United States* (1896) 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322; *Chabot v. American Button-Hole & Over-Seaming Co.* (1872) 9 Phila. 378, 6 Fisher, Pat. Cas. 76, Fed. Cas. No. 2,567; *Magoun v. New England Glass Co.* (1877) 3 Bann. & Ard. 114, Fed. Cas. No. 8,960; *Whiting v. Graves* (1878) 3 Bann. & Ard. 222, Fed. Cas. No. 17,577; *Wade v. Metcalf* (1883) 16 Fed. 130, affirmed in (1889) 129 U. S. 202, 32 L. ed. 661, 9 Sup. Ct. Rep. 271 (stating rule); *Barry v. Crane Bros. Mfg. Co.* (1884) 22 Fed. 396; *Bensley v. Northwestern Horse-Nail Co.* (1886) 26 Fed. 250; *American Tube-Works v. Bridgewater Iron Co.* (1886) 26 Fed. 334; *Jencks v.*

Langdon Mills (1886) 27 Fed. 622; *Herman v. Herman* (1886) 29 Fed. 92; *Davis v. United States* (1888) 23 Ct. Cl. 329; *Withington-Cooley Mfg. Co. v. Kinney* (1895) 15 C. C. A. 531, 37 U. S. App. 117, 68 Fed. 500; *Blauvelt v. Interior Conduit & Insulation Co.* (1897) 26 C. C. A. 243, 51 U. S. App. 291, 80 Fed. 906; *Boston v. Allen* (1898) 33 C. C. A. 485, 50 U. S. App. 447, 91 Fed. 248; *Barber v. National Carbon Co.* (1904) 5 L.R.A.(N.S.) 1154, 64 C. C. A. 40, 129 Fed. 370; *Wilson v. American Circular Loom Co.* (1911) 109 C. C. A. 600, 187 Fed. 840; *Schmidt v. Central Foundry Co.* (1914) 218 Fed. 466, affirmed in (1916) 143 C. C. A. 433, 229 Fed. 157; *Wilson v. J. G. Wilson Corp.* (1917) 241 Fed. 494. See also *McKinnon Chain Co. v. American Chain Co.* (1919) 259 Fed. 873, the decision in which is affirmed in (1920) — C. C. A. —, 268 Fed. 353.

New Jersey.—*Eustis Mfg. Co. v. Eustis* (1893) 51 N. J. Eq. 565, 27 Atl. 439.

New York.—*Clark v. Fernoline Chemical Co.* (1889) 25 Jones & S. 36, 5 N. Y. Supp. 190 (recognizing rule).

Pennsylvania.—*Re Slemmer* (1868) 58 Pa. 155, 98 Am. Dec. 248 (approving rule); *Dempsey v. Dobson* (1896) 174 Pa. 130, 32 L.R.A. 761, 52 Am. St. Rep. 816, 34 Atl. 459, later appeal in (1898) 184 Pa. 588, 40 L.R.A. 550, 63 Am. St. Rep. 809, 39 Atl. 493; *Bundy v. Pittsburg Physicians' Supply Co.* (1910) 57 Pittsb. L. J. 668.

Wisconsin.—*Fuller & J. Mfg. Co. v. Bartlett* (1887) 68 Wis. 73, 60 Am. Rep. 838, 81 N. W. 747; *Valley Iron Works Mfg. Co. v. Goodrick* (1899) 103 Wis. 436, 78 N. W. 1096; *Rowell v. Rowell* (1904) 122 Wis. 1, 99 N. W. 473.

England.—*Imperial Supply Co. v. Grand Trunk R. Co.* (1912) 11 East. L. R. 340, 14 Can. Exch. 88, 7 D. L. R. 504.

If a person employed in the manufactory of another, while receiving wages, makes experiments at the expense and in the manufactory of his employer, has his wages increased in consequence of the useful result of the experiments, makes the article in-

vented and permits his employer to use it, no compensation for its use being paid or demanded, and then obtains a patent, these facts will justify the presumption of a license to use the invention. *M'Clurg v. Kingsland* (1843) 1 How. (U. S.) 202, 11 L. ed. 102.

The existence of a license has been treated by the courts as a mixed question of law and fact, and a determination of this issue in one suit does not furnish a decisive precedent for another. *Boston v. Allen* (1898) 33 C. C. A. 485, 50 U. S. App. 447, 91 Fed. 248.

In *Lane & B. Co. v. Locke* (1893) 150 U. S. 193, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78, it was held that when a person in the employ of another, in a certain line of work, devises an improved method or instrument for doing that work, and uses the property of his employer to develop and put in form his invention, and explicitly assents to the use of the employer of such invention, a jury or a court trying the facts is warranted in finding that he has given to such employer an irrevocable license to use the invention.

So, in *Magoun v. New England Glass Co.* (1877) 3 Bann. & Ard. 114, Fed. Cas. No. 8,960, it was held that the master had a special license to use patented molds constructed by a servant, or under his direction, while in the master's employ, at the latter's expense, and put in the master's factories and used under the servant's direction up to the date of his application for a patent.

And it was held in *Blauvelt v. Interior Conduit & Insulation Co.* (1897) 26 C. C. A. 243, 51 U. S. App. 291, 80 Fed. 906, that an inventor who, as a workman in the employ of another, manufactures for him in his shop, and with his materials, for weekly wages, as a part of his ordinary mechanical work, machines which the employer uses as part of his tools without knowledge of any objection thereto, cannot, after obtaining a patent therefor, restrain the employer from their use.

It has been held also, that an employer company had at least a

shop right or implied license to use, without compensation, machines which were invented by the manufacturing superintendent of its factory and installed therein under his direction, where it was one of the employee's duties to improve the machinery, and the entire cost of experiments, of construction of the machines, and of taking out of a patent were paid by the employer, the salary of the employee, on account of the invention and subsequent profits, being greatly increased from time to time, and the employee also having a substantial interest in the profits of the business. *Wilson v. American Circular Loom Co.* (1911) 109 C. C. A. 600, 187 Fed. 840.

The rule is laid down in the syllabus by the court in *Valley Iron Works Mfg. Co. v. Goodrick* (1899) 103 Wis. 436, 78 N. W. 1096, as follows: "If an employee, using the time, material, machinery, and assistance of coemployees with his employer's consent, invent a machine, and construct and put the same into practical use, and the employer by the aid and with the consent of the inventor, in advance of an application for a patent on the invention, manufacture and put machines embodying it into practical use, an implied contract will arise from the facts that the employer shall have the right to manufacture at his factory, and sell, such machines, which a court of equity will enforce."

And the court in *Gill v. United States* (1896) 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322, took the view that an employee of the government who invents certain machines and permits the government to use them without saying anything about compensation therefor cannot afterwards compel payment for the use of such inventions. The principle, it was said, is an application or outgrowth of the law of estoppel in pais, by which a person looking on and assenting to that which he has power to prevent is held to be precluded afterwards from maintaining an action for damages.

So, where an employee of the government experimented at its expense.

and invented a self-canceling stamp, and used government machinery in perfecting it, and notified the government that he would make no charge if it adopted his stamp, for the express reason that he was in the government employ, it was held that an assignee of the inventor could not recover from the government for the use of the stamp. *Solomons v. United States* (1890) 137 U. S. 342, 34 L. ed. 667, 11 Sup. Ct. Rep. 88, affirming (1886) 21 Ct. Cl. 482.

Also, in *Davis v. United States* (1888) 23 Ct. Cl. (U. S.) 329, in which a foreman in a government ordnance department, at the suggestion of a superior officer, experimented at the government's expense, and invented an improvement for a breech-loading cannon, it was held that no action for the recovery of royalty could be maintained, where he had been asked to take out a patent to protect the government, and did so at the government's expense, the money being paid by the government "to reimburse him for the expense incurred in securing the patent and as a royalty for the right to use the patent."

And in *McAleer v. United States* (1893) 150 U. S. 424, 37 L. ed. 1130, 14 Sup. Ct. Rep. 160, affirming (1890) 25 Ct. Cl. 238, a skilled mechanic was employed by the government to secure the most effective service from certain machines put in his care, and to keep them in repair, and apply such improvements as experience might suggest. He devised certain improvements to be applied to the machines then under his charge as a machinist, doing the work largely in his office hours and entirely with government tools and machinery, and took out a patent at the solicitation of the bureau officers and at the expense of the government. The decision turns chiefly on the effect of a written license which he made to the government of the right to make and use the improvements; but the court said the rights granted under it would otherwise have been implied.

It has been held also that the fact that an employee conceived, developed, and perfected his invention

out of working hours will not take the case out of the rule by which the employer is entitled to a license to use the invention, where the cost of preparing the patterns and working drawings of the machines invented, as well as the cost of constructing the machines themselves that were made in putting the inventions into practical use, was borne by the government, the work being also done under the immediate supervision of the inventor. *Gill v. United States* (U. S.) *supra*.

Where the vice president and operating head of a foundry company, at its expense, invented and obtained a patent on a certain form of pipe coupling, and was instrumental in inducing the company to expend considerable sums of money in changing and making tools and equipment necessary to manufacture the new form, and in contracting to furnish to others pipe embodying his invention, without claiming any rights therein, it was held in *Schmidt v. Central Foundry Co.* (1914) 218 Fed. 466, that he could not recover from the company for an alleged infringement of the patent, since it had an implied license to use the invention. The decision is affirmed in (1916) 143 C. C. A. 433, 229 Fed. 157, on the ground that the patent was void for lack of utility.

The contention was denied in *Schmidt v. Central Foundry Co.* (Fed.) *supra*, that there could be an implied license only when the consent on the part of the employee to the use of the invention could be presumed or found to have been given before the patent was applied for, in view of the statute providing that whoever purchases of an inventor, or with his knowledge or consent constructs, any newly invented machine, "prior to the application for a patent," shall have the right to use the same, and to vend it to others for use, without liability.

The court also overruled the contention, in *Schmidt v. Central Foundry Co.* (Fed.) *supra*, that the implied license did not extend to pipe manufactured for the company by other concerns. It was said that this pipe was manufactured for the company to

enable it to fulfil a contract which the plaintiff himself had executed for it, and that under the circumstances there was no difference, so far as the application of the principle was concerned, between goods manufactured by the defendant company itself, and goods manufactured by another concern for it.

It was held in *Dempsey v. Dobson* (1896) 174 Pa. 130, 32 L.R.A. 761, 52 Am. St. Rep. 816, 34 Atl. 459, that a carpet manufacturer had the right, at least, to use color recipes made by an employee in the course of his employment, even if the employee obtained patents for the formulas to protect himself against the public. See in this connection, the English case of *Makepeace v. Jackson*, under III. b, *supra*.

On a later appeal in the above case (*Dempsey v. Dobson* (1898) 184 Pa. 588, 40 L.R.A. 550, 63 Am. St. Rep. 809, 39 Atl. 493), it was held that a custom or usage of carpet making which would give the color mixer an exclusive title, as against his employer, to the various combinations of shades and colors devised by him in the use and manufacture of carpets in his employer's mill, was unreasonable and could not be sustained; and that such a custom, therefore, did not affect the question.

Somewhat similar to the *Dempsey Case* (Pa.) *supra*, is *Bundy v. Pittsburgh Physicians Supply Co.* (1910) 57 Pittsb. L. J. (Pa.) 668, where a drug-manufacturing company was held entitled to use formulas prepared by a chemist employed in its laboratory to compound pharmaceutical supplies.

In *Keyes v. Eureka Consol. Min. Co.* (1895) 158 U. S. 150, 39 L. ed. 929, 15 Sup. Ct. Rep. 772, where two servants of a mining company invented a new method of withdrawing molten metal from a furnace, permitted the master to use it for a number of years, and then quit his service and demanded an injunction and an accounting for damages and profits, the court, in denying equitable relief, said that there was at least an implied license to use the improvement upon the same terms and royalties fixed for other

parties, from the time complainants left defendant's employment, while defendant was entitled to use the invention without payment of any royalty during the continuance of such employment.

And in *Jencks v. Langdon Mills* (1886) 27 Fed. 622, there was strong evidence that the master was allowed to use the servant's inventions as an advertisement, so as the better to enable the servant to introduce them elsewhere. The tools and materials used in making the inventions were furnished by the master. The court said it had been held, in cases where the facts were far less favorable to the master, that a license from the patentee was to be presumed. The master was, therefore, held not liable for infringement by use of the inventions.

In *Bensley v. Northwestern Horse-Nail Co.* (1886) 26 Fed. 250, where two mechanics, who were paid \$4.50 and \$5 per day respectively for their work in connection with certain machines, experimented at the master's expense, and invented improvements, for which they received a patent, and then sued for infringement and compensation, the court refused the relief asked, saying that it was clearly a case of the development and perfecting, by practical experience and labor, of the elements of the alleged patent, at the sole expense of the master, and under such circumstances as, if standing alone, would make a very strong case in favor of the right of the master to use them. There was also, however, in the case, a sharp conflict in the testimony as to the existence of a verbal contract that the inventions by the servants should belong to the master.

And in *Herman v. Herman* (1886) 29 Fed. 92, where a superintendent who had been a partner in the business was employed at a salary equal to 50 per cent of the net profits of the business, with the right to draw \$7,500 during the year, and agreed to devote all of his time and energy during that period to superintending the manufacturing department of said business, etc., and it appeared that

he had been accustomed to prepare new designs for use in the business, for some of which he had obtained patents, it was held that the master had an implied license to use a design patented by him during the course of his employment at the expense of the master.

In *Chabot v. American Button-Hole & Over-Seaming Co.* (1872) 9 Phila. 378, 6 Fisher, Pat. Cas. 71, Fed. Cas. No. 2,567, the presumption of a license was held to be strengthened by the terms of an express contract which had been made before the employee applied for a patent, and which provided that a large number of machines should be manufactured by the use of the defendant's factory, machinery, tools, and materials, the employee supplying, at a specified price, merely the labor expended upon them and his own services.

Statutory provisions, rather than the relation of employer and employee, appear to have controlled the decisions in such cases as *Dable Grain Shovel Co. v. Flint* (1890) 137 U. S. 41, 34 L. ed. 618, 11 Sup. Ct. Rep. 8, that the employer was entitled to use the invention without compensation. The court cited the Federal statute providing that every person or corporation which purchases or constructs any newly invented machine prior to the application by the inventor for a patent shall be held to possess the right to use, and lend to others for use, the specific machines so made or purchased, without liability therefor to the inventor, provided the machine was purchased from the inventor, or constructed with his knowledge and consent. And in this case, where the machines in question were constructed and put into use in the defendant's grain elevator by the inventor himself, while he was in their employment as superintendent of machinery, and before his application for patents, the court held that by the express terms of the statute the defendants had the right to continue the use of these specific machines without paying any compensation to him or his assigns.

The court in *Dable Grain Shovel*

Co. v. Flint (U. S.) *supra*, held that the statute was not unconstitutional as depriving the inventor of his property without compensation.

In several cases it has been held that, under the particular circumstances, there was no implied license on the part of the employer to use the invention.

Thus, it was held that no license for the benefit of the master would be implied, where a master mechanic in the employ of a railway company invented various devices for cars, for which patents were issued to him, where none of the time, material, labor, or tools of the master entered into or were used in the developing and perfecting of these inventions, and the patents were procured by the employee at his own expense, although no claim for compensation was made by him for several years while the appliances were being placed on railroad equipment with his knowledge and consent, and generally under his personal supervision, at the direction of the superintendent of the railroad. *Ft. Wayne, C. & L. R. Co. v. Haberkorn* (1896) 15 Ind. App. 479, 44 N. E. 322.

So, in *White Heat Products Co. v. Thomas* (1920) 266 Pa. 551, 109 Atl. 684, the court held that the principle that, where one in the employ of another makes a new invention and uses the property of his employer and the services of other employees to put the device in practical form, and assents to the use of the perfected invention by his employer, he thereby gives to the employer an irrevocable license to use the device, was inapplicable, where the invention was conceived and the preliminary work done outside of the employee's working hours, in a plant not connected with that of the employer, and, while the invention was subsequently perfected and manufactured in the employer's plant, the labor necessary to accomplish that result was done under, and subject to the completion of, negotiations for a proper compensation to the employee, by way of a proportionate share of the profits to

be derived from the manufacture and sale of the patented article.

And the mere fact that one was president of a corporation when he discovered an invention and applied for a patent was held in *American Stoker Co. v. Underfeed Stoker Co.* (1910) 182 Fed. 642, affirmed in (1911) 110 C. C. A. 292, 188 Fed. 314, not to entitle the company to an implied license to use the invention. The court said that there was nothing in the evidence tending to show that the inventor, as president, owed any duty to the company to give it the benefit of any discoveries that he might make; that the relation of employer and employee did not exist; and that, even if it did exist, that would not be sufficient.

Where the owner of a patented invention was a director and officer of a corporation, and the latter appropriated and used such invention with his consent and acquiescence, it was held in *Deane v. Hodge* (1886) 35 Minn. 146, 59 Am. Rep. 321, 27 N. W. 917, that he was not necessarily precluded from recovering a reasonable compensation therefor by reason of his relationship to the company, but that such relationship, with other circumstances, was for the jury to consider in determining the question whether the license to use the patent should be implied to be for, or without, compensation.

b. Nature of license.

1. Generally.

As before stated, the courts have not undertaken clearly to define and limit the nature of the employer's license to use the invention of an employee, where this license exists, but have in general merely applied the rule to the facts of the particular case. It seems clear that this license has limitations which make it much less valuable than the patent right. Such possible limitations are that it may be nonassignable, may be restricted as to the number of machines or designs which the employer may use, and may be of a nonexclusive character, although the language of the court in one case is to the con-

trary. And it has been contended, also, that the license should be limited to the period of employment. These various possible limitations will be considered in connection with the rulings in the particular cases.

In one case the court expressed the view that the employer had an exclusive license. Thus, where an inventor was paid a salary as an officer of a corporation, and given a certain amount of its capital stock in consideration for the transfer of a certain patent, and he afterwards, while in the service of the corporation, experimented and took out other patents at the expense of the corporation, and let the corporation use them without any claim for compensation, it was held that the corporation had an irrevocable, exclusive license for their use, and that the fact that, when the inventor was about to break with the company, he directed the bookkeeper to transfer the expense charges of the patents to his account, would not make a different rule applicable. *Eustis Mfg. Co. v. Eustis* (1893) 51 N. J. Eq. 565, 27 Atl. 439. It was said that this license did not transfer absolute ownership, as an assignment would, but was relief of the same general character, only less extensive; that it would cease on the dissolution of the company, and would not pass to an assignee.

Where employees of a railway company invented certain lubricating devices, perfecting the same, it was contended, on company time and with the use of its tools and materials, and assented to the use of the inventions by the company, it was held in *Imperial Supply Co. v. Grand Trunk R. Co.* (1912) 11 East. L. R. 340, 14 Can. Exch. 88, 7 D. L. R. 504, that the irrevocable license on the part of the company to use the inventions did not give it the right to make and sell the same to others.

In *Re Slemmer* (1868) 58 Pa. 155, 98 Am. Dec. 248, the court was of the opinion that the license which an employer has to use an invention of an employee, where the experiments are made at the employer's expense, and the latter is permitted to use the in-

vention without payment of, or demand for, compensation, is not limited to the period of time during which the employee continues in the employment.

And in *Barry v. Crane Bros. Mfg. Co.* (1884) 22 Fed. 396, where a foreman of a brass foundry, experimenting at the expense of the master, made certain tools which he had patented, and permitted the master to use them until he left his employment, when he sought an injunction and an accounting, the court was of the opinion that by introducing the tools into use in the master's business the servant had licensed, or consented to, their use, not only for the time in which he was employed, but so long as the tools should last. It was said: "It can hardly be possible that an employee, himself the owner of a patent, can introduce his patented device into his employer's business without his employer's consent, and without a special agreement to pay him, and afterwards turn around and demand royalties or profits and damages from his employer for the use of such device; especially in a case like this, where the invention . . . has been developed and brought to a practical condition at the expense of his employer."

In *Wade v. Metcalf* (1883) 16 Fed. 130, the court said: "If the workman, by using the tools and time and money of his employer with his consent, makes an invention and applies it in his employer's business, the employer may continue to use it. If the improvement is a process, it has been held that the employer may continue to practice the process for the whole period of the patent. . . . But, if the invention pertains to a machine, it is understood that only the specific machine or machines which have been so made are licensed." This point was not referred to by the Supreme Court in affirming the decision in (1889) 129 U. S. 202, 32 L. ed. 661, 9 Sup. Ct. Rep. 271.

Summing up the authorities of the Federal courts, the court in *McKinnon Chain Co. v. American Chain Co.* (1919) 259 Fed. 873, said that the

principle had been generally expressed that, where the designing or creating of a machine or process involves invention, and a patent is taken out, it is well established that the person for whose benefit such creating was done is entitled to an irrevocable license to the use of the patent, to such an extent as may be necessary to secure the beneficial rights in question. It was held in this case, where a chain company employed a machine company to build a machine of a particular type which was new in this country, that the former had a license to use not only the particular machines on which a patent had been obtained by the builder, but also all other machines of the same kind which it needed in its business. The decision in this case is affirmed in (1920) — C. C. A. —, 268 Fed. 353.

And in *Barber v. National Carbon Co.* (1904) 5 L.R.A.(N.S.) 1154, 64 C. C. A. 40, 129 Fed. 370, a mechanical engineer was hired by a carbon company to give his skill, attention, and inventive ability to the service of the company in and about the cheapening and improving of the process of electroplating and other processes in the manufacturing of carbons. There was no contract by which he was to make inventions, or devote his inventive faculty to the service of the company, or any agreement that any inventions he might make should belong to the company, or any patent that he might obtain therefor. He invented a valuable machine during his employment. Six of these machines, which were costly and required special buildings for their use, were erected, and a building had been put up for the seventh machine when the inventor was discharged. It was held that the company had an implied license to use all of the machines. The court said that the right of use presumed was the right to use such number of machines as had been prepared for, and that the right was not limited to the life of the particular machine, but would include replacements so long as the carbon company continued the manufacture of carbons.

So, in *Withington-Cooley Mfg. Co. v. Kinney* (1895) 15 C. C. A. 531, 37 U. S. App. 117, 68 Fed. 500, an inventor was employed for the express purpose of drawing plans and constructing patterns by which a new and improved power press might be made for the trade. At the master's expense a new press was made, which was patented after the inventor left the service of his employer. A demand for the payment of a royalty was then refused, and, after a delay of ten years, suit was brought for infringement. It was held that the master had an implied license to manufacture and sell the press, and that the license was not limited by the life of the original patterns, but constituted an authority to make and sell presses embodying the improvement so long as the employer continued in business and during the life of the patent. The court said that the object of the employer in employing the servant was to obtain patterns and drawings by which he, as a manufacturer of presses for the trade, might make and supply the trade with presses built on the new design and from the new patterns; that this fact was well known to the servant, and when he accepted employment and produced an improvement it must be presumed that he intended that his employer would use that improvement in such new machines as he should make while engaged in the business of supplying such machines to the trade; also, that the case could not reasonably be likened to one for the building of a machine for use, where the license might well be limited to the use of the machine so long as its identity was preserved.

An implied license on the part of a manufacturing company to use an invention made and patented at its expense by an officer and manager of the company, and introduced by him into sales contracts of the company, was held in *Schmidt v. Central Foundry Co.* (1914) 218 Fed. 466, affirmed on other grounds in (1916) 143 C. C. A. 433, 229 Fed. 157, to inure to the benefit of a receiver of the company, and to exempt him from liability for

infringement. The court distinguished cases holding that such a license is personal, and not assignable, stating that in this case there was no transfer of title or interest from the corporation to the receiver, but that the latter was a mere custodian, carrying on the business of the company, that his acts in making use of the device covered by the patent were the acts of the corporation, and that he had the same right to do so that the corporation had.

As to the extent of the implied license in *Schmidt v. Central Foundry Co.* (Fed.) *supra*, holding that it applied to articles manufactured by another concern for the employer company, and also that it was unnecessary that the inventor should have consented to its use by the company before applying for a patent, see citation of the case under VI. a, *supra*.

Where one in the employ of the fire department of New York city invented a heating apparatus, and attached it himself to two of the engines, and it appeared that it had gone into extensive use in the fire department, it was held in *Brickill v. New York* (1880) 18 Blatchf. 273, 7 Fed. 479, that the city had no right to the use of the invention, except in respect to those machines to which it had been applied before the employee took out a patent for it.

And in *Boston v. Allen* (1898) 33 C. C. A. 485, 50 U. S. App. 447, 91 Fed. 248, where an employee of the city, while working on a ferry invented and patented certain improvements in the gangways, it was held that the implied license of the city to use these improvements did not permit their use, some years later, on another ferry in a different part of the city.

In this connection, attention is called to *Burden v. Burden Iron Co.* (1903) 39 Misc. 559, 80 N. Y. Supp. 390, where the question arose as to whether a corporation had a license to use an invention made by its president. The court, in denying the license, stated that the inventor was not in any sense an employee, that such a license more frequently arises where

the patentee is an employee, and that it is a personal one, and extends only to the machine or devices actually in use.

2. Assignability.

In *Hapgood v. Hewitt* (1886) 119 U. S. 311, 30 L. ed. 363, 7 Sup. Ct. Rep. 193, the court held that whatever right the employer corporation had to a license to use an invention made by its employee was confined to it, and was not assignable, and that the license did not pass by an assignment to a corporation organized by stockholders, on the dissolution of the first corporation, to succeed it, but was extinguished by such dissolution.

The court relied upon *Troy Iron & Nail Factory v. Corning* (1852) 14 How. (U. S.) 193, 215, 14 L. ed. 383, 393, in which the general rule was laid down that "a mere license to a party without having 'his assigns,' or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensees."

And where an employee of a firm invented a device which was put into use by his employers, and obtained a patent thereon after he left the employment, it was held that the right to use the device did not pass to a corporation organized by the surviving members of the firm, upon its dissolution, and that the fact that all of the shares of stock of the corporation, except thirty which were reserved for employees, were held by the old members of the firm, who had transferred their rights to the company, did not so identify the company with the firm as to entitle the former to use the invention. *Locke v. Lane & B. Co.* (1888) 35 Fed. 289.

In *Rowell v. Rowell* (1904) 122 Wis. 1, 99 N. W. 473, it is said: "As to the rights in patents issued to individuals while in the employ of the firm, the law in this state is quite well settled, in accord with the Federal cases, that the employer in certain circumstances acquires by implication a free and perpetual license to manufacture under the patent at the same factory, and in the same business, but

not a right which can be assigned to another."

The proposition that an implied license to use the invention of an employee, or, in other words, a shop right, is personal to the employer and cannot be assigned, is supported also by *Morton v. A. H. Andrews Co.* (1915) 143 C. C. A. 421, 229 Fed. 145; *Dowse v. Federal Rubber Co.* (1918) 254 Fed. 308; and by the language of the court in *Eustis Mfg. Co. v. Eustis* (1893) 51 N. J. Eq. 565, 27 Atl. 439, and *Burden v. Burden Iron Co.* (1903) 39 Misc. 559, 80 N. Y. Supp. 390, cited under VI. b, 1, *supra*. See also, among other cases supporting the general doctrine of the nonassignability of a mere license to use an invention, *Thomson v. Citizens' Nat. Bank* (1892) 3 C. C. A. 518, 10 U. S. App. 500, 53 Fed. 250, and *Kraatz v. Tie-man* (1897) 79 Fed. 322, reversed on other grounds in (1898) 29 C. C. A. 257, 56 U. S. App. 545, 85 Fed. 437.

But the doctrine that the license on the part of an employer to use a patented invention made by an employee is personal, and cannot be assigned, was held in *Wilson v. J. G. Wilson Corp.* (1917) 241 Fed. 494, to be inapplicable, so as to prevent a successor in interest of the employer company from having an irrevocable license to use a patent obtained by an employee of the former company, where this employee was an engineer in charge of a department of the company at a large salary, a part of his duties being to keep it abreast of the times, and the employer, a manufacturing corporation, had paid all of the expenses connected with the making of models, furnishing of materials, etc., for the invention, and paid the cost incident to procuring the patent, and had been permitted for more than twenty years to use the invention without any claim for royalty, the company claiming to be, at least, the equitable owner of the rights under the patent until its stock was sold to the other corporation. The court said: "The suggestion that the right in and license to use said letters patent is a personal one, exist-

ing in favor of the James G. Wilson Manufacturing Company, and does not, in the absence of an express contract, pass to the defendant company, is not well taken, and cannot be maintained, for the reason that the defendant company is but a continuation of its predecessor company, and the complainant in good faith and fair dealing is as completely estopped from claiming the right here set up against one as the other. In a word, these patents were procured by the complainant while in the predecessor company's employ, with a view to the successful transaction of its business, and they are no less essential to the successor corporation's operation of

its business than they were to the original company; and to allow the original company to sell and dispose of its stock and assets, which included these patent rights and privileges and which added to the value of the assets, at a profit, and then to give the patents, or relinquish their privileges in them, to one having the relation to the business that the complainant had, would operate as a fraud upon the successor company."

See also *Schmidt v. Central Foundry Co.* (Fed.) under VI. b, 1, *supra*, holding that the implied license extends to a receiver of the employer, and distinguishing cases where there is an assignment. R. E. H.

COPLAY CEMENT MANUFACTURING COMPANY

v.

PUBLIC SERVICE COMMISSION OF PENNSYLVANIA and PENNSYLVANIA POWER & LIGHT COMPANY, Appt.

Pennsylvania Supreme Court—July 1, 1921.

(271 Pa. 58, 114 Atl. 649.)

Public utility — right to change rates — effect of pending contest.

1. The existence of an undetermined contest before the Public Service Commission of a change of rates by a public utility does not prevent its making and publishing another change.

[See note on this question beginning on page 1219.]

Public Service Commission — intent in creation.

2. The intent in creating the Public Service Commission was not that it should be a board of managers to conduct and control the affairs of public service corporations, but to give the commission inquisitorial and corrective authority to regulate and control the utility where its powers and obligations had intimate relations to the public.

— liberal construction of powers.

3. In determining whether or not the change by a public service corporation of a rate, pending determination upon a prior change, offends against the regulatory control of the Public Service Commission, the authority given the commission should be liberally construed.

Public utility — relation of rates to duties.

4. Safety, accommodation, and convenience, as those terms are understood in public utility regulations, do not primarily depend upon rates, though indirectly they may be affected thereby.

— governmental control of rates.

5. Governmental control over the establishment of rates by public utilities must be carefully exercised.

Public Service Commission — power to prevent change of rate.

6. The Public Service Commission has no power to prevent a public utility from exercising its right to change its rates when it appears to the utility to be necessary to do so; it can only determine the reasonableness of the change after it is made.

APPEAL by the Power Company from a decree of the Superior Court of Pennsylvania (Keller, J.) reversing an order of the Public Service Commission and refusing to allow the Power Company to increase its rates during the existence of an undetermined contest before the Commission. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Berne H. Evans, Ralph J. Baker, Thomas J. Perkins, and George Wharton Pepper, for appellant:

Under the common law no restriction was imposed upon public service companies similar to appellant, in respect to freedom in making and changing their rates, and to the method to be followed in so doing.

Brymer v. Butler Water Co. 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249.

The court below erroneously construed the provisions of the Public Service Company Law which impose restrictions upon changes in rates, and, in effect, read provisions into the law which are not contained therein.

Suburban Water Co. v. Oakmont 268 Pa. 243, 110 Atl. 778.

Under the theory of regulation adopted by law, no rate can ever become permanent, even after it has been determined by the commission. It must be subject to objection by any complaint, and be open to change, including change because of changed conditions.

Scranton v. Public Service Commission, 73 Pa. Super. Ct. 192; *Ben Avon v. Ohio Valley Water Co.* 260 Pa. 310, 103 Atl. 750.

The superior court failed to give due weight, in construing the relevant provisions of the Public Service Company Law, to the long and uniformly accepted usage and practice under that law.

Scranton v. Public Service Commission, supra; *Com. v. Mann*, 163 Pa. 290, 31 Atl. 1003.

Messrs. Abraham Israel and Davis Wallerstein, for appellee:

While a contest as to change of rates is undetermined, the public service company has no right to file still another schedule increasing the rates payable under the schedule in contest.

Scranton v. Public Service Commission, supra; *Reading v. Reading Transit & Light Co.* 9 Pa. Corp. 217.

Where a consumer complains within thirty days, there arises the rebuttable presumption that the rate is unreasonable, which presumption re-

mains until it is decided that the rate is reasonable.

Wigmore, Ev. § 1354.

If, upon hearing of a complaint against a rate, the public service company offers no evidence, the complaint must be sustained.

Public Service Commission v. Iroquois Natural Gas Co. 103 Misc. 587. P.U.R.1918E, 419, 170 N. Y. Supp. 692.

Kephart, J., delivered the opinion of the court:

This is an appeal from a decree of the superior court, reversing an order of the Public Service Commission, and holding that a public service company could not increase its rates while it had a prior increase complained against (before the effective date) undetermined by the commission. The superior court fell into error in not considering the general scope and scheme of the Public Service Act (Pa. Stat. 1920, §§ 18,057-18,214) and its applicability to utilities in the performance of their various obligations. It was not intended by the legislature that the commission should be a board of managers to conduct and control the affairs of public service companies; but it was meant that, where certain of their powers and obligations had intimate relation to the public through fairness, accommodation, or convenience, the commission should have an inquisitorial and corrective authority to regulate and control the utility in the field specifically brought within the commission's jurisdiction.

Public Service
Commission—
intent in
creation.

There are many powers and obligations inherent in a public service company. They exist through statute or common law, or are indispensably necessary to the fulfillment of the charter obligations. When the Public Service Act was

passed, it reached into these rights, powers, privileges, and obligations, and took over the part relating to public welfare, and embodied them in an act, as being subject to regulation. Such steps created no new powers in the utility except such as affected the commission—its dealings with the company, if these may be called powers. They are, in effect, certain limitations on the existing powers, in the form of requisites necessary to be done or secured before these powers may be exercised by the public service company.

All the powers mentioned in article 3 appertained to the corporate entity before the act, and the same may be said of the obligations and duties contained in article 2. But neither created an additional franchise or right, nor, what is more important, did they impress on the existing rights, powers, and privileges not mentioned in the act a limitation, restriction, or an elimination. To sweep away such rights, or hamper their exercise, because not mentioned in the act, would be to deprive the company of the capacity to function, and the public is vitally interested in its continuation. To sustain this conclusion, aside from constitutional questions, the least that can be said is: The Public Service Act should contain positive and explicit language. But the act did not so speak, for we find them specifically safeguarded. Section 12 of article 3 is a distinct, positive recognition: "Every public service company shall be entitled to the full enjoyment and exercise of all and every the rights, powers, and privileges which it lawfully possesses, or might possess, at the time of the passage of this act, except as herein otherwise expressly provided."

This certainly did not mean abrogation or restriction of these rights. The concern was supposed to move along, performing its ordinary duties as theretofore, subject to the regulation imposed by the act. The rights, powers, and privileges not

mentioned constitute by far the greater part of corporate life, internal management, control, and discretionary power over its property; the proper application, enforcement, and enjoyment of the same matters submitted to the commission's control being among them. *In short, the company manages its own affairs to the fullest extent consistent with the protection of the public's interest, and only as to such matters is the commission authorized to intervene, and then only for the special purposes mentioned in the act.*

In considering the reservation in article 3, § 12, it is necessary to know, from a full reading of the act, whether the exercise of an existing right or privilege not mentioned therein (here, the right to change the rate while another rate is undetermined) should be restricted to secure a fulfilment of its purpose. Is its exercise hostile to the accommodation, convenience, or safety of the public? The theory underlying the act must be taken into account. Public service business occupies a peculiar position in the community, interwoven as it is with communal life, of a nature monopolistic in character, compelling the public to be its customer, whether it will or not, operating under laws with governmental powers not given to ordinary companies. See *New Street Bridge Co. v. Public Service Commission*, 271 Pa. 19, 114 Atl. 378. In determining whether the exercise of a right

such as are now ^{-liberal construction of powers.} discussed offends

against the regulatory control necessary for such concerns (in the interest of convenience, accommodation, and safety of the public), the authority given the commission should be liberally construed, and that incidentally necessary to a full exposition of the legislative intent be upheld as being germane to the law. Where, therefore, the unrestricted exercise of existing powers tends to nullify the commission's control, a restrictive use is intended, its extent to be determined by the

commission, with a right of appeal to the courts as provided by the act.

The statute imposed on the utilities certain obligations and limitations of powers; certain steps must be taken and certain acts performed before they can do or refrain from doing certain things. This was a part of the scheme to perfect the control necessary to safeguard the public in securing convenience, accommodation, and safety. But how can a change of rate injure such control, or in what aspect is the public injured by a change of rate? Safety, accommodation, and convenience, as those terms are understood

Public utility— in public utility relation of rates regulation, do not to duties.

primarily depend on rates, though indirectly they may be affected thereby. Nor does a change of rate control the commission in determining the reasonableness of rates. The company, not the commission, initiates rates, fares, and charges for the kind and character of service furnished, or the kind and character of facilities, and the price to be paid therefor. This is done under the same power that it originally possessed before the act, and, moreover, the authority is expressly recognized in the act. Article 3, § 1, reads: "It shall be lawful for every public service company,—To demand, collect, and receive fair, just, and reasonable prices, rates, fares, tolls, charges, or other compensation for each and every service rendered or to be rendered by it to any person or corporation."

This is what has been done. There is no limitation on the number of times a company "may demand, collect, and receive fair, just, and reasonable rates." When a given rate, because of business conditions, becomes unfair, unjust, and unreasonable, the company has the power to demand fair, just, and reasonable rates. It initiates rates when the necessity here defined compels it; the wavering scale of reasonableness is the standard, and of it the utility is the sole judge in the first instance, subject, of course,

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to what may later follow when the commission's machinery is started. This authority certainly is not hostile to the Public Service Act, but makes the act a more workable one,—secures to the public the service demanded,—the public being fully protected by complaint and reparation.

But the right to initiate is subject to a limitation imposed on the utility; it becomes effective as provided by § 1f, article 2.

"A rate becomes, on the effective date, an effective rate, and, as such, it is a collectable rate, or one that may be sued for. There can be no legal rate except the last tariff rate published as provided by law, . . . and the effective rate thus published supersedes all prior rates covering the service therein called for." *Suburban Water Co. v. Oakmont*, 268 Pa. 243, 248, 110 Atl. 779.

Generally speaking, the only limitation imposed by the act on the initiation or change of rates is that mentioned in article 2, § 1f. There are three exceptions, not material, but which we shall name: (1) A change within three years of a rate determined by the commission after a hearing (mentioned in article 2, § 1f); (2) a rate subject to automatic adjustment in relation to dividends and profits; (3) a sliding scale.

The new schedule was filed one year after the one to which the undetermined complaint had been filed by one consumer. It increased the cost of service. This new schedule, superseded the prior one, and was the only collectable rate. This conclusion does not give rise to multiplication of issues, in that a new complaint must be filed to the new rate, nor a duplication of effort, nor an increase in costs, nor an anomaly of proceeding. It must be remembered the real issue before the commission is a complaint as to rates, and though a change in the rate has been filed, the commission may—and it has the power under the act—consolidate these several schedules of rate increases, and cause the

complaint, the record, and the evidence to be taken as a complaint, record, and evidence in connection with the new rate. Ample authority exists in the act to prevent any injustice or unnecessary expenditure of money on the part of a consumer. Furthermore, the commission has the power to take speedy action to safeguard the public by quickly striking down the sharp practices suggested by appellee, which it says may occur where successive increases are made.

Governmental control over these essential elements of corporate existence must be carefully exercised.

—governmental
control of
rates.

The commission and the utility are not dealing with a purely legal proposition, subject to inflexible rules of law, but with an ever-changing economic condition, with powers adapted to fit recurring changes in economic life. To attempt to confine it or the utility to the sometimes unwieldy procedure adopted by the courts would be subversive of all the good intended by the act. The business disposed of by this body, with the speedy and expeditious manner in which it is conducted, is enormous. Certain matters before it must assume a legal aspect, as appears from the act. But subjects like that now before us (frequency of change of rate of utility) are not to be adjudged by technical legal procedure. They are regulated by economic law, which, so far, courts or legislatures have not been able to control. What may be an adequate rate to-day, next month may be quite unreasonable, and this through circumstances beyond the control of the commission, utility, or courts. Therefore, the right to initiate and change is fundamental to the company, as the act imposes the severest

—right to change
rates—effect of
pending contest.

kind of penalties for charging a rate that is not a published rate; the legislature, with evident intent, did not disturb this

heretofore-existing right. But, on the other hand, when the rate is changed, the act expressly recognizes the right of placing it completely in the commission's control and power to safeguard the public in every way. When an action of assumpsit is instituted, the stage is set; the future takes care of itself. With these concerns the stage is constantly changing; no one, at present, will be vain enough to guess, in times such as now exist, what the next setting may be.

No little argument has been devoted to the question that this should be reviewed in the same light as a proceeding in equity to restrain the collection of an unreasonable rate. In addition to what we have already said, we are referred to no act of assembly or action of the court (except artificial gas and water companies) which authorizes the court to interfere in the matter of rates. In fact it was very early held that "there is no restriction upon the rates they may charge for roadway use and transportation by themselves." *Boyle v. Philadelphia & R. R. Co.* 54 Pa. 310.

We are not merely deciding an equitable proceeding governed by the rules heretofore applied, where the courts have been asked to restrain the collection of unreasonable rates. What we are endeavoring to do is to uphold the commission in its effort to sustain the Public Service Act as a workable one, for the best interest of the public as well as the utility.

The order of the commission was an entirely proper one. They had no jurisdiction to restrain or prevent a corporation from exercising its right to change its rate, when it appeared necessary to them.

Public Service
Commission—
power to prevent
change of
rate.

The decree of the Superior Court is reversed, and the order of the Commission is reinstated; appellee to pay the costs.

ANNOTATION.

Right of public service corporation to change rate while another rate is undetermined.

There is but little direct authority upon the question as to the right of a public service corporation to change a rate while another rate is undetermined, other than the reported case (*COPLAY CEMENT MFG. CO. v. PUBLIC SERVICE COMMISSION*, ante, 1214). In that case it is held that a public service company may increase its rates, although the reasonableness of a prior increase of rates, complained against before becoming effective, is at the time of the second increase pending and undetermined by the public service commission. The reason for this conclusion appears to lie in the power delegated to the commission by the Public Service Act (Pa. Stat. 1920, §§ 18,057–18,214) to consolidate the several rate increases, and to cause the complaint, record, and evidence to be taken as a complaint, record, and evidence in connection with the new rates.

In *Northwestern Bell Teleph. Co. v. Hilton* (1921) 274 Fed. 384, where the public service commission, on its own initiative, began a broad investigation of telephone rates, and the telephone companies, after completing their evidence in the main inquiry, themselves initiated before the commission a subordinate inquiry as to temporary rates to be charged pending the determination of the main proceeding, in which subordinate inquiry an order was made by the commission denying the increase of temporary rates, the court said that the two proceedings were independent, distinct, and separable; that is, the relief in the subordinate proceeding need not

wait relief in the main proceeding, nor need the relief in the main proceeding depend in any way upon whether the relief in the subordinate proceeding was granted or denied.

In *New York v. New York Teleph. Co.* (1921) 115 Misc. 262, 189 N. Y. Supp. 701, it was held that the public service commission had power to consent to a temporary increase of telephone rates pending a proceeding before it for the establishment of a new schedule of rates.

However, the question whether a public service corporation may increase its rates, and make such increase effective prior to a determination by the public service commission of the reasonableness thereof, was discussed in *Public Service Commission v. Iroquois Natural Gas Co.* (1918) 184 App. Div. 285, P.U.R.1918F, 687, 171 N. Y. Supp. 379, reversing (1918) 103 Misc. 587, P.U.R.1918E, 419, 170 N. Y. Supp. 692, wherein it was held that, under the Public Service Commission Law (47 McKinney, Consol. Laws, § 29, p. 34), an increase in rates, effective thirty days after the filing of the new schedule, was valid, and the commission had no power to suspend or postpone the taking effect of such increase until a determination of the propriety thereof. This decision was affirmed without opinion in (1919) 226 N. Y. 580, 123 N. E. 885. See to similar effect, *State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co.* (1916) 275 Ill. 555, P.U.R. 1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50; *Scranton v. Public Service Commission* (1919) 73 Pa. Super. Ct. 192, 197.

L. F. C.

STATE OF OREGON, Respt.,

v.

WARD SMITH, Appt.

Oregon Supreme Court (In Banc) — July 12, 1921.

(— Or. —, 199 Pac. 194.)

Intoxicating liquor — prosecution under Federal law as bar to state action.

1. Since the adoption of the 18th Amendment to the Federal Constitution, a conviction for possessing intoxicating liquor, under the Federal law, bars a prosecution under a state law for an offense based on the same facts.

[See note on this question beginning on page 1231.]

Courts — concurrent jurisdiction — exclusiveness.

2. Where different courts have equal jurisdiction of the same of-

fense or subject-matter, the one which first acquires it has exclusive jurisdiction.

[See 7 R. C. L. 1067.]

APPEAL by defendant from a judgment of the Circuit Court for Union County (Knowles, J.) sustaining a demurrer to the plea of former jeopardy and sentencing him to a fine for the crime of having intoxicating liquors in his possession. *Reversed.*

Statement by Johns, J.:

On June 10, 1920, the defendant was indicted by the grand jury of Union county, charged with the crime of possessing intoxicating liquor, committed as follows: "The said Ward Smith, on the 30th day of April, 1920, in the county of Union, and state of Oregon, then and there being, did wrongfully have in his possession and possess intoxicating liquor, in the amount of 5 gallons, all contrary to the statutes," etc.

To this indictment, both orally and in writing, he entered a "plea of former jeopardy" in the district court of the United States for the district of Oregon, from which it appears on May 19, 1920, an information was filed against him in that court in which, in count No. 1, it is charged: "That Ward Smith, the defendant above named, did, on, to wit, the 30th day of April, 1920, in the vicinity of LaGrande, in the state and district of Oregon, and within the jurisdiction of this court, knowingly, wilfully, and unlawfully have in his possession a quantity of intoxicating liquor, said liquor con-

taining more than $\frac{1}{4}$ of 1 per cent of alcohol by volume, contrary to the form of statute," etc.

The defendant was arraigned May 19, 1920, pleaded guilty, and was adjudged to pay a fine of \$250, and that he be committed to jail until the fine was paid. The defendant paid his fine. It is then further alleged:

"That the liquor mentioned in this indictment in this court and cause is the same liquor as that referred to in the said information hereinbefore set forth in the district court of the United States for the district of Oregon.

"And the defendant pleads that the above facts show conclusively that this defendant cannot by law be again put upon his trial upon this indictment."

To this "plea of former jeopardy" the state filed a demurrer "for the reason that such a conviction, if any, in such court under the Federal law, is not a bar to the trial and conviction of the defendant under the law of Oregon for the violation of the laws of the state of Oregon; that the said plea does not consti-

tute any defense to the charge alleged in the instant indictment."

On January 6, 1921, it was ordered and adjudged by the court that the demurrer should be sustained, "whereupon defendant in open court having declined to plead further as to said plea of former jeopardy, and defendant having announced in open court that he will plead guilty to the indictment, and stand on said plea of former jeopardy," on January 8, he was sentenced to pay a fine of \$100, from which ruling and judgment of the court the defendant appeals, claiming "that the court erred in sustaining the demurrer to the plea of former jeopardy and entering judgment whereby this defendant was sentenced to pay a fine of \$100."

Mr. R. J. Green, for appellant:

Where two courts have concurrent jurisdiction of an offense, under the same law or act, the verdict or decision rendered in that court which first acquires jurisdiction constitutes former jeopardy and is a bar to a subsequent trial in the other court.

Bryant v. State, 72 Ind. 400; Com. v. Miller, 5 Dana, 320; Offutt v. Com. 3 Ky. L. Rep. 333; Com. v. Goddard, 13 Mass. 455; McGinnis v. State, 9 Humph. 43, 49 Am. Dec. 697; State v. Layne, 96 Tenn. 668, 36 S. W. 390; Dunn v. State, 6 Tex. 542; Com. v. Overby, 80 Ky. 208, 44 Am. Rep. 471; Houston v. Moore, 5 Wheat. 29, 5 L. ed. 25; Ex parte Ramsey, 265 Fed. 950.

Messrs. I. H. Van Winkle, Attorney General, and Edward Wright, District Attorney, for respondent:

Persons guilty of offenses which constitute violations of the law of the United States and of the state of Oregon, may be punished, for the same act, under the law of the United States and the law of the state of Oregon.

Territory v. Coleman, 1 Or. 191, 75 Am. Dec. 554; State v. Brown 2 Or. 221; Ex parte Young, 36 Or. 247, 48 L.R.A. 153, 78 Am. St. Rep. 772, 59 Pac. 707.

Where the crime is merely one of police regulation, a conviction in the Federal court does not bar a prosecution in the state court.

12 Cyc. 137; United States v. Palan, 167 Fed. 991; 16 C. J. § 482, p. 282.

Johns, J., delivered the opinion of the court:

Section 36, art. 1, of the state Constitution, provides:

"From and after January 1, 1916, no intoxicating liquors shall be manufactured, or sold within this state, except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes.

"This section is self-executing, and all provisions of the Constitution and laws of this state and of the charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section, are hereby repealed."

The legislature of 1917 amended § 5 of chapter 141 of the General Laws of Oregon for the year 1915, to read as follows: "Except as hereinafter provided in this amendatory act it shall be unlawful for any person to receive, import, possess, transport, deliver, manufacture, sell, give away or barter any intoxicating liquor within this state; and the place of delivery of any intoxicating liquor is hereby declared the place of sale; provided that it shall not be unlawful for any person to have in his possession intoxicating liquor lawfully procured and in the possession of such person within this state at the time of the taking effect of this amendatory act, or lawfully obtained or received under the provision of this act." [Laws 1917, chap. 40, § 1.]

On January 29, 1919, the 18th Amendment to the Constitution of the United States, which provides for national prohibition, was adopted and reads as follows:

"After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"The Congress and the several states shall have concurrent power

to enforce this article by appropriate legislation.

"This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the state by the Congress."

Congress then enacted what is known as the Volstead Law (Act Cong. Oct. 28, 1919, chap. 85, 41 Stat. at L. 305), the material provisions of § 3 of title 2 of which are as follows: "No person shall on or before the date when the 18th Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage, may be prevented."

Under this section of the Volstead Act, on May 20, 1920, an information was filed against the defendant in the district court of the United States for the district of Oregon, in which it was charged that on April 30, 1920, in the vicinity of La Grande, Oregon, the defendant did "knowingly, wilfully, and unlawfully have in his possession a quantity of intoxicating liquor, said liquor containing more than $\frac{1}{2}$ of 1 per cent of alcohol by volume."

To this charge the defendant pleaded guilty, and was fined \$250, which he paid. On June 10, 1920, the defendant was indicted by the grand jury of Union county, in which it is alleged that on April 30, 1920, he "did wrongfully have in his possession and possess, intoxicating liquor, in the amount of 5 gallons," etc. To this indictment, the defendant duly entered both an oral and written plea of former jeopardy, to which the lower court sustained the demurrer of the state, upon the ground that it was not a defense. From the plea it appears that the date of the possession of

the liquor described in the indictment is the same liquor as that described in the information. The plea involves the construction of § 2 of the 18th Amendment to the Constitution of the United States, which says: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." In other words, whether a person informed against in the United States court for having liquor in his possession in violation of the National Prohibition Act can be prosecuted under the state prohibition laws for having the same liquor in his possession and at the identical time alleged in the information filed in the United States court. Article 5 of the Amendments to the Constitution of the United States, among other things, says: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Section 12, art. 1, of the state Constitution, says: "No person shall be put in jeopardy twice for the same offense, nor be compelled in any criminal prosecution to testify against himself."

In the discussion of this case it should be borne in mind that what is known as the state prohibition or "Bone Dry" Law, was adopted in November, 1916; the National Prohibition Law was adopted on the 29th day of January, 1919; the information against the defendant in the United States district court was filed on the 19th day of May, 1920, and the indictment against him in the circuit court of Union county was found on the 10th day of June, 1920; that the United States exercised its jurisdiction first, and that the question is not involved as to what jurisdiction, if any, the United States might have if the defendant had first been tried and convicted in the state court. The importance of this distinction is pointed out in the opinion of *United States v. Barnhart* (C. C.) 10 Sawy. 491, 22 Fed. 285. There the defendants, being white men, were indicted by the

United States grand jury for the crime of manslaughter in the killing of an Indian, to which they entered a plea of *autrefois acquit*, in that on June 16, 1884, they were indicted for the crime of murder for the killing of the Indian by the grand jury of Umatilla county, and were later tried and acquitted. In sustaining a demurrer to the plea, the court says: "And again, it must be borne in mind that the policy of the state and the United States may be, and sometimes is, at variance on a given subject. In such case, the former may indirectly hinder or defeat the policy of the latter, if a trial in its courts for a crime growing out of an act which also constitutes a crime against the United States can be used as a bar to a prosecution of the offender in the national courts. For instance, the United States, under the 15th Amendment, may punish anyone who discriminates against the exercise of the elective franchise by another on account of color. *United States v. Reese*, 92 U. S. 217, 23 L. ed. 564. But if the state may also declare such an act a crime it may purposely affix a mere nominal punishment thereto, and thus give anyone guilty of such an act an opportunity to seek refuge in its tribunals before the United States can reach him, and by a trial and acquittal therein, at the hands of a sympathizing jury, or the imposition of a mere nominal punishment, effectually prevent the United States from prosecuting the offender in its own courts and inflicting such punishment upon him as may be necessary to vindicate its authority and maintain its policy in the premises.

"Indeed, if a trial and acquittal or punishment in a state court, under such circumstances, is a bar to a prosecution in this court for the crime of which these defendants stand indicted herein, it is difficult to see why a pardon by the governor of the state would not have the same effect. In short, it is impossible that the United States can maintain its paramount authority over the

subjects committed by the Constitution to its jurisdiction, and at the same time allow a trial in a state court on a criminal charge growing out of an act that Congress has defined to be a crime, to be a bar to a prosecution therefor in its own courts and according to its own laws."

In *Territory of Oregon v. Coleman*, 1 Or. 191, 75 Am. Dec. 554, it was held that "one who sells liquor to Indians may be punished for the same act under the law of the territory and the law of the United States."

The opinion quotes with approval from the language of Justice Grier of the United States Supreme Court, in *Moore v. Illinois*, 14 How. 13, 14 L. ed. 306, as follows: "An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of the state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the Marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment under the state laws for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet, it cannot be truly averred that the offender has been twice punished for the same offense; but only by one act he has committed two offenses, for each of

which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox v. Ohio*, 5 How. 432, 12 L. ed. 222, that a state may punish the offense of uttering or passing false coin as a cheat or fraud practised on its citizens; and in the case of *United States v. Marigold*, 9 How. 560, 13 L. ed. 257, that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States."

In the leading case of *Fox v. Ohio*, supra, the court also holds: "The two offenses of counterfeiting the coin, and passing counterfeit money, are essentially different in their characters. The former is an offense directly against the government, by which individuals may be affected; the latter is a private wrong, by which the government may be remotely, if it will in any degree, be reached," and that "if there were a concurrent power in both governments to punish the same act, a conviction under the laws of either could be pleaded in bar to a prosecution by the other."

In *Houston v. Moore*, 5 Wheat. 1, on page 23, 5 L. ed. 19, 24, the opinion says:

"If, in a specified case, the people have thought proper to bestow certain powers on Congress, as the safest depository of them, and Congress has legislated within the scope of them, the people have reason to complain that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time, compatible with each other. If they correspond in every

respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other so far as they do differ. If the one imposes a certain punishment for a certain offense, the presumption is that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature imposes a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

"I admit that a legislative body may, by different laws, impose upon the same person, for the same offense, different and cumulative punishments; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body. There is, therefore, and can be, no opposition of wills. But the case is altogether different where the laws flow from the wills of distinct co-ordinate bodies. This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other. . . .

"It was contended that if the exercise of this jurisdiction be admitted, that the sentence of the court would either oust the jurisdiction of the United States court-martial, or might subject the accused to be twice tried for the same offense. To this I answer that, if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a circuit court of the United States."

On principle a similar question was involved in *Mayhew v. Eugene*, 56 Or. 102, 104 Pac. 727, Ann. Cas. 1912C, 33. That case grew out of a prosecution of the defendant for a violation of an ordinance of the city of Eugene, in which the defendant was charged with maintaining a common nuisance in that he was a lessee, and in possession of a certain building in which he did knowingly and wilfully engage in the business of selling intoxicating liquors. To this charge he entered a plea of former jeopardy, in that a complaint was previously filed against him before a justice of the peace in which he was charged with selling intoxicating liquor to one Dennie, upon which he had been arrested, tried, convicted, and sentenced. The opinion says:

"2. It is also contended that, the local option law being in force in the city of Eugene, the city has no authority to legislate in any way against the sale of liquor. We have already held that, when local option has been adopted in any city or incorporated town, all laws or ordinances conflicting therewith are suspended.

"3. In other words, as long as the state law prohibits an act, the city law previously in force cannot be invoked to permit the same act.

"4. There is no conflict between the local option law and the ordinance declaring a place where liquors are sold to be a nuisance.

The court further holds: "The offense of making a single sale of liquor is not identical, and cannot be identical, with that of maintaining a nuisance by carrying on the business, and the plea was bad on its face."

It cites the case of *State v. Stewart*, 11 Or. 52, 4 Pac. 128, in which Judge Lord, speaking for the court and quoting from Judge Gray in *Morey v. Com.* 108 Mass. 434, says: "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an

offense against two statutes; and, if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Continuing, Judge Lord says: "The offenses charged in the former and in the present case are not only distinct, but the evidence required to support the one would fall far short of establishing the other."

We have read with care all of the different opinions of the Supreme Court of the United States in the National Prohibition Cases (*Rhode Island v. Palmer*) 253 U. S. 350, 64 L. ed. 946, 40 Sup. Ct. Rep. 486, 588. As we analyze them, the question here presented was not decided, or even discussed; and while inferences pro and con may be drawn from the language used in the respective opinions, yet all of such inferences are nothing more than mere conjecture. The majority opinion of the court was written by Mr. Justice Van Devanter, in which eleven "conclusions" are announced. In his dissenting opinion, speaking of these "conclusions," Mr. Justice Clarke says: "The 8th, 9th, and 11th paragraphs, taken together, in effect, declare the Volstead Act to be the supreme law of the land,—paramount to any state law with which it may conflict in any respect."

He was a member of the court, and his construction of the meaning of those "conclusions" is entitled to some weight. They are as follows:

"8. The words 'concurrent power' in that section do not mean joint power or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"9. The power confided to Con-

gress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them. . . .

"11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title 2, § 1), wherein liquors containing as much as $\frac{1}{2}$ of 1 per cent of alcohol by volume and fit for use for beverage purposes are treated as within that power. *Jacob Ruppert v. Caffey*, 251 U. S. 264, 64 L. ed. 260, 40 Sup. Ct. Rep. 141."

If, as Mr. Justice Clarke says, the Volstead Act is the supreme law of the land, and is paramount to any state law with which it is in conflict in any respect, then it must follow that a conviction in the United States court under the Volstead Act for the possession of liquor is a bar to an indictment in the state court for the possession of the same liquor, at the same time.

The state relies upon the case of *United States v. Holt* (D. C.) 270 Fed. 639, in which it is squarely held that "the concurrent power given by Const. Amend. 18, § 2, to the states to enforce that Amendment, is similar to the power exercised by them in numerous cases, where acts already made offenses under the state law were made offenses under the United States law, with a provision that the latter law should not affect the jurisdiction of the states, and authorizes each to punish the same act as an offense against its sovereignty."

But again it will be noted that the conditions are reversed. There the defendant was previously indicted and prosecuted by the state court, and to the information filed against him in the United States court pleaded "a previous conviction in

the state court for the same acts," and in that case it was further held that "in view of the fact that the National Prohibition Act imposes more severe penalties for a second offense, the conviction and punishment of defendant in the state court for a violation of the state statute does not authorize the refusal of leave to file an information charging those acts as violations of the Federal law, but the United States courts, in passing sentence, will take into consideration the punishment previously involved in the state courts, to the end that the citizen may not be twice subjected to the full measure of punishment for the same acts."

The Prohibition Law of North Dakota, under which Holt was convicted and sentenced, had been in force for many years prior to the 18th Amendment, and it was contended that, by reason of the second section of the 18th Amendment, the Prohibition Law of North Dakota was "an exercise by the state of the concurrent power conferred upon the Congress and the several states to enforce prohibition by appropriate legislation," that, such power being concurrent, the offense there charged is the same offense for which he had been convicted under the state law. The opinion says: "A study of the cases can leave no doubt of the soundness and wisdom of the settled law that, where both sovereignties may punish, a conviction by one is not a bar to punishment by the other. Though the acts punished are identical, the offense is not the same."

In so far as we are advised, this is the only decision of a Federal court which places that construction upon the National Prohibition Amendment. Although it was rendered January 8, 1921, it makes no reference to the case of *Ex parte Ramsey* (D. C.) 265 Fed. 950, decided by Judge Call of the United States district court for the southern district of Florida, on July 17, 1920. There were two habeas corpus proceedings, one by Ramsey et al. and the

other by Stewart et al., in which the petitioners in the first case were discharged and those in the second remanded to custody. The following is the statement of facts from the opinion:

"In the first of the above two cases the petition for the writ of habeas corpus alleges that each of the three petitioners was convicted in the criminal court of record for Duval county, Florida, on two informations, charging that on July 2, 1920, they had in their possession, in Duval county, 1,000 quarts of liquor, and sentenced on such convictions to serve terms of six months in the county chain gang on each offense charged in such informations.

"In the second the four petitioners allege that they are being held in jail by the sheriff of Duval county, awaiting trial in the criminal court of record for Duval county, upon information charging that they had in their possession on July 7, 1920, in Duval county, 1,500 quarts of intoxicating liquor. The petitioners in each of the cases seek to be discharged from custody on the ground that the state law under which the prosecutions are had is in violation of the Volstead Act (41 Stat. at L. 305, chap. 85), and therefore void.

"In the first case it is contended, also, that, at the time the state authorities took the petitioners in custody, they were then in the custody of a revenue agent of the United States government, under a charge of violating the Volstead Act. No question is made but that under this ground the petitioners must be discharged from the custody of the county officers. This leaves the question common to all the petitioners to be disposed of."

It quotes the ninth "conclusion" from the Supreme Court of the United States, *supra*, and also the following from the opinion of Chief Justice White:

"It is said, conceding that the concurrent power given to Congress and to the states does not as a prerequisite exact the concurrent ac-

tion of both, it nevertheless contemplates the possibility of action by Congress and by the states, and makes each action effective; but as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict, the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged, because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers, and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

"In the first place, it is indisputable, as I have stated, that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or distinctions between state and Federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition effi-

cacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and legislation of Congress enacted to make it completely operative."

Judge Call then says: "It is clear to my mind, from the conclusions reached by the majority of the court, as announced in its ninth conclusion, and from the discussion by Chief Justice White in his concurring opinion, that the second section of the Amendment does vest certain powers of legislation in the states to carry out the purposes of the first section of the Amendment. If I am correct in this conclusion, does it make any difference whether the legislative action of a state was taken before or after the going into effect of the Amendment and the Volstead Act? I think not. Of course, I do not mean to say that the state could pass legislation which would so conflict with the congressional action as to make that a crime under the state law which would not be a crime under the Volstead Act. The decision of that particular question is not involved in these cases, and therefore I express no opinion on that subject. But if any effect is to be given to the second section of the Amendment, then surely a state could pass legislation for the purpose of carrying out the Amendment under the authority given in the Amendment itself, which was not in violation of any provisions of the Volstead Act, and this, it seems to me, could be done either before or after the 18th Amendment went into effect."

The court then holds: "Such being my conclusion in these matters, the defendants named in the second case will be remanded to the county authorities for a trial under the information filed in the criminal court of record. The three defendants named in the first case, on the ground heretofore noted, will have to be discharged from custody under said conviction."

As we analyze Judge Call's opinion in the Ramsey-Stewart Cases, it

is squarely in conflict with the decision of Judge Woodrough in the Holt Case. In *United States v. Peterson* (D. C.) 268 Fed. 864, a plea in bar was filed and sustained in two cases and overruled in three. The opinion says:

"The Washington Prohibition Law (Laws 1915, chap. 2, p. 2) is more stringent in its provisions as to possession and use of intoxicating liquors than the National Prohibition Act (41 Stat. 305). It is sometimes called a 'bone dry' law.

"Section 2, art. 18, and § 2, art. 6, must have harmonious relation, since no express declaration in the Amendment was made, nor are the provisions necessarily inconsistent. The national legislation, therefore, is paramount, and the state laws, when in conflict, must yield. *Ballaine v. Alaska Northern R. Co.* 8 A.L.R. 990, 170 C. C. A. 251, 259 Fed. 183, and cases cited. . . .

"The state, then, may, by appropriate legislation, exert its power to enforce article 18, either by new legislation or appropriate existing legislation. Neither article 18 nor the Congress sought to destroy any existing remedies by a state to curb the drink evil, and where existing remedies are provided by a state, available for the enforcement of article 18, and in harmony with the Prohibition Act, *supra*, the power of the state, through its courts, may be invoked, and a conviction in a state court for conduct which is in violation of the Prohibition Act, *supra*, is a bar to a prosecution in the Federal courts. It seems manifest that it was not the intent that a person should be punished by the state and Federal law for the same offense."

On legal principle, under the facts there shown, this case seems to be squarely in point. It must be remembered that the Amendment is to the Federal Constitution, and that it prohibits the manufacture, sale, or transportation of intoxicating liquor anywhere in the United States. Prior to its adoption there were

many states which had adopted state prohibition in one form or another. Although their respective laws may have been designed for the same purpose, and in some respects were similar, they were not uniform; that is to say that each state had a separate and distinct law of its own, and had different penalties for the violation of its own law. Again, many of the states, including some of the largest in the Union, never had and may never have state prohibition in any form. The question is thus presented whether it was the purpose and intent of the National Prohibition Act that a person who lives in a prohibition state can be twice prosecuted and convicted for the crime of having liquor in his possession, and whether a person who lives in a state that never has adopted state prohibition can be convicted once only for that crime. That is to say, if a person lives in a prohibition state and has liquor in his possession, he does commit two offenses,—one against the United States and one against the state; and if he lives in a state which does not have state prohibition, and has liquor in his possession, his offense is against the United States only.

As we analyze § 2, Congress and the several states have "concurrent power" to enforce national prohibition by appropriate legislation. The enforcement of such legislation can only be done in and through the courts, and the words "concurrent power" to enforce carry with them and imply that the courts of the several states have concurrent jurisdiction with the Federal courts over the question of national prohibition; otherwise the state courts would not have any authority to enforce that law. The rule is fundamental that, where different courts have equal jurisdiction of the same offense or subject-matter, the one which first acquires it has exclusive jurisdiction. 12 Cyc., p. 264, states the rule: "Where two courts have

concurrent jurisdiction of an offense, the verdict or decision rendered in that court which first acquires jurisdiction constitutes former jeopardy and is a bar to a subsequent trial in the other."

Under the Federal practice, leave of court must be first obtained before an information can be filed. Where the jurisdictions are concurrent, and in the absence of some special or extraordinary reason, we have a right to assume that no Federal court would ever grant leave to file an information against any person for the identical crime for which he had been previously convicted in the state court. There is no such state law. An indictment by a grand jury for an offense against the state is not founded upon leave of court first had and obtained. Under a given state of facts, it is for the grand jury, and not for the court, to say whether a man should be prosecuted for the violation of a state law. That is one reason why a defendant should not be prosecuted in a state court for the doing of the identical thing for which he was previously convicted in the Federal court. In the instant case the defendant was fined \$250 in the Federal court, and for doing the identical thing charged in the information in that court he was later indicted, prosecuted, and fined \$100 in the state court, the legal effect of which is that the government gets the \$250 fine and the state the \$100. That is to say that, if he had been fined \$350 in the Federal court, the net result to the defendant would have been the same.

Under the facts of the instant case, and in the absence of a final decision by the Supreme Court of the United States, the question involved here is one of first impression in this court. The plea of former jeopardy is not only an inherent right which is founded upon the common law, but it is embodied in both the state and Federal Constitutions, and is grounded on the fundamental principle that no man shall be tried and convicted twice of

Courts—
concurrent
jurisdiction—
exclusiveness.

the same offense. Under article 10 of the Amendments to its Constitution, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Under the provisions of article 10, it would not be contended that the United States would have any jurisdiction or control over state prohibition, but the sole purpose of the 18th Amendment to the Constitution was to give and vest in the Federal government power and authority over national prohibition, and through its adoption, and to that extent and for that purpose, the states surrendered that power to the Federal government when the 18th Amendment to the Constitution was adopted. It must be conceded that, prior to the adoption of national prohibition, the Oregon state courts had exclusive jurisdiction over questions involving a violation of its prohibition law. Hence we have this situation. By the adoption of national prohibition, concurrent jurisdiction is vested in both the state and Federal courts to enforce that law; and under the theory of the prosecution in this case, the state court would have the power to enforce the state prohibition law, and "concurrent power" with the Federal court to enforce national prohibition through any appropriate legislation by the state. To say the least, it was never the intent of the National Prohibition Act that a state court should ever have any higher authority or anything more than concurrent jurisdiction with the Federal court to enforce the law. There is an important distinction between the joint exercise of a "concurrent power" by the state and nation, acting together, and the exercise by either of them of a separate and distinct power. On principle, none of the early decisions above quoted, either state or Federal, are in point here, and it is only by analogy that they can be applied. From an examination of the facts in them, it will be found that, under

the provisions of the Federal Constitution as it then existed, Congress had enacted certain punitive laws and provided penalties for their enforcement, and that, under their respective Constitutions as they then existed, the state had legislated upon the same subject-matter and provided penalties for the violation of its laws, and that, in the enactment of such laws, each acted separately and distinct from the other; there was no joint action, and the only limitation upon the powers of either of them was the constitutional limitation, and as to all of such matters, article 10 of the Constitution of the United States was then in full force and effect, and all of the powers which were not delegated to the United States were by it reserved to the respective states, or to the people.

In the instant case, by a vote of the states and of the people, all the powers conferred by the adoption of the 18th Amendment were taken away from the states and vested in the government itself. Those early decisions are not founded upon legislation jointly enacted by Congress and the several states. They are based upon legislation growing out of the exercise of separate and distinct powers, one of which was vested in the government under the Federal Constitution, and the other in the legislatures of the respective states. They were not founded upon an amendment to the Federal Constitution which vested in Congress or the states "concurrent power" to enforce any given law by appropriate legislation. In 2 Words & Phrases, p. 1391, it is said that:

" 'Concurrent jurisdiction' means equal jurisdiction. . . . 'Concurrent' is having the same authority. Such and such courts have concurrent jurisdiction; that is, each has the same jurisdiction. . . .

" 'Concurrent jurisdiction' is that jurisdiction exercised by different courts, at the same time, over the same subject-matter, and within the same territory, and wherein liti-

gants may, in the first instance, resort to either court indifferently.

"By conferring on Missouri 'concurrent jurisdiction' on the river Mississippi, so far as the said river shall form a common boundary to the said state and any other state or states bounded by the same, Congress intended to declare that, subject to the other laws of the United States, transactions occurring anywhere on that river between the two states might lawfully be dealt with by the courts of either according to its laws, and that, where a court of one state assumed jurisdiction in a particular case, the same should be exclusive therein until relinquishment. *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 3 L.R.A. 390, 10 S. W. 597."

In 8 Cyc. p. 553, the word "concurrent" is defined as: "Having the same authority; acting in conjunction; agreeing in the same act; contributing to the same event; contemporaneous; running together; co-operating; contributing to the same effect; acting in conjunction; agreeing in the same act; contributing to the same event or

effect; co-operating; accompanying; conjoined; associate; concomitant; joint and equal; existing together, and operating on the same objects."

The plea of former jeopardy is an inherent constitutional right designed to promote the ends of justice. As we construe it, it was never the purpose or intent of the National Prohibition Act that a person against whom an information had been filed in the Federal court, charging him with the violation of the Volstead Act, to which he pleaded guilty and paid his fine, could again be indicted, prosecuted, and convicted in the state court for the doing of the identical thing, and on the same day charged in the information filed against him in the Federal court, to which he had pleaded guilty and paid his fine. The demurrer to the defendant's plea of former jeopardy should have been overruled. If true, the facts therein stated are a complete defense to the indictment.

The case is reversed, and remanded for further proceedings not inconsistent with this opinion.

Intoxicating
liquor—
prosecution
under Federal
law as bar to
state action.

ANNOTATION.

Acquittal or conviction under Federal statute as bar to prosecution under state or territorial statute based on the same act or transaction, and vice versa.

I. Scope, 1231.

II. In general, 1232.

III. Acquittal or conviction in state court as bar to prosecution in Federal court, 1236.

IV. Acquittal or conviction in Federal court, as bar to prosecution in state court, 1237.

V. Prohibition laws:

a. In general, 1238.

I. Scope.

The present annotation is concerned only with the question whether one who has been acquitted or convicted in a Federal court may be prosecuted in a state court for the same act or transaction, or vice versa, and does not deal with the general question whether the same act may constitute

V.—continued.

b. Conviction for violating municipal ordinance as bar to Federal prosecution, 1242.

VI. Double punishment not inflicted in practice, 1242.

VII. Territorial statutes, 1244.

VIII. Courts-martial, 1247.

IX. Miscellaneous, 1249.

an offense against both the state and Federal governments, or, in other words, offend both Federal and state laws. The latter question might be answered in the affirmative, and yet it would not follow that the offender could be prosecuted and punished in both jurisdictions. A conviction or acquittal in the one first exercising its

authority might bar prosecution in the other. Cases where there was no prosecution in the other jurisdiction—state or Federal—are cited only in so far as their discussion appears to reflect the opinion of the court on the present subject.

It should be noted that the annotation treats the question of double jeopardy from the standpoint of the effect of the fact that the prosecutions are in the courts of different jurisdictions, and is not concerned with the question of identity of offenses. In other words, cases which turn on the circumstance that the two offenses are distinct in their nature, and not merely repugnant to the laws of two jurisdictions, are not of the class which the note purports to cover. It has not been feasible, however, to draw fine distinctions in this respect, and cases in general are included in which the two prosecutions for the same act were in courts of different jurisdictions,—state and Federal,—even though the decision turned in part on the different nature of the offense under the state and Federal laws.

II. In general.

The rule that since the same act may constitute an offense against both Federal and state laws, an acquittal or conviction in one jurisdiction will not prevent prosecution in the other, is supported by the holding, or at least by the underlying principle, in numerous cases.

United States.—*Fox v. Ohio* (1847) 5 How. 410, 12 L. ed. 213 (arguendo); *Moore v. Illinois* (1852) 14 How. 13, 14 L. ed. 306; *United States v. Amy* (1859) 14 Md. 149, note, Fed. Cas. No. 14,445 (rule recognized); *United States v. Barnhart* (1884) 10 Sawy. 491, 22 Fed. 285; *United States v. Palan* (1909) 167 Fed. 991; *United States v. Casey* (1918) 247 Fed. 362 (approving rule); *United States v. Holt* (1921) 270 Fed. 639; *Martin v. United States* (1921) — C. C. A. —, 271 Fed. 685; *United States v. Bostow* (1921) 273 Fed. 535; *United States v. Regan* (1921) 273 Fed. 727; *United States v. Lee Sa Kee* (1908) 3 Haw. Dist. Ct. 262 (approving rule). See

also *Cross v. North Carolina* (1889) 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47; *Crossley v. California* (1898) 168 U. S. 640, 42 L. ed. 610, 18 Sup. Ct. Rep. 242; and *United States v. Lackey* (1900) 99 Fed. 952, reversed on other grounds in (1901) 53 L.R.A. 660, 46 C. C. A. 189, 107 Fed. 114.

Georgia.—*Bryson v. State* (1921) — Ga. App. —, 108 S. E. 63; *Moore v. State* (1921) — Ga. App. —, 108 S. E. 65. See also *Tharpe v. State* (1919) 24 Ga. App. 349, 100 S. E. 754.

Iowa.—*State v. Moore* (1909) 143 Iowa, 240, 121 N. W. 1052, 21 Ann. Cas. 63.

Massachusetts. — *Com. v. Barry* (1874) 116 Mass. 1 (approving rule).

Oregon. — *Territory v. Coleman* (1855) 1 Or. 192, 75 Am. Dec. 554.

Tennessee.—*State v. Rankin* (1867) 4 Coldw. 145.

Utah.—*State v. Norman* (1898) 16 Utah, 457, 52 Pac. 986 (approving rule).

Virginia.—See *Hendrick v. Com.* (1834) 5 Leigh, 707, and *Jett v. Com.* (1867) 18 Gratt. 959.

Washington. — *State v. Kenney* (1915) 83 Wash. 441, 145 Pac. 450.

Wyoming.—*Re Murphy* (1895) 5 Wyo. 297, 40 Pac. 398, 9 Am. Crim. Rep. 122 (rule approved).

In *United States v. Holt* (1921) 270 Fed. 639, the court said that a study of the cases left no doubt of the soundness and wisdom of the settled law that where both sovereignties may punish, a conviction by one is not a bar to punishment by the other; that, although the acts punished are identical, the offense is not the same.

And in *United States v. Amy* (1859) 14 Md. 149, note, Fed. Cas. No. 14,445, Justice Taney, in a prosecution for stealing a letter containing articles of value from a postoffice, said that as the letter containing money was stolen in a state, the accused might undoubtedly have been punished in the state tribunals, according to the laws of the state, "without any reference to the postoffice or the act of Congress; because, from the nature of our government, the same act may be an offense against the laws of the United States and also of a state, and

be punishable in both. . . . And the punishment in one sovereignty is no bar to his punishment in the other."

On facts not within the scope of the annotation, the Federal Supreme Court in *United States v. Cruikshank* (1876) 92 U. S. 542, 23 L. ed. 588, in discussing the dual nature of our form of government, said: "The people of the United States resident within any state are subject to two governments,—one state and the other national,—but there need be no conflict between the two. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace in the assault. So, too, if one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the state,—the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction."

The doctrine of the earlier Federal cases that the same act may constitute two offenses, one against the United States and the other against the state, is approved (obiter) in *Grafton v. United States* (1907) 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640.

16 A.L.R.—78.

In *Com. v. Barry* (1874) 116 Mass. 1, the court said that if the fact that a person was teller of a national bank subjected him to the punishment imposed for a breach of trust in that capacity, under the Federal statute, it did not relieve him from his liability to punishment for the larceny at common law or under statutes of the state; that there was no identity in the character of the two offenses, although the same evidence might be relied upon to sustain the proof of each; and that an acquittal or conviction of either would not be a bar to a prosecution for the other. This statement was made arguendo in sustaining the jurisdiction of the state court to punish another person who was charged with having feloniously aided in the concealment of money of the bank stolen from it by the teller.

Some cases passing merely on the question whether the state courts had jurisdiction, or whether the matter was one cognizable exclusively in the Federal courts, are of value on the present question, and may be here cited because of their consideration of the question whether the accused might be illegally subjected to trial and punishment twice for the same offense in case the jurisdiction of both state and Federal courts was sustained.

Thus, in *Moore v. Illinois* (1852) 14 How. (U. S.) 13, 14 L. ed. 306, the court took the view that unconstitutional double punishment for the same offense would not result from the fact that a person might be liable to a prosecution under an act of Congress for the same act of harboring and preventing the owner from retaking his slaves as would subject him to punishment under a state law. In this case the defendant had been convicted under a statute of Illinois, which it was contended was void, for harboring and secreting a negro slave. It does not appear that there had been a prosecution under a Federal statute, but it was contended that the state law was void on the ground that the Federal law provided a punishment for the same act. The court pointed out the difference in the two

statutes, but took the view that, admitting that the defendant might be liable to an action under the Federal statute for the same acts, it did not follow that he would be twice punished for the same offense; that every citizen might be regarded as owing allegiance to two sovereigns and subject to punishment for an infraction of the laws of either, and that he cannot plead punishment by one in bar to a conviction by the other. See quotation from this case in *STATE v. SMITH* (reported herewith) ante, 1220.

And in *Fox v. Ohio* (1847) 5 How. (U. S.) 410, 12 L. ed. 213, a case which is frequently cited on the present question, the court sustained a conviction under a statute of Ohio for passing counterfeit coin, as against the objection that, if the state could inflict penalties for the offense of passing such coin and the Federal government should provide a penalty for the same act, a person would be liable to be twice punished for the same offense, in violation of the provision of the Federal Constitution against double jeopardy. It does not appear that there had been a prosecution in the Federal court, but the court pointed out that even if Congress should undertake to punish the same act against which the state statute was directed, there would be no constitutional objection to punish one who was guilty of violation of both statutes, though based on the same acts. The decision, however, is only to the effect that the two offenses of counterfeiting the coin and passing counterfeit money are essentially different in their character, and that, while the former is an offense directed against the government, the latter is a private wrong, which may be made punishable by the state.

So, in *Hendrick v. Com.* (1834) 5 Leigh (Va.) 707, although it does not appear that there had been a prosecution in the Federal court for the offense charged, the court was of the opinion apparently that the courts of a state may punish criminally any forgery committed of the notes, checks, etc., of or upon the bank of the United States, although this is

made an offense punishable by the courts of the United States, and although a person might be punished twice for the same offense.

Another case in which it does not appear that there had been a prosecution in the Federal court, but in which the authority of the state court was upheld, notwithstanding the same act might be punishable by the Federal courts, is *People v. McDennell* (1889) 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190, 8 Am. Crim. Rep. 147, which is to the effect that the same act of counterfeiting may be punished both as an offense against the United States and as an offense against the state.

And in *United States v. Lackey* (1900) 99 Fed. 952, the court said there were many instances where the same acts are offenses against the law both of the state and of the United States; and that while doubtless the state might punish the particular offense it by no means followed that the national government might not do so also in proper cases. The decision is to the effect that the Federal government is not precluded from punishing one for an offense against the United States for influencing or controlling the vote of a colored man by means of bribery, because the state court may, on the same state of facts, punish the same person for the offense of bribery. The decision is reversed on the ground of the unconstitutionality of the Federal statute in (1901) 53 L.R.A. 660, 46 C. C. A. 189, 107 Fed. 114. A petition for a writ of certiorari was denied in (1901) 181 U. S. 621, 45 L. ed. 1032, 21 Sup. Ct. Rep. 925.

That a trial and conviction in the state court of the offense of uttering a forged national bank note, under a state law, is not illegal merely because the sustaining of the statute and the conviction might result in a second punishment under a Federal statute for the same act, in violation of the Federal Constitution, is held also in *Jett v. Com.* (1867) 18 Gratt. (Va.) 933. The question here was merely as to the jurisdiction of the state court, it being contended that

the Federal court had exclusive jurisdiction. The court reached the conclusion that there was nothing in the relation between the state and Federal government, or in the nature of the jurisdiction itself, which made the jurisdiction of the Federal court to punish the act in question as an offense against the United States necessarily exclusive of the jurisdiction of the state court to punish the same act as an offense against the state. It does not appear that there had been a trial in the Federal court, but the principle underlying the decision is that both courts may punish the same act as an offense against each jurisdiction, although, to avoid injustice and oppression, in ordinary cases double punishment would in practice be avoided, either by the court on the subsequent trial, or by the pardoning power.

However, in several of the earlier cases involving counterfeiting, the courts, *arguendo*, have taken the position, in sustaining the jurisdiction of the state court, that the defendant could not be tried and punished twice for the same offense, but that the court, Federal or state, which first takes jurisdiction, has the right to proceed to trial, and judgment.

Thus, in *Com. v. Fuller* (1844) 8 Met. (Mass.) 313, 41 Am. Dec. 509, on an indictment against a person for having counterfeit coin in his possession with intent to utter and pass the same as true, it was objected to the jurisdiction of the court that the offense was cognizable only in the United States court, and that the state law under which the defendant was indicted was unconstitutional. In overruling this contention the court said: "It is contended, also, that it is unconstitutional to subject a person to the operation of two distinct laws upon the same subject, and inflicting different pains and penalties. But I hold that the delinquent cannot be tried and punished twice for the same offense, and that the supposed repugnancy between the several laws does not, in fact, injuriously affect any individual. The man who commits the crime runs

the hazard under which jurisdiction he may be subjected to punishment; and after violating the law, it comes with ill grace from him to complain of the penalty. If he were indeed liable to be punished twice for the same offense, he might well argue against oppression; and the existence of such liability would go far to prove the unconstitutionality of the law. But while the proviso in the act of Congress remains unrepealed, the criminal cannot be thus exposed; as the court which first exercises jurisdiction has the right to enforce it by trial and judgment, by the well-established principles of law relating to the jurisdiction of courts."

And in *Com. v. Overby* (1882) 80 Ky. 208, 44 Am. Rep. 471, where the question was whether bail in a case in which the defendant was charged with passing a counterfeit United States Treasury note should be exonerated after the accused had been tried and convicted in a United States court for the same offense, one of the reasons given for exonerating the bail was that the defendant could not have been tried and convicted, even if present in the state court, after having been tried and convicted of the same offense in the Federal court, for the offense was the same, denounced alike by the laws of the United States and of the state.

Also in *Harlan v. People* (1843) 1 Dougl. (Mich.) 207, where the question was whether a state had the right to punish counterfeiting, the court, in reply to the contention that a conviction in the state court would be no bar to an indictment in the courts of the United States, said: "If such concurrent jurisdiction in fact exists, we apprehend such conviction would be admitted in Federal courts as a bar. This would follow necessarily from the existence of a concurrent jurisdiction; even if it did not come strictly within the provision of the 7th Article of the Amendments of the Constitution."

So, the doctrine that the state and Federal courts cannot both punish for counterfeiting under state and Federal statutes, respectively, although the

state courts are not precluded from exercising jurisdiction if there has been no prosecution in the Federal court, is supported by *State v. Antonio* (1816) 5 S. C. L. (3 Brev.) 562, in which, in holding that the state courts had jurisdiction of the offense of passing a counterfeit coin, the court said: "As to the second objection, 'a man may be twice tried,' this could not possibly happen: First, because it is the established comitas gentium, and is not infrequently brought into practice, to discharge one accused of a crime who has been tried by a court of competent jurisdiction. If this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties? But a guard yet more sure is to be found in the 7th Article of the Amendments to the Federal Constitution."

As before stated, the present annotation does not cover the question whether the state and Federal courts both have the jurisdiction of such offenses as counterfeiting, since this is a different question from that as to whether an acquittal or conviction in the courts of one jurisdiction may be pleaded in bar of a prosecution in the other. Cases in which only the former was the ultimate question are included herein only so far as, by their reasoning, they throw light on the latter question. Other cases of that kind are excluded. See, for example, as representative of that class of cases not covered in the note, *Re Truman* (1869) 44 Mo. 181, in which a state statute punishing the passing of counterfeit money was upheld as against the contention that the courts of the United States had exclusive jurisdiction of the offense, the court saying that the offense charged in the indictment was of a nature to constitute an offense as well against the state as against the United States, and that, although Congress might perhaps by appropriate legislation render the jurisdiction of the national courts exclusive, still, as it did not appear to have done so, the jurisdiction of the state court was not suspended.

See also, as passing merely on the question whether the Federal courts had an exclusive jurisdiction of the offense, *People v. Welch* (1894) 141 N. Y. 266, 24 L.R.A. 117, 38 Am. St. Rep. 793, 36 N. E. 328, in which the court held that the same act might be an offense against both state and Federal governments, punishable in each jurisdiction under its laws, and that therefore manslaughter committed within the territorial limits of a state by the misconduct or negligence of a pilot, licensed under Federal laws, in charge of a vessel which came into collision with another, causing the death of a person, was punishable under state laws, although by Federal statute it was made an offense against the United States. The view of the court on the present subject, however, may perhaps be regarded as reflected in the statement in the opinion, in which all of the judges concurred, that "it would be a more satisfactory state of this law than now exists if it could be held that the court first acquiring jurisdiction should retain it, and that the judgment of one court in such a case as this could be pleaded in bar of a further prosecution for substantially the same offense in the courts of the other jurisdiction."

III. Acquittal or conviction in state court as bar to prosecution in Federal court.

Cases holding that an acquittal or conviction in the courts of a state under a state statute will not bar a prosecution in the Federal courts under a Federal statute, based on the same act or transaction, are: *United States v. Barnhart* (1884) 10 Sawy. 491, 22 Fed. 285; *United States v. Palan* (1909) 167 Fed. 991; *United States v. Casey* (1918) 247 Fed. 362 (approving rule); *United States v. Holt* (1921) 270 Fed. 639; *Martin v. United States* (1921) — C. C. A. —, 271 Fed. 685; *United States v. Bostow* (1921) 273 Fed. 535; *United States v. Regan* (1921) 273 Fed. 727. But see *United States v. Peterson* (Fed.) under V. a, *infra*.

An acquittal in a state court of the

charge of murder committed by the killing of an Indian was held in *United States v. Barnhart* (Fed.) *supra*, not to be a bar to a trial of the charge of manslaughter in a United States court for the killing of the same Indian. The court took the view that a person living under two governments or jurisdictions, as does every inhabitant of the states of this Union, may commit two crimes by doing or omitting one act,—one against the state and the other against the United States; and that in such a case the conviction or acquittal of the one crime, in a forum of the state, is not a bar to a prosecution for the other, in a forum of the United States. See quotation from this case in *STATE v. SMITH* (reported herewith) *ante*, 1220.

It was said in *United States v. Casey* (1918) 247 Fed. 362, *supra*, that a conviction and sentence of keepers of bawdyhouses by the state court, under state law, would not bar their prosecution in the Federal courts, under the Selective Service Act of 1917, and regulations thereunder, forbidding the keeping of such resorts within 5 miles of a military post. The court was discussing the contention that the Federal statute was unconstitutional as interfering with the police power of the state, and it does not appear that action had begun in the state court.

In *United States v. Palan* (1909) 167 Fed. 991, *supra*, where the defendants, on a trial for harboring an alien woman for purposes of prostitution within three years after she entered the United States, in violation of a Federal statute, set up the defense that they had been convicted in a state court and had served a term of imprisonment for keeping a disorderly house, the prosecution being based on the same facts, the court held that this punishment, although for substantially the same offense, would not preclude sentence to further imprisonment on a conviction in the Federal court. As to suspension of sentence in such a case, see VI. *infra*.

For the specific holdings in the other Federal cases cited above, see V. a, *infra*.

IV. Acquittal or conviction in Federal court, as bar to prosecution in state court.

An acquittal or conviction in a Federal court for violation of a Federal statute, it has been held, will not bar a prosecution in a state court for violation of a state law, although the two prosecutions are based on the same act or transaction. *Bryson v. State* (1921) — Ga. App. —, 108 S. E. 63; *Moore v. State* (1921) — Ga. App. —, 108 S. E. 65; *State v. Moore* (1909) 143 Iowa, 240, 121 N. W. 1052, 21 Ann. Cas. 63; *State v. Rankin* (1867) 4 Coldw. (Tenn.) 145, under VIII. *infra*; *State v. Kenney* (1915) 83 Wash. 441, 145 Pac. 450. See also *Tharpe v. State* (1919) 24 Ga. App. 349, 100 S. E. 754.

Several of the cases cited above involve prohibition laws, which constitute a somewhat distinct class of cases in view of the special provision contained in the 18th Amendment. And as regards this particular class of cases there is a conflict of authority. See V. a, *infra*, where the cases are set out.

In *State v. Moore* (1909) 143 Iowa, 240, 121 N. W. 1052, 21 Ann. Cas. 63, *supra*, the court held that a conviction in the Federal court for breaking and entering a postoffice with the intent to commit a larceny under Federal statutes would not bar a prosecution by the state for burglary under an indictment based on the same facts. The court took the view that the two offenses were distinct, but also referred to the doctrine that a citizen may be obliged to pay the penalties which each government—Federal and state—exact for obedience to its laws.

Although the question under consideration is not discussed, attention is called also to *Ex parte Roach* (1908) 166 Fed. 344, in which it was held that the facts that a person was convicted in the United States court, of breaking and entering a building used as a postoffice, with intent to commit larceny therein, and served the sentence imposed, would not prevent a prosecution in the state court for unlawfully breaking and entering

in the nighttime the private office of the postmaster, and feloniously stealing and taking therefrom the money and other property of the said postmaster, the offenses not being the same. The court said, however, that if the money or other property charged in the indictment to have been stolen was in fact the money and property of the United States, the state court would not have jurisdiction, and the United States court would alone have jurisdiction thereof.

V. Prohibition laws.

a. In general.

The question of the construction and effect of the Volstead Act is treated in the annotation appended to *Street v. Lincoln Safe Deposit Co.* 10 A.L.R. 1553.

And as to the effect of Federal, constitutional, or legislative provisions as to intoxicating liquors on state legislation, see the annotations in 10 A.L.R. 1587, and 11 A.L.R. 1320. It will be observed from the latter annotation that the cases are to the effect that the 18th Amendment and the act of Congress known as the Volstead Act do not invalidate all state legislation, but only such as conflicts therewith. Assuming that state laws are not abrogated by the 18th Amendment or legislation enacted thereunder by Congress, the question arises whether, if the state and Federal government each has enacted prohibition legislation, a prosecution in the state courts will bar a prosecution in the Federal courts, or vice versa, where the offense charged is based on the same act or transaction. While cases not involving national and state prohibition laws are instructive on the principles involved, yet the above question is somewhat distinctive because of the express provision in the 18th Amendment for "concurrent power" of enforcement on the part of the state and Federal governments.

In several cases it has been held that a conviction or acquittal in a state court for violation of a state prohibition act is not a bar to a prosecution in a Federal court for violation

of the Federal Prohibition Statute, based on the same act or transaction. *United States v. Regan* (1921) 273 Fed. 727; *United States v. Bostow* (1921) 273 Fed. 535; *Martin v. United States* (1921) — C. C. A. —, 271 Fed. 685; *United States v. Holt* (1921) 270 Fed. 639.

It was held in *United States v. Holt* (Fed.) *supra*, that the conviction of the defendant in a state court for importing, transporting, and having intoxicating liquor in his possession, was not a bar to his prosecution in the Federal court for violating the Volstead Act, by importing, transporting, and having intoxicating liquor in his possession, although the two prosecutions were based on the same act. The doctrine was followed that, where the same act is an offense against the laws of two sovereignties, both may punish, and a conviction by one is not a bar to punishment by the other, since the offenses are not the same.

The decision in *United States v. Holt* (Fed.) *supra*, was approved in *United States v. Regan* (Fed.) *supra*, where it was held, in a prosecution in the Federal court for unlawfully transporting liquor in New Hampshire without having received a permit from the Commissioner of Internal Revenue, that a plea in bar was insufficient which alleged that the defendant had pleaded guilty in the state court and was fined for the same unlawful transportation. The court, in referring to the 5th Amendment to the Federal Constitution, called attention to the fact that the case was not one of "life and limb," but rather one involving a misdemeanor, and one which might be influenced, perhaps, by the "concurrent-power" provision of the 18th Amendment. The fact that the laws of the two jurisdictions—Federal and state—were different, and not that the Federal government was paramount, was regarded as the justification for the two prosecutions, although the court did not discuss fully the merits of the question, stating that it was one which would probably be settled by the Federal Supreme Court in view of the conflict in the Federal district court decisions.

And in the recent case of *United States v. Bostow* (Fed.) *supra*, the court, in holding that a conviction of acquittal in the state court for violation of the state prohibition statute was not a bar to a prosecution in the Federal court for violation of the National Prohibition Act, though the two prosecutions were based on the same transaction, approved the decision in the *Holt Case* (Fed.) *supra*, and declined to follow that to the contrary in *United States v. Peterson* (1920) 268 Fed. 864, *infra*. The court, after referring to the Amendment of the Federal Constitution, that no person shall be subject for the same offense to be twice put in jeopardy, said: "What meaning shall be given to the words 'the same offense'? How shall they be construed? If the Congress can pass legislation to enforce the Prohibition Amendment, and the states may also do so, it is manifest that such legislative acts will differ—that different laws will be provided for the enforcement of the Amendment, and different punishments will be imposed. It is also manifest that often the same act or transaction will violate both the Federal and state provisions, so the question arises: Where the same act violates both statutes, has there been only one or more offenses committed? It will be conceded that the offender cannot be tried in the Federal court for violation of the state statute, nor in the state court for the violation of the Federal statute; so it appears that the offense is not the act or transaction alone, but that the act or transaction must be considered in the light of the legislative provisions and prohibitions. In the absence of such legislative prohibitions, the act or transaction committed would not be an offense. It is not the prohibited act, but the terms of the statute which declare and define the offense. It seems to me, therefore, that as each legislative entity, whether state or Federal, declares its own offense, this cannot be the same offense as that provided by the other, though the same act or transaction may violate each of them, but that there are as

many offenses as the legislative provisions may declare."

In *United States v. Bostow* (Fed.) *supra*, it was contended as to one of the defendants who had been indicted but had apparently not yet been tried for violation of the National Prohibition Act, that, since he had been indicted in the state court under a state statute for the same transaction for which he was indicted in the Federal court, the doctrine should be applied that where a state court has entered upon the prosecution of a criminal or civil case, whichever court first acquires jurisdiction will be permitted to proceed to the final hearing without being interfered with by another court. The court said, however, that the same right was not involved in the two prosecutions, which were based on different statutes; and that where the same right is not involved, the fact that the case is pending in the state court is no reason why the Federal court should not proceed with the indictment. The court also called attention to the rule that the doctrine of noninterference with the court first acquiring jurisdiction is confined in its operation to the parties who are before the court, or who may, if they wish to do so, come before the court and have a hearing on the issues to be decided. And it was manifest, the court said, that the Federal government could not appear in the prosecution before the state court, for it had no standing there, and also that the state had no right to appear in the Federal court, because no state statute was involved. So that, for this reason also, it was held that the doctrine prohibiting noninterference was inapplicable.

And in *Martin v. United States* (1921) — C. C. A. —, 271 Fed. 685, it was held that in a prosecution in the Federal courts for transporting intoxicating liquor in interstate commerce, it was not erroneous for the trial court to refuse to admit in evidence the record of proceedings before a justice of the peace of the state in which the crime was alleged to have been committed, showing that the defendant had been tried and ac-

quitted on a complaint charging him with having on the day in question unlawfully and knowingly transported intoxicating liquors to be kept, stored, and sold to other persons in the county. The defendant in this case did not insist that the judgment of acquittal in the state court was a bar to his trial and conviction in the Federal court, but that it was admissible upon the question of transportation, to be considered with all the other evidence in the case. The court said that, of course, the defendant could not claim that the judgment of acquittal in the state court was a bar to his trial and conviction in the Federal court, for the reason that the two offenses were different, and committed against different sovereignties; that the defendant could be convicted of one of them and acquitted of the other. And, inasmuch as the judgment was a general one on a general verdict, without any special findings of facts, and in the state court the transportation of intoxicating liquors had to be for a certain purpose, and the jury there might have found the purpose lacking, whereas the defendant might still be guilty of illegally transporting liquors in interstate commerce, the court held that the judgment of acquittal was properly excluded.

It has been held, also, that an acquittal or conviction in a Federal court under the Federal Prohibition Law will not bar a prosecution under a state law, based on the same act or transaction. *Bryson v. State* (1921) — Ga. App. —, 108 S. E. 63; *Moore v. State* (1921) — Ga. App. —, 108 S. E. 65. See also *Tharpe v. State* (1919) 24 Ga. App. 349, 100 S. E. 754.

It was held in *Bryson v. State* (Ga.) supra, that one who has already pleaded guilty in a Federal court for illegally possessing liquor in violation of the Volstead Act could be legally punished in the state court for possessing the same liquors in violation of a state prohibition law. In the syllabus by the court it is said: "Both the sovereignty of the United States and the sovereignty of the state of Georgia having jurisdiction over the

illegal act of possessing liquor, the same may constitute a criminal offense equally against both sovereignties, subjecting the guilty party to punishment under the laws of both, and the punishment in one sovereignty is no bar to his punishment in the other; and a conviction for the same offense in both the Federal and state courts is not in violation of those provisions of the Federal and state Constitutions that provide, in substance, that no person shall be twice put in jeopardy of life and limb for the same offense. . . . Under the above rulings, the trial court did not err in striking the defendant's plea of former jeopardy, in which he alleged that he had previously pleaded guilty in the United States district court to the same offense,—possessing the same whisky at the same time as charged in the state indictment,—and that a conviction in the state court would be in violation of certain named provisions of the Federal and state Constitutions which declare that no person shall be twice put in jeopardy of life and limb for the same offense."

The court, however, in *Bryson v. State* (Ga.) supra, took the further position that the two statutes, national and state, were radically different, and that the Federal statute did not prohibit the possession of liquor for the personal consumption of the owner, his family, and his bona fide guests, as did the state law; and that for this reason also a conviction of the national offense was no bar to punishment for the state offense, since the two laws were clearly separate and distinct in this particular, and the same transaction might involve both.

In *Tharpe v. State* (Ga.) supra, only the syllabus by the court being reported, it is said: "The accused was indicted for making alcoholic liquors. He pleaded 'former jeopardy,' alleging 'that he pleaded guilty in the United States district court for the southern district of Georgia for the offense of violation of the internal revenue laws of the United States; . . . that the offense charged is the very same offense as that he is now charged with; that the United States

district court for the southern district of Georgia had full jurisdiction to try him.' The plea was properly stricken. It shows on its face that he pleaded guilty in a different jurisdiction, and to an indictment which charged a violation of a Federal statute, and to the commission of a crime which is entirely different and distinct from the one for which he was indicted and tried in the state court."

The cases above set out, decided since the enactment of the 18th Amendment to the Federal Constitution and the National Prohibition Law, apparently represent the weight of authority, and are in harmony with the majority of the cases previously decided. However, there are several cases in which a conclusion in conflict with the above has been reached.

Thus, in *STATE v. SMITH* (reported herewith) ante, 1220, it was held that since the adoption of the 18th Amendment to the Federal Constitution a conviction for possessing intoxicating liquor under the Federal law bars a prosecution under a state law for an offense based on the same facts.

And in *United States v. Peterson* (1920) 268 Fed. 864, it was held that a conviction in a state court for conduct which was in violation of the Federal Prohibition Act was a bar to a prosecution in the Federal courts, the court saying that it seemed manifest that it was the intent that a person should not be punished by the state and Federal law for the same offense. In this case pleas in bar of a prosecution under the National Prohibition Act, setting forth conviction in the state court upon the same facts, were sustained.

And the court was of the opinion, apparently, in *Burrows v. Moran* (1921) — Fla. —, 89 So. 111, that a prosecution under a state or Federal prohibition act would be a bar to proceedings under a statute of the other jurisdiction, although, in this case, it does not appear that there had been a prosecution for violation of the Federal Act. The court lays down the doctrine that the 2d section of the 18th Amendment confers upon Congress and the several states, "each

within its jurisdiction, power by its own enactments and procedure to separately enforce the commanded prohibitions, such power in particular cases to be exercised by either one, but by only one of the two sovereignties, to the end that violations of the specified organic prohibitions shall be redressed by one if the other fails to act, or by the first one to attain jurisdiction in any case."

Also in *Wood v. Whitaker* (1921) — Fla. —, 89 So. 118, the court, in discussing the effect of the 18th Amendment to the Federal Constitution, said that, in order that its provisions might be made effective under any and all conditions that might arise and "by one enforcing authority if the other fails," the Amendment expressly conferred upon Congress and the several states concurrent power to enforce its commands by appropriate legislation.

Several other cases may be referred to which have a bearing on the present question as to whether an acquittal or conviction in one jurisdiction—state or Federal—for violation of prohibition statutes will bar a prosecution in the other, although the actual decisions are only to the effect that state prohibition laws, not in conflict therewith, were not abrogated by the 18th Amendment and the Federal Prohibition Law.

Thus, in *Re Guerra* (1920) — Vt. —, 10 A.L.R. 1560, 110 Atl. 224, the court, in holding that a statute of that state forbidding the sale of intoxicating liquor without a license was not superseded or nullified by the Federal War Prohibition Act, said that it was no objection to the concurrent validity of the two statutes that both penalized the same act; for it had been repeatedly held that the same act might constitute a criminal offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each, provided the act was one over which both sovereignties had jurisdiction. The court, however, expressly stated that it was unnecessary to decide whether an acquittal or conviction of the violation of the Federal statute would bar a prosecution under the

statute of the state, or vice versa; that the authorities were not in harmony upon this question; that that court had said in *State v. Randall* (1827) 2 Aik. (Vt.) 89, that such would be the result, but that the question was not involved in the decision.

And in *Jones v. Hicks* (1920) 150 Ga. 657, 11 A.L.R. 1315, 104 S. E. 771, the court, in holding that the 18th Amendment and the Volstead Act did not supersede or abrogate the existing state prohibition law, said: "It may be suggested that concurrent power to enforce may result in one being twice put in jeopardy for the same offense; and that, if each of the forty-eight states retain the sovereign power to enforce the Amendment, lack of uniformity in the punishments may result. These questions likewise were thoroughly considered by the Congress, as shown by the debates. The constitutional inhibition against being twice put in jeopardy for the same offense was also considered in *State v. Antonio* (1816) 5 S. C. L. (3 Brev.) 562, and, as suggested by the deliberations in Congress, it was said that the plea of *autrefois acquit* and *autrefois convict* would doubtless be applicable. We are not, however, confronted with that question at present."

In a case arising prior to the adoption of the 18th Amendment (*State v. Kenney* (1915) 83 Wash. 441, 145 Pac. 450), it was held that, on a trial for giving intoxicating liquor to an Indian, the court properly rejected evidence offered by the defendant to show that he had been acquitted on a like charge in the Federal court in that state. The court quoted the doctrine that an acquittal or conviction in either the state or Federal court is not a bar to an indictment in the courts of the other jurisdiction, because the same transaction may constitute a crime under the laws of both jurisdictions.

See also *Territory v. Coleman* (Or.) under VII. *infra*, as to prosecution under territorial and Federal statutes for the same sale of liquor to Indians.

Although the annotation does not include cases in general which turn merely on the fact that the former

prosecution was for an essentially different offense, as distinguished from a prosecution for substantially the same offense in another jurisdiction, attention is called to *Smith v. State* (1917) 82 Tex. Crim. Rep. 283, 199 S. W. 466, where, in a prosecution for pursuing the occupation or business of selling intoxicating liquor in prohibition territory, the defendant pleaded former jeopardy, alleging that he had been convicted in the United States district court in that state for selling liquor without a license. And the court took the view that the plea itself showed that the offense alleged therein was not the same as that charged in the case before it.

b. Conviction for violating municipal ordinance as bar to Federal prosecution.

Although holding that a conviction in a state court for conduct which was a violation of the National Prohibition Act was a bar to a prosecution in the Federal courts for the same act, the court in *United States v. Peterson* (1920) 268 Fed. 864, held that a conviction for violation of a municipal ordinance, pursuant to a grant of power given by the state, had no such effect, but that the defendant could still be prosecuted in the Federal court for violation of the National statute. The court said that the concurrent power given to the state did not authorize it to delegate that power to municipalities, but that it was a power which must be exercised by the state itself. It was admitted, however, that the state might confer on municipal courts and officers power to enforce, under state authority, the 18th Amendment, which had not been done in this instance.

VI. Double punishment not inflicted in practice.

But although the weight of authority is to the effect that a prosecution and conviction or acquittal under the courts of one jurisdiction—state or Federal—will not bar a prosecution in the courts of the other, based on the same act or transaction, yet it does not follow that punishment will necessarily be imposed and executed in the

courts of both jurisdictions. A sentence in one jurisdiction may be taken into consideration in fixing the penalty in the other, where the court has a discretion in the matter, or the execution of the subsequent sentence may be suspended. There is authority to support the doctrine that punishment in the courts of each jurisdiction, even though not prohibited, should not, in practice, be imposed, unless in extraordinary cases, where there are aggravating circumstances or special considerations from the standpoint of public safety justifying or requiring it. *Fox v. Ohio* (1847) 5 How. (U. S.) 410, 12 L. ed. 213; *United States v. Amy* (1859) 14 Md. 149, note, Fed. Cas. No. 14,445; *United States v. Palan* (1909) 167 Fed. 991; *United States v. Holt* (1921) 270 Fed. 639; *People ex rel. McMahon v. Westchester County* (1852) 1 Park. Crim. Rep. (N. Y.) 659; *Jett v. Com.* (1867) 18 Gratt. (Va.) 933; *Re Murphy* (1895) 5 Wyo. 297, 40 Pac. 398, 9 Am. Crim. Rep. 122.

In *Fox v. Ohio* (U. S.) *supra*, the court, in upholding a conviction under a state statute for passing, with fraudulent intent, a counterfeit coin, as against the objection that, if the state could fix penalties for the offense and the Federal government should denounce a penalty against the same act, a person might be liable to be twice punished for the same crime in violation of the Federal Constitution, said: "It is almost certain that, in the benignant spirit in which the institutions, both of the state and Federal systems, are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which

those authorities might ordain and affix to their perpetration."

And in *United States v. Amy* (1859) 14 Md. 149, Fed. Cas. No. 14,445, *supra*, in a prosecution for stealing a letter containing articles of value from a postoffice, Chief Justice Taney, after stating that, since the letter containing money was stolen in a state, the state tribunals might undoubtedly have punished the accused without reference to Federal laws, because from the nature of our government the same act might be an offense against the laws of the United States and also of the state, and be punishable in both, said: "Yet in all civilized countries it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offense; and, if this party had been punished for the larceny in the state tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a *nolle prosequi*, or granting a pardon. But there does not appear to have been any proceeding in the state tribunals, or under the state laws, to punish the offense, and, as the prisoner has been proceeded against according to the laws of the United States, and found guilty by a jury selected and impaneled according to the act of Congress, we see no ground for setting aside the verdict or suspending the sentence, and the motion is therefore overruled."

So, the court in *United States v. Palan* (1909) 167 Fed. 991, *supra*, while holding that the fact that the defendants had served terms of imprisonment under a judgment of the state court for substantially the same offense of which they had been convicted in the Federal court was not technically a bar to their being sentenced to further imprisonment on a conviction in the Federal court, said that it was not aware of any instance in which a person who had been convicted and had undergone the punishment imposed in a state court had been subjected to another punishment, upon conviction in the Federal court, for the same act; that in the absence

of extraordinary circumstances no such double punishment should be inflicted; that to punish one twice for the same offense shocks the sense of justice. And the court accordingly in this case suspended sentence, in view of the fulfilment of the prior sentences.

The court also in *United States v. Holt* (1921) 270 Fed. 639, *supra*, approved the doctrine that it is contrary to the nature and genius of our government to punish an individual twice for the same offense; and held that, while a conviction of the defendant for violation of a state prohibition law would not justify a Federal court in refusing permission to file an information against the same defendant, based on the same transaction, for violation of the Volstead Act, in view of the fact that under that act offenses subsequent to the first conviction were to be more severely dealt with, yet, if the defendant pleaded guilty to the charge, the circumstance of his previous punishment would be given consideration, a record would be made of his conviction, to protect the government in case of a repetition of such acts, and a nominal penalty would be imposed.

In *Jett v. Com.* (1867) 18 Gratt. (Va.) 933, *supra*, the court, in reaching the conclusion that the state court might punish the crime of uttering a forged national bank note, the jurisdiction of the Federal courts not being exclusive, stated that it did not think there was any solid ground for the objection that this doctrine would, in its practical working, lead to injustice and oppression, by subjecting offenders to double punishment for the same act; that the court must suppose that the criminal laws would be administered, as they should be, in a spirit of justice and benignity to the citizen, and that those who are intrusted with their execution will interpose to protect offenders against double punishment, whenever their interposition is necessary to prevent injustice or oppression; and that, if in any case, they fail to do so, the wrong will be redressed by the pardoning power; that the court might

clearly assume that there would be no cases of double punishment hereafter, as it presumed there had been none previously, except, perhaps, in cases of great enormity, or in cases attended by some peculiar circumstances in which the ends of justice could not be otherwise secured.

And in *Re Murphy* (1895) 5 Wyo. 297, 40 Pac. 398, 9 Am. Crim. Rep. 122, *supra*, the court, in upholding a territorial law punishing bigamy, as against the objection that to do so would subject the offender to a prosecution under the laws of the territory as well as under the laws of the United States, in violation of the constitutional provision against double jeopardy, said: "In the interests of justice, after a man has been tried for the offense in the courts of the one government, the courts of the other, for the same act, would, within the scope of their authority, in some way suffer the accused to obtain the benefit of the former trial, whether thereon he had been convicted or acquitted; although such courts would not be absolutely bound to extend such advantage to the offender."

The language in the opinion in *People ex rel. McMahon v. Westchester County* (1852) 1 Park. Crim. Rep. (N. Y.) 659, indicates that the court entertained the view that it would be a flagrant injustice to punish one in both the state and the Federal courts for substantially the same offense, but it was unnecessary to decide the question, as the proceedings in the Federal court had not progressed to termination; and it was held that under these conditions release on habeas corpus should not be granted one held for trial in the state court.

VII. Territorial statutes.

The question has arisen as to whether a territory occupies a different relation to the Federal government from that occupied by a state, so far as concerns the rule that the courts of the two jurisdictions—Federal and state—may each inflict punishment for violation of its own laws, based on the same act or transaction. On

this question it may be said generally that there are several decisions to the effect that the same act may constitute an offense against both a territory and the Federal government. But these decisions go only to the question of the jurisdiction of the territorial court, in view of the fact that the same act may be punished under the laws of Congress. They do not decide that, had there been a conviction or acquittal under the Federal statute, there might also be a prosecution in the territorial court; although, in view of the contentions made against the jurisdiction of the latter, this might be the inference. As respects the Philippine Islands, it appears to be settled that the Federal and territorial courts do not derive their jurisdiction and authority from different sovereignties, but both from the national government, so that the doctrine permitting a prosecution in a state or Federal court notwithstanding a conviction or acquittal in the other, based on the same act or transaction, because the same act may constitute an offense against the two different sovereignties, is inapplicable.

That the act of selling liquor to Indians may be made punishable under the laws of a territory and also under the laws of the United States is held in *Territory v. Coleman* (1855) 1 Or. 191, 75 Am. Dec. 554. And the court apparently approved the doctrine that a defendant in such a case could not plead the punishment in one jurisdiction in bar of a conviction in the other jurisdiction. It seems, however, that it was only necessary to pass upon the validity of the state statute prohibiting the sale of liquor to Indians, the validity of the law being denied on the ground that Congress had previously passed a statute for the same purpose; and it was contended that if the defendant was convicted and punished under the territorial law, he might also be convicted and punished for the same act under the law of Congress, and thus be punished twice for the same offense. It does not appear from the report, however, that in this case there

had been a previous prosecution under the Federal statute.

And in *State v. Norman* (1898) 16 Utah, 457, 52 Pac. 986, although it does not appear that there had been a prosecution in the Federal court for the same offense, the court, in upholding a territorial statute against adultery as against the contention that the offense was punishable only by the act of Congress, laid down the rule in the syllabus that "where a person perpetrates an act which constitutes a crime against the United States, and also an offense against a territory or state and its local laws, he is subject to punishment by each government, and neither of such punishments is in contravention of the constitutional inhibition against the twice putting in jeopardy for the same offense."

To a similar effect is *Re Murphy* (1895) 5 Wyo. 297, 40 Pac. 398, 9 Am. Crim. Rep. 122, where the court sustained a territorial statute punishing bigamy, as against the contention that the Federal statute punishing the same crime, in effect when the territorial law was enacted, deprived the territory of the power to legislate on the subject, and that to uphold the territorial law would violate the constitutional provision against double jeopardy. The court said that the constitutional provision against a second jeopardy invoked in this case would not inhibit the twice putting one in jeopardy for the same act, but for the same offense; that by one and the same act, a person might offend and violate the laws of more than one sovereignty to which he owed allegiance, and might be punishable under the laws of each of such sovereignties.

And it was held, also, in *Re Murphy* (Wyo.) *supra*, that the relation of a territory to the Federal government was not so different from that of a state as to require the application of a different doctrine.

In a case in the United States district court for the district of Hawaii (*United States v. Lee Sa Kee* (1908) 3 Haw. Dist. Ct. (Fed.) 262), the court on a demurrer to an indictment for the offense of adultery, based

on the ground that the Federal court had no jurisdiction for the reason that the crime of adultery was punishable under the laws of the territory of Hawaii, said that, as to the contention that a person committing one of the offenses under consideration in such territory would be liable to be tried twice for the same offense if both the Federal and territorial laws were enforced, the answer was that he would be liable to be tried twice for the same act,—once for violating a Federal statute and once for violating a territorial statute, making in reality two offenses. It does not appear, however, from the report that there had been a prosecution under the territorial statute.

However, in *United States v. Perez* (1908) 3 Haw. Dist. Ct. (Fed.) 295, the Federal district court in Hawaii held that, on a charge of adultery, defendant could plead in bar an acquittal in a territorial court of Hawaii on the same charge. Adhering to its former decision that both the territorial and the Federal laws were in force, the court took the view that, as both the Federal and the territorial courts derived their jurisdiction and authority from the United States, the judgment of one court must be a bar to a trial for the same offense in the other, and that the doctrine did not apply in the case of a territory, as in the case of a state, that trial and conviction in one jurisdiction—state or Federal—is not a bar to a trial of substantially the same offense in the other jurisdiction.

It was held, also, in *Grafton v. United States* (1907) 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640, that one convicted by a military court of competent jurisdiction of the crime of homicide, as defined by the Penal Code of the Philippine Islands, could not be tried a second time in a civil court of those Islands, for the same offense. In this case, where a soldier in the Philippine Islands shot and killed a Filipino, and was acquitted by a court-martial, but was afterwards prosecuted in the civil courts of the Islands, and pleaded in bar of the pro-

ceedings a judgment of acquittal by the court-martial, the plea of double jeopardy was overruled by the supreme court of the Philippines in affirming his conviction. The case was reversed by the United States Supreme Court, which distinguished its earlier decisions to the effect that a state and Federal government may each punish the same act as an offense against its own sovereignty, on the ground that in this case the government of the Philippines derived its authority and jurisdiction from the Federal government. It was said: "It is clear that the cases above cited are not in point here. The government of the United States and the governments of the several states, in the exercise of their respective powers, move on different lines. The government of the United States has no power, except as expressly or by necessary implication has been granted to it, while the several states may exert such powers as are not inconsistent with the Constitution of the United States nor with a republican form of government, and which have not been surrendered by them to the general government. An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas an offense against a state can be punished only by its authority and in its tribunals. The same act . . . may constitute two offenses, one against the United States and the other against a state. But these things cannot be predicated of the relations between the United States and the Philippines. The government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same act committed in a state of the Union may constitute an offense against the United States and also

a distinct offense against the state do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government,—that of the United States.”

And, conceding that an exception to the general rule, that an offender could not be twice tried for the same offense against his will, arose where the same act constituted two crimes, one against the United States and another against the state, so that in the latter class of cases the offender could be punished both in the Federal and state courts, the court in *United States v. Colley* (1903) 3 Philippine, 58, held that this exception was not applicable so as to permit one guilty of a crime in the Philippine Islands to be tried both in the civil courts of the Islands, and in the Federal court (in this case a military tribunal), it being said that there was no dual sovereignty in the Philippines, but only one,—the United States.

VIII. Courts-martial.

The general question whether a conviction or acquittal in a military tribunal will bar a prosecution for the same act in the civil courts, or vice versa, is beyond the scope of the note. However, in some cases involving this question, the courts have discussed also the question under annotation. That is, they have regarded the military tribunals as representing the authority of the Federal government and as corresponding, apparently, to the Federal civil courts so far as the question under annotation is concerned. In so far as these decisions turn on the circumstance that the two prosecutions were in tribunals representing different jurisdictions they are of value in the note. But in so far as they involve the relations of the civil and military tribunals, as such, to try and to punish the same misconduct, they are beyond its scope. Therefore, it should be borne in mind that at this point no attempt is made to cover the general question first above indicated, as to the right to prosecute in both military and civil courts for the same act.

The doctrine that a conviction or acquittal by the military tribunals will not bar a prosecution in the state courts based on the same act has rested in several cases, partly at least, on the proposition that the same misconduct constituted an offense against two jurisdictions, Federal and state.

Thus, in *State v. Rankin* (1867) 4 Coldw. (Tenn.) 145, where the defendant was indicted for murder in the state court, the court, in holding that a plea was insufficient to the effect that the defendant, while in the military service of the United States, and subject to the articles of war, was charged, tried, and acquitted of the same murder with which he was charged in the indictment, by a court-martial, convened under the laws of the United States, during the existence of a civil war and insurrection, said: “The government of the United States and that of the state of Tennessee are both within its sphere, separate and distinct sovereignties; each may and has provided for the punishment of offenses against its own laws; but neither can, by merely providing for the punishment of offenders against its laws, deprive the other of the right or the power to punish offenses against its laws; and the mere fact that the same act may be an offense against the laws of both can make no difference. The act of Congress was not designed, neither could it operate, to provide a punishment for an offense against the laws of the state. One sovereign may not administer the criminal laws of another, or oust another of its jurisdiction to try and punish an offender against its laws, by punishing the same act. Murder is an offense against the laws of Tennessee, whether the perpetrator be a citizen or soldier; whilst it is only an offense against the laws of the United States when committed in time of civil war, insurrection, or rebellion, and when the perpetrator is in the military service of the United States and subject to the articles of war. It is insisted for the defendant that, to subject the defendant to this prosecution, after he has been tried and ac-

quitted for the same alleged murder, is in violation of that provision of the Constitution of the United States which declares, 'Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb.' Now, is a party liable to be twice punished for the same act, or would a double punishment for the same act be in violation of that provision of the Constitution of the United States? This question has been several times before the Supreme Court of the United States. . . . It will be seen that, according to these authorities, . . . both the civil and military tribunals of the United States are in harmony in holding that a party may be subjected to different and double punishment for the same act, making two different offenses; and that the same act makes two different offenses, when it is in violation of the laws of a state and also of the laws of the United States; and consequently subjecting the party to double punishment for the same act, making two offenses, cannot be said to be in violation of the Constitution of the United States, by placing the party twice in jeopardy for the same offense. The fact that the offense may be distinguished by the same name, and the punishment prescribed by the laws of both governments the same, can make no difference."

See also *Pearson v. State* (1874) 1 Shannon, Cas. (Tenn.) 311, holding that the state courts had jurisdiction to try and punish one for murder committed in Tennessee in 1865, as against the contention that that state was at the time in the occupation of the Federal forces, that the defendant was in the military service of the United States, and was only subject to punishment under military regulations.

And in holding that a conviction of an officer in the National Guard by a court-martial, of conduct unbecoming an officer and a gentleman, and prejudicial to good order and military discipline, and of making a false certificate of account, followed by sentence of dismissal from the service, did not stand in the way of his prosecu-

tion in the civil court for grand larceny, based on the same facts, the court in *People v. Wendel* (1908) 59 Misc. 354, 112 N. Y. Supp. 301, referred to the fact that the same act may be an offense against two jurisdictions, and may legally subject the offender to be tried and punished under both. An appeal was dismissed in (1908) 128 App. Div. 437, 112 N. Y. Supp. 837.

An acquittal before a court-martial for giving intelligence to the enemy, in violation of the articles of war, was held in *United States v. Cashiel* (1863) 1 Hughes, 552, Fed. Cas. No. 14,744, not a bar to a prosecution before a state court for inciting, setting on foot, assisting, or engaging in a rebellion or insurrection against the authority of the United States, although the facts charged in each case were substantially the same.

In *Re Stubbs* (1905) 133 Fed. 1012, it was held that an acquittal, on a trial in a state court, of a soldier of the charge of murder, is not a bar to his prosecution by a court-martial on the charge of conduct to the prejudice of the good order and military discipline, although the act charged is identical with the act alleged in the information for murder.

And the plea that the accused has been tried in the supreme court of the state on the charge of manslaughter has been said not to be a bar to his prosecution by the military courts, although sustained by the same evidence and involving the same facts. *Pleas, before, and Jurisdiction of, Courts-Martial* (1842) 3 Ops. Atty. Gen. 749. To the same effect is *Howe's Case* (1854) 6 Ops. Atty. Gen. 506.

With the correctness of the decision on the ultimate question in the above cases, as to whether a trial followed by conviction or acquittal in a military tribunal will bar a prosecution in a state court, or vice versa, the present annotation is not concerned. This is further exemplified by reference to *Coleman v. Tennessee* (1879) 97 U. S. 509, 24 L. ed. 1118, where a soldier of the United States Army, convicted of murder in

Tennessee by a military court-martial while that state was in the military occupation of the United States, was held not subsequently amenable to the laws of that state then in force for the same offense, the case turning on the effect of military occupation of enemy territory. On the question under annotation, the court said: "In thus holding, we do not call in question the correctness of the general doctrine asserted by the supreme court of Tennessee,—that the same act may, in some instances, be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee. But here there is no case presented for the application of the doctrine."

In *Re Fair* (1900) 100 Fed. 149, it was held that a soldier acquitted before a United States court-martial of the charge of manslaughter, to the prejudice of good order and military discipline, by the shooting of a deserter in obedience to orders, cannot be tried for murder by a state court, since an officer or agent of the United States who does an act which is within the scope of his authority as such officer or agent cannot be held to answer therefor under the criminal laws of another and different government.

It was held in *United States v. Colley* (1903) 3 Philippine, 58, that a soldier in the United States Army in the Philippines, who was duly tried, convicted, and sentenced by a court-martial for murder, could not be afterwards tried by the civil courts of the Islands for the same crime, although the military authorities had declined to execute the sentence because of the amnesty proclamation of the President, and had turned the accused over to the civil authorities. The court took the view that the provisions of

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the Federal Constitution, made applicable to the Philippine Islands, against double jeopardy, prohibited the second trial; and declined to apply the exceptions which it was conceded might exist respecting crimes against both the sovereignty of the United States and of the state, because in the Philippines there was no dual sovereignty, but only that of the United States.

In this connection see also *Grafton v. United States* (1907) 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640, under VII. supra, dealing with the question of the right to punish one in the civil courts of the Philippine Islands who had been previously tried by the military authorities.

Among other cases not within the scope of the annotation, but involving the effect of an acquittal by a civil tribunal as a bar to a trial by the military authorities, or vice versa, are *Re Esmond* (1886) 5 Mackey (D. C.) 64, and *United States v. Clark* (1887) 31 Fed. 710.

IX. Miscellaneous.

One New York case turns on the principle that a judgment, at least in the Federal court, is necessary to preclude prosecution in the state court, and that the latter is not ousted of jurisdiction merely because a prosecution based on the same transaction has previously been begun in the former. Thus, where the captain and other officers of a boat operating on the Hudson river were charged in the state court with murder through criminal mismanagement of the boat, under a state statute, and also previously in the Federal court with manslaughter for the same misconduct, under Federal statutes, and sought relief on habeas corpus from an arrest under a warrant issued from the state court, the court in *People ex rel. McMahon v. Westchester County* (1852) 1 Park. Crim. Rep. (N. Y.) 659, said that the question was whether the prisoners were liable to be proceeded against in the state courts, or whether those courts were ousted of their jurisdiction by that of the Federal

court; and that the fact that the Federal court had already instituted proceedings, and thus assumed jurisdiction, was not material on this inquiry, for it was the termination, and not the commencement, of proceedings in one court which might be pleaded in another; and that it was therefore unnecessary to dwell upon the consideration which was pressed on the argument that the prisoner might be in danger of being twice convicted for the same offense, since the time to raise this objection had not yet arrived, and that when it should arrive the several courts would be able to afford the adequate relief against what would be so flagrant a wrong. The court proceeded to discuss the question whether the jurisdiction of the Federal authorities was exclusive, and held that the absence of jurisdiction in the state courts was not so clear as to warrant a discharge on habeas corpus.

The Federal Statute of 1913 (Comp. Stat. §§ 8603-8604, 4 Fed. Stat. Anno. 2d ed. pp. 573, 575), providing a penalty for certain acts, among which are the stealing of interstate freight from railroad cars or the receiving or having the same in possession, knowing that it has been stolen, expressly provides that nothing in the act should be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof, and that a judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution under the Federal statute for the same act or acts. The case of

United States v. Porria (1918) 255 Fed. 172, applies the latter provision in the statute, holding that on a prosecution under an indictment charging the defendant with having in his possession certain property, a foreign shipment, the same having been stolen, a plea of conviction in the state court upon the charge of receiving and aiding in concealing and withholding the same property should be sustained. But it was held that a plea should not be sustained as to a charge in the Federal court of larceny of the property, since the same character and degree of proof were unnecessary to establish the two offenses.

Where one was acquitted of murder by a state court of competent jurisdiction, after trial, it was held in United States v. Mason (1909) 213 U. S. 115, 53 L. ed. 725, 29 Sup. Ct. Rep. 480, that the acquittal was a bar to so much of an indictment for conspiring criminally in violation of the Federal statute which prescribes a punishment for conspiracy to threaten or intimidate any citizen in the free exercise of enjoyment of any right or privilege secured to him by the Federal Constitution or laws, and provides that, if, in the act of violating the statute, any other felony or misdemeanor is committed, the offender shall be punished for the same with such punishment as attaches to the felony or misdemeanor by the laws of the state in which the crime was committed, as sought to enforce the latter provision by charging him with the commission of such murder.

R. E. H.

BEN B. LINDSEY, Plff. in Err.,

v.

PEOPLE OF THE STATE OF COLORADO EX REL. JOHN A. RUSH,
District Attorney.

Colorado Supreme Court (In Banc)—April 7, 1919.

(66 Colo. 343, 181 Pac. 531.)

Evidence — privileged communications — to judge of juvenile court.

1. A confidential communication by a child to a judge of the juvenile

court, with respect to a crime which had been committed in the community, is not privileged in a prosecution against the alleged perpetrator of the crime.

[See note on this question beginning on page 1263.]

Contempt — criminal — refusal to answer questions.

2. Refusal of a witness to answer a question in a single case which obstructs the administration of justice is a criminal contempt.

[See 6 R. C. L. 497.]

— summary punishment.

3. Summary punishment may be inflicted without affidavit, notice, rule to show cause, or other process, upon one refusing to answer a question in a criminal case, to the obstruction of the administration of justice.

[See 6 R. C. L. 522, 523.]

Constitutional law — due process — contempt.

4. One guilty of direct criminal contempt cannot complain that he was denied due process of law, if in response to a petition for citation he was permitted to file a defense, and amend it twice, and was only punished after he had failed to present a valid one.

Evidence — effect of statute.

5. A child is not deemed to be a juvenile delinquent the moment an offense is presumed to have been committed by him, so as to make operative a statute providing that any child committing certain acts shall be deemed a juvenile delinquent, and shall be proceeded against as such in the manner prescribed by the statute, and that any evidence given in such case shall not in any other case or proceeding whatever be made evidence against such child, so as to make privileged communications made by him to the judge of the juvenile court before proceedings are actually instituted against him.

— communications to public officer — privilege.

6. The judge of the juvenile court cannot refuse to disclose communications made to him by a juvenile delinquent under a statute providing that a public officer shall not be examined as to communications made to him in official confidence, when the public interest, in the judgment of the court, would suffer by the disclosure, if the court directs him to make the disclosure.

— communications to judge.

7. A judge of a court of record is not privileged from testifying in a criminal proceeding as to communications which have been made to him in his official capacity.

[See 28 R. C. L. 573.]

— communications to attorney.

8. Communications by a child to a judge of the juvenile court, made before the institution of proceedings against the child, cannot be regarded as privileged as made in the relation of attorney and client, if the judge is prohibited by statute from acting as an attorney and counselor.

[See 28 R. C. L. 572, 573.]

— in loco parentis.

9. Communications by a juvenile delinquent to the judge of the juvenile court are not privileged on the theory that the judge, under the powers conferred by the state in its capacity as parens patriæ, stands in loco parentis to the child.

[See 28 R. C. L. 517.]

Witness — privilege — who can claim.

10. The privilege, if any, as to communications by a juvenile delinquent to the judge of the juvenile court, cannot be claimed by other persons on trial for crime.

(Bailey, Scott, and Allen, JJ., dissent.)

ERROR to the District Court for Denver County (Perry, J.) to review a judgment imposing a fine upon defendant for contempt of court. *Affirmed.*

Statement by Burke, J.:

From a judgment of the court below imposing a fine upon plaintiff

in error (who is, and at all times hereinafter mentioned was, judge of the juvenile court of the city and

county of Denver) for contempt of court in refusing to testify, he prosecutes this writ.

The case of *People v. Bertha Wright* was on trial in the criminal division of the district court of the city and county of Denver. The defendant in that case was being prosecuted on the charge that she had murdered her husband, John A. Wright. In the course of the trial Neal Wright, the twelve-year-old son of Bertha Wright, was called as a witness and testified in her behalf. Thereupon the prosecution called the plaintiff in error for the purpose of discrediting the said Neal Wright, by showing that he had made admissions to plaintiff in error contrary to his sworn testimony. Counsel for the defendant, Bertha Wright, first objected on her behalf to the plaintiff in error testifying at all, on the ground that any statement made to him by Neal Wright was made in confidence. The objection was overruled. Plaintiff in error thereupon testified, in substance, that he first met Neal Wright early in May when he came to plaintiff's chambers in company with a friend to discuss matters connected with the murder case; that he again saw Neal Wright at the latter's home about May 18th and had a further talk with him on the same subject; that thereafter, on the same day and in the same place, he had a conference with said Neal Wright at which no third person was present. Plaintiff was then asked the following question: "During that time that you had him separate and apart from the others, state whether or not he told you that at the time his father was shot on the 13th day of April, 1915, at this same house, his mother was standing with the gun, holding it with both her hands as she fired the shot, and that Neal was then standing in the doorway of the folding doors between the parlor and the hall, or in substance that?" to which question plaintiff replied, "That, if your Honor please, brings me into a conversation that I had in

confidence with this boy, and I will not state whether I did or did not, or anything he said to me, and I would like to give my reasons why I consider it a privileged communication." Plaintiff further stated that the communications made by the boy to him at the time in question were "indirectly" in a case pending before him; that such a case was *now* pending; that at the time the communications were made he anticipated there would be such a case; that he did not think there was a case pending, but that he considered "a child becomes a ward of the state when an offense is committed;" that the communication in question was in absolute confidence. Assured by the district attorney that when Neal Wright was on the witness stand he had consented to plaintiff's answering this question, plaintiff replied: "I contend that he has no right to weigh what I wish to do." The court thereupon ruled plaintiff to answer, and he refused. Warned by the trial judge that he was disobeying an order of court, he answered: "I differ with your Honor on the law." Again ordered to answer the question, he again refused, expressly upon the ground that the communication thus called for was privileged. Thereupon a petition for a citation in contempt was prepared and filed by the district attorney by order of court; the citation was issued and respondent moved to strike certain portions thereof. This motion was sustained in part and denied in part. Thereupon an oral motion was made to dismiss the petition for want of sufficient facts, which motion was overruled. Plaintiff in error then answered, to which answer a demurrer was filed and sustained. An amended answer was filed, and a motion to make the same more specific, which motion was sustained, and an amendment to the said amended answer filed. The district attorney thereupon filed a motion to strike this amendment from the files as evasive, not responsive, inconsistent with facts theretofore

specifically pleaded by plaintiff in error, and inconsistent with his sworn testimony, and for judgment on the pleadings. This motion was sustained, and judgment entered imposing a fine upon plaintiff in error for "wilful, deliberate, and gross contempt."

The answer, amended answer, and amendment to the amended answer of plaintiff in error are largely statements of conclusions of law and arguments thereon. Aside from such, these pleadings set forth the following facts:

Early in May, 1915, Neal Wright came to the chambers of plaintiff in error in company with a friend, and in the presence of both stated that he fired the shot which killed his father. May 15, 1915, plaintiff in error went to the home of Neal Wright, where, in the presence of other persons, said Neal Wright repeated in detail this statement. On the suggestion of plaintiff in error, he then held a conference with the boy apart from the others. This conference was had by the consent of his mother, Bertha Wright, her friends, and her attorney, and upon the assurance that whatever was said would be accepted as confidential. In that conference he assured Neal Wright that whatever he then said could not be used against him, and could not be used in any court against his mother. During the conference Neal Wright once or twice said, "They couldn't make you testify as to what I am telling you, could they?" and was each time assured that they could not. In addition to the foregoing, the amendment to the amended answer recites, in substance, that on the 18th day of April, 1915, Neal Wright said to the plaintiff in error: "I killed my father. He beat up my mother, and I made up my mind that sooner or later I would have to lay him out." That thereupon he was taken in charge as a delinquent child, and proceedings were instituted (no date is given) against said Neal Wright, and from that date he was declared a

delinquent child; that such proceedings have ever since been pending, and are still pending (at the time of the filing of the pleading), against the said Neal Wright, and appear upon the docket of said juvenile court for trial as of the 14th day of October, 1915; "that at the date mentioned, under and by virtue of the law of Colorado designed to protect delinquents from publicity pending investigation in the case, no proceedings were entered of record, but that the same remained in the breast of this respondent, as chancellor, and were pending without number and date, under the rules and policy of said juvenile court, and are now pending, by number and date, as by the records of said court, ready to be produced, will more fully appear."

Messrs. O. N. Hilton, Caesar A. Roberts, and Leslie M. Roberts, for plaintiff in error:

A judge of a court of record ought not only to be exempted, but prohibited, from testifying.

Buccleuch v. Metropolitan Bd. of Works, L. R. 5 H. L. 429, 41 L. J. Exch. N. S. 137, 27 L. T. N. S. 1, 8 Eng. Rul. Cas. 455; Maitland v. Zango, 14 Wash. 92, 44 Pac. 117; Rogers v. State, 60 Ark. 76, 31 L.R.A. 465, 46 Am. St. Rep. 154, 29 S. W. 894; Reg. v. Petrie, 20 Ont. Rep. 317; Reg. v. Gazard, 8 Car. & P. 595; Reg. v. Harvey, 8 Cox, C. C. 99; Wigmore, Ev. § 2372; Jones, Ev. 3d ed. § 764; Stephens, Ev. art. 111; People v. Pratt, 133 Mich. 125, 67 L.R.A. 923, 94 N. W. 752; People v. Barker, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539.

A judge as a public officer cannot be compelled to give in evidence those matters which relate to the state and the citizen accused by the state.

Stephens, Ev. art. 112; Beatson v. Skene, 5 Hurlst. & N. 838, 157 Eng. Reprint, 1415, 29 L. J. Exch. N. S. 430, 6 Jur. N. S. 780, 2 L. T. N. S. 378, 8 Week. Rep. 544; Totten v. United States, 92 U. S. 105, 23 L. ed. 605; United States v. Six Lots, 1 Woods, 234, Fed. Cas. No. 16,299; Re Lamber-ton, 124 Fed. 446; Stegall v. Thurman, 175 Fed. 813; Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736.

Where defendant was denied his right to make full proof of his de-

fense, and his defense was stricken out arbitrarily, such action was a denial of his fundamental rights.

Greig v. Ware, 25 Colo. 184, 55 Pac. 163; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Walter Cabinet Co. v. Russell, 250 Ill. 416, 95 N. E. 462; Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889; McNamara v. McNamara, 86 Neb. 631, 27 L.R.A.(N.S.) 1062, 126 N. W. 94, 21 Ann. Cas. 451; Gordon v. Gordon, 141 Ill. 160, 21 L.R.A. 387, 33 Am. St. Rep. 294, 30 N. E. 446; Meacham v. Bear Valley Irrig. Co. 145 Cal. 606, 68 L.R.A. 600, 79 Pac. 281; Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; Trough v. Trough, 59 W. Va. 464, 4 L.R.A.(N.S.) 1185, 115 Am. St. Rep. 940, 53 S. E. 630, 8 Ann. Cas. 837; Peel v. Peel, 50 Iowa, 521; Haldane v. Eckford, L. R. 7 Eq. 425, 38 L. J. Ch. N. S. 372, 20 L. T. N. S. 389, 17 Week. Rep. 570.

In controversies affecting the custody of an infant, his interest and welfare are the primary and controlling question by which the court must be guided.

Wilson v. Mitchell, 48 Colo. 454, 30 L.R.A.(N.S.) 507, 111 Pac. 21; Breene v. Breene, 51 Colo. 342, 117 Pac. 1000; People ex rel. Broxholm v. Parks, 57 Colo. 458, 141 Pac. 994; People ex rel. Flannery v. Bolton, 27 Colo. App. 39, 146 Pac. 489; Re Stittgen, 110 Wis. 625, 86 N. W. 563; Lindsay v. Lindsay, 257 Ill. 328, 45 L.R.A.(N.S.) 908, 100 N. E. 892, Ann. Cas. 1914A, 1222; Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223; Cullins v. Williams, 156 Ky. 57, 160 S. W. 733; People v. Atwood, 188 Mich. 36, 154 N. W. 112.

Messrs. Leslie E. Hubbard, Attorney General, and Bertram B. Beshoar, Assistant Attorney General, for the defendant in error:

Section 7274 of the Revised Statutes does not render the communication of Neal Wright to defendant a privileged communication.

Kitz v. Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64; State v. Snowden, 23 Utah, 318, 65 Pac. 479; State v. Louanis, 79 Vt. 463, 65 Atl. 532, 9 Ann. Cas. 194; Booren v. McWilliams, 26 N. D. 558, 145 N. W. 410, Ann. Cas. 1916A, 388; Harris v. Daugherty, 74 Tex. 1, 15 Am. St. Rep. 812, 11 S. W. 921; State v. Hoben, 36 Utah, 186, 102 Pac. 1000; Burdett v. Com. 103 Va. 838, 68 L.R.A. 251, 106 Am. St. Rep. 916, 48 S. E. 878; Coleman v. Roberts,

113 Ala. 323, 36 L.R.A. 84, 59 Am. St. Rep. 111, 21 So. 449; Holman v. State, 105 Ind. 513, 5 N. E. 556; Green County v. Rose, 38 Mo. 390; Re Teitelbaum, 84 App. Div. 351, 82 N. Y. Supp. 887; Re Le Prohon, 102 Me. 455, 67 Atl. 317, 10 Ann. Cas. 1115; Ehrhardt v. Stevenson, 128 Mo. App. 476, 106 S. W. 1118; Re Young, 33 Utah, 382, 17 L.R.A.(N.S.) 108, 126 Am. St. Rep. 843, 94 Pac. 731, 14 Ann. Cas. 596; Lanum v. Patterson, 151 Ill. App. 36; Cronin v. Court of Honor, 187 Ill. App. 480; People v. Pratt, 133 Mich. 125, 67 L.R.A. 930, 94 N. W. 752; 1 Greenl. Ev. 16th ed. § 244c; Pierson v. Steertz, Morris (Iowa) 136.

The fact that defendant is judge of the juvenile court does not in itself render all communications made to him privileged.

Hawes, Jurisdiction, § 1; Wigmore, Ev. §§ 1762, 2285; Reg. v. Richardson, 3 Fost. & F. 693; Marks v. Beyfus, L. R. 25 Q. B. Div. 494; Colias v. People, 60 Colo. 230, 153 Pac. 224; Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223; People ex rel. Atty. Gen. v. News-Times Pub. Co. 35 Colo. 253, 84 Pac. 912; Wyatt v. People, 17 Colo. 252, 28 Pac. 961; Bloom v. People, 23 Colo. 416, 48 Pac. 519; Cooper v. People, 13 Colo. 337, 6 L.R.A. 430, 22 Pac. 790; State v. Kaiser, 8 L.R.A. 584, note.

Burke, J., delivered the opinion of the court:

Plaintiff in error contends that he has been denied due process of law. A contempt committed in the immediate presence of the court, while sitting as such, is

a direct contempt.

13 C. J. 5. A contempt which disrespects the court or

obstructs the administration of justice is a criminal contempt. Wyatt v. People, 17 Colo. 252-258, 28 Pac. 961, citing Rapalje, Contempt, § 21.

Where the contempt

is in the immediate presence of the

court, summary punishment may be inflicted without affidavit, notice, rule to show cause, or other process. 13 C. J. 63.

If plaintiff in error in this case was guilty of contempt, it was a direct criminal contempt. It interfered with the due course of the trial

Contempt—
criminal—
refusal to
answer ques-
tions.

—summary
punishment.

and the administration of justice, and might have, and may have, resulted in a gross miscarriage of justice. It could have been punished summarily. Instead, the trial judge directed the filing of a petition for citation, as to the sufficiency of which respondent was heard. He was permitted to file an answer, which was held insufficient. He was permitted to file an amended answer, which, failing to comply with the ruling of the court, he was given leave to make more specific. His amendment to the amended answer was stricken, and judgment entered on the pleadings. His

**Constitutional
law—due process
—contempt.**

claim of denial of due process of law could not have been upheld had he been punished summarily. He was thrice given an opportunity to present a defense, and, by the ruling of the trial court, he thrice failed. Unless the communication called for was privileged, the judgment must stand.

The claim of privilege made by plaintiff in error is based primarily upon three contentions:

First. That the communication was privileged, under the general rule concerning such communications, irrespective of any statute.

Assuming, but not deciding, that communications other than those specifically mentioned in any statute on the subject may be now held privileged, the general rule is well laid down in 4 Wigmore on Evidence, § 2285, as follows: "(1) The communications must originate in a *confidence* that they will not be disclosed; (2) this element of *confidentiality* must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the *relation* must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation."

Considering the importance of the

case on trial to the defendant as well as the people, and the rare instances in which courts are likely to be confronted with a similar situation, it appears to us beyond question that the benefit to be gained by the correct disposal of the litigation was so infinitely greater than any injury

which could possibly inure to the relation by the disclosure of the communication that the requirements of the 4th section of the rule were not met, and the rule is inapplicable.

**Evidence—
privileged communications—to
judge of juvenile
court.**

Second. Plaintiff in error contends that the communication was privileged by reason of the provisions of certain sections of the Juvenile Law of Colorado. The only sections relied upon, and which seem to require any consideration, are §§ 586, 1590, and 1607, of the Revised Statutes of Colorado 1908;

§ 1, chap. 199, p. 478, Laws of 1909; chap. 51, p. 152, Laws 1913; and chap. 156, p. 334, Laws 1909, amending § 586, Rev. Stat. 1908. From these sections plaintiff in error draws the following conclusions: That the instant an offense was committed by Neal Wright, plaintiff became in loco parentis during the child's minority; that the moment Neal Wright told him he killed his father the child became a ward of the juvenile court; that his jurisdiction attached without any proceedings being entered of record; that such proceedings, until so entered of record, remained in the breast of respondent and were pending without number or date; that he alone could decide when Neal Wright was within the jurisdiction of the juvenile court; that he was the sole judge as to whether the interests of the public, or the interests of the child, or its parents, or public justice, would suffer by his disclosing the communication in question.

Said § 586 provides that a "delinquent child" shall include any child sixteen years of age, or under, who violates any law of this state;

that "any child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and shall be proceeded against as such in the manner hereinafter provided;" that "a disposition of any child under this act, or any evidence given in such cause, shall not in any civil, criminal, or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, excepting in subsequent cases against the same child under this act."

Said § 1590 provides that the juvenile court "shall have original jurisdiction in all criminal cases or other actions or proceedings in which the disposition, custody, or control of any child or minor . . . may be involved under the acts concerning delinquent, dependent or neglected children, . . . or which may in any manner concern or relate to the person, liberty, protection, correction, morality, control, . . . of any infant child or minor."

Said § 1607 vests the power and authority to exercise jurisdiction over minors under the acts concerning delinquent children, "or which may in any manner concern or relate to the person, liberty, protection, correction, morality, control, adoption or disposition" of any such child in the juvenile courts created by the act of which this section is a part.

Section 1, chapter 199, Laws of 1909, provides that that act "shall be construed to be an effort of the state under its police powers and in its character of *parens patriæ* to care for and provide for the protection of the morals and well-being of its citizens and where practicable to avoid proceedings tending to degrade and, under the provisions of this act, to endeavor to redeem to good citizenship persons drifting into crime. . . . This act shall only apply to cases of persons whose acts or offenses in a criminal proceeding would constitute a misdemeanor."

Chapter 51, § 1, p. 152, Laws of 1913, provides that "in any case in any court against any person for the violation of any statute against rape, or of the contributory delinquency or dependency law, or any other law of this state for the correction or protection of children, it shall be unlawful for any person to print or publish in any daily or weekly newspaper, magazine, or other periodical, the picture or name of any child who may be involved therein or called as a witness."

Section 4 of the same act provides that, "in any such case mentioned in § 1 of this act, the court may, in the interest of public morals and for the protection of children, enter an order forbidding the publication of all, or any part, of the proceedings in such case, and a violation of such order shall be deemed contempt of court."

That § 586 is applicable because the moment an offense was committed, or presumed to be committed, by Neal Wright, he that moment was ^{—effect of} ~~statute.~~

"deemed a juvenile delinquent person," and for that reason the jurisdiction of the juvenile court attached instantaneously, is an absurdity.

Section 1786, Rev. Stat. 1908, provides that any person who commits any offense therein defined "shall be deemed a bunco steerer."

Section 1787, that any person who commits any offense therein defined "shall be deemed a confidence man."

Section 1788, that any person who commits any offense therein defined "shall be deemed a fakir."

Many other statutes use similar language. The district courts of the state are given jurisdiction of these offenses, but it will not be contended that as soon as any such offense is committed the court or judge may, without complaint or information, take personal charge of the supposed offender. No more can the juvenile judge in cases of presumed juvenile delinquency. To do so would be a gross violation of the rights of

childhood and an outrage upon parenthood. In case of the violation of any of the criminal laws above mentioned, the supposed offender must be proceeded against as provided by law; and juvenile delinquents must be proceeded against "in the manner hereinafter (in the statutes) provided." This proceeding is defined by § 3, chap. 156, p. 334, Laws of 1909, as follows: "All proceedings under this act shall be by written petition. . . . The petition shall be verified. . . . Upon the filing of such petition . . . the judge or clerk of said court shall issue a notice, which may be in the form of a citation or summons . . . which shall be served upon one or both such parents, or guardian, . . . requiring them to appear . . . and show cause, if any, why said child should not be declared by the court to be a delinquent child. . . . In case it shall appear . . . the court may thereupon proceed to the examination and hearing provided for, and determine its delinquency. . . ."

We search this section in vain for any authorization of instantaneous jurisdiction or proceedings pending in the breast of the judge. It clearly appears from an examination of these statutes that at the time the communication in question was made to plaintiff in error there was no case pending against Neal Wright, and the juvenile court had no jurisdiction over him. For the reasons given, the further provisions of § 586, prohibiting the giving of evidence in such juvenile delinquency cases against the delinquent or any witness in the case, in any other court or proceeding, have no application. This portion of the section contemplates a case pending, and a hearing thereon, and prohibits the giving of the evidence taken in such hearing "against such child." There was no case pending against Neal Wright; there was no hearing upon any such case; the evidence sought from plaintiff in error had not been given in any such case, and it was not sought to be in-

troduced *against* Neal Wright in any sense of the word as used in this act.

It is perfectly clear that under § 1590 the juvenile court would have jurisdiction when such a case was pending, and that it would have jurisdiction under the provisions of § 1607. That § 1, chap. 199, p. 478, Laws of 1909, has no application, is so apparent from its wording that it is unnecessary to more than point out that it applies only to misdemeanors. If Neal Wright committed any offense, or was charged with any offense, which gave the juvenile court jurisdiction over him, that offense certainly was not a misdemeanor.

That chap. 51, Laws of 1913, has no application, is equally apparent. Section 1 thereof is solely a prohibition upon the publishers of newspapers, magazines, and periodicals. Section 4 of the same act authorizes the juvenile court to enter an order prohibiting the publishing of all or any of the proceedings in cases therein mentioned, but as no such proceedings were pending in the juvenile court in the instant case, and no claim is made that any such order had been entered, it is wholly inapplicable.

It follows that the privilege claimed cannot be sustained under any of the provisions of the Juvenile Law of Colorado.

Third. Plaintiff in error contends that the communication in question was privileged by reason of the provisions of ¶ 5, § 7274, Revised Statutes of Colorado 1908. This paragraph reads as follows: "A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure."

The entire argument upon this contention is based upon the theory that, in construing this section, the court must absolutely strike out of it the words "in the judgment of the court." Such a construction is indispensable to the application of the

paragraph to the claim of privilege now made by plaintiff in error. Otherwise, the judgment of the court has been exercised against the claim, and the paragraph affords no protection. Every decision on the question of the disclosure by public officials of communications made to them in official confidence, not taking into consideration this language of our statute, must be disregarded. The act itself makes the trial court the sole judge as to when the public interests would suffer by the disclosure. When a public officer is called upon on the witness stand to disclose such communications, his opinion that such disclosure is improper, and the reasons therefor,

—communications to public officer—privilege.

are matters to be presented to the court and are for the determination of the court—not the witness. If there are exceptions to this statute, they are only such as fall within those stated by Stephens's Evidence, art. 112, p. 163: "The executive of the nation, or of a state, and cabinet officers [and perhaps others falling in the same general class] are entitled, in the exercise of their discretion, to determine how far in a judicial inquiry they will produce papers or answer questions as to public affairs."

In addition to the foregoing, it is argued that a judge of a court of record ought not only to be exempted, but prohibited, from testifying.

—communications to judge.

There is no such law in this state. It is argued that communications of the nature of those here in question partake of the character of confidential communications between attorney and client, and are therefore privileged. The contrary is true in Colorado, for the very good reason

—communications to attorney.

that judges generally are prohibited from acting in any such capacity, and § 1595 expressly prohibits the judge of the juvenile court from acting "as attorney or counselor at law." The rule which excludes a

judge from testifying in a case on trial before him, and the cases cited in support thereof, have no application.

An interesting argument is presented in favor of the claim of privilege based upon the supposed powers and duties conferred by the state, in its capacity of *parens patriæ*, upon plaintiff in error, and his assumed position in *loco parentis*. There is no law to support this ^{—in loco parentis.} argument, and the privilege claimed by it is one which is denied a natural parent.

If the privilege existed at all, it existed for the protection of Neal Wright—not for the benefit of plaintiff in error, or the defendant, Bertha Wright. So far as it could be said to exist for the benefit of the state, a waiver was tendered by the state's representative charged with the prosecution of cases of juvenile delinquency, the district attorney, and that waiver was admitted by the state's judicial officer, the trial judge. It was a privilege which had to be claimed by Neal Wright, or someone for him. If it could be claimed by him it could be waived by him, and he had expressly waived it. It has been said that the proper person to claim or waive the privilege as to a minor is the natural guardian of such minor—in this case, his mother. *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000. Bertha Wright sat in court with her counsel at the time of the trial and attempted to claim the *privilege as a defendant*, which ^{Witness—privilege—who can claim.} was clearly not her right. She made no attempt to make the claim as *natural guardian* of her son, and by her silence she waived it.

Much is said of the unique position of the juvenile court, of the vital interest of the state in the unhampered exercise of its functions, of the powers and duties of its judge and his influence for good over wayward children, all of which meets with our unqualified approval; and, viewing the instant case apart from

(66 Colo. 343, 131 Pac. 531.)

that characteristic. The general principles governing such communications are laid down and discussed in 4 Wigmore on Evidence, § 2285, as follows: "Looking back at the principle of privilege, as an exception to the general liability of every person to give testimony to all facts inquired of in a court of justice, and having in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception, . . . four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation: (1) The communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. These four conditions being present, a privilege should be recognized, and not otherwise."

The mere reliance upon the fact that a communication was made in consequence of some confidential or official relation will not, in and of itself alone, make such communication privileged. This is but one of four essentials. That particular condition undoubtedly was present relative to the communication under consideration. To determine the presence of the second condition, to wit, that the element of confidentiality must be essential to the maintenance of the relation of the parties, we need only to refer to the statute creating juvenile courts. Chapter 158, Laws 1909, in defining the powers and duties of juvenile courts in the cases of juvenile delinquency, begins as follows: "Section 1. In all cases of dependent children, and

in cases of delinquent children who are, as defined by § 12 of the act concerning delinquent children, to be treated not as criminals, but as needing aid, assistance, encouragement, help, and education, and therefore where practicable to be tried under the chancery rather than the criminal jurisdiction of the court as wards of the state.

. . . ."

The jurisdiction thus conferred in general terms is that of the English court of chancery. 16 Cyc. 28. This jurisdiction, so far as it applies herein, is discussed in 10 R. C. L. 340, as follows: "Equity has full and complete jurisdiction over the persons and property of infants, and all other persons laboring under legal disabilities, as idiots, lunatics, and married women. The jurisdiction in all these cases is plenary, and potent to reach and afford a relief in every case where it may be necessary to preserve their estates and protect their interests. While the source of this jurisdiction is admittedly involved in some uncertainty, the doctrine now commonly maintained is that it represents a delegation to the chancellor by the Crown of its rights, as *parens patriæ*, to interfere in particular cases for the benefit of such as were incapable of protecting themselves, that it belonged to the court of chancery and was exercised by it from its first establishment, and that the jurisdiction exists in the United States by inheritance from the English courts of chancery, and not because equitable rights or titles are involved. While this is indeed a special exercise of equity jurisdiction, it is beyond question that, by virtue thereof, purely personal rights are frequently protected. Thus, the protection of infants from their own parents is a well-established exercise of equity jurisdiction for the protection of personal rights."

The relationship thus created between the parties is in the nature of that of guardian and ward, or parent and child, but without limita-

tions of law, and is brought about by legal process for the purpose of aiding and uplifting delinquent and wayward children, in an effort to make them assets to the state rather than liabilities. This is a humane field of boundless possibilities for good, in which plainly the element of confidentiality between the judge of the juvenile court and such children is essential to the success of the enterprise.

The last two essentials referred to by Wigmore, *supra*, namely, that the relationship should be one which in the opinion of the community should be sedulously fostered, and where the injury to accrue by disclosure is likely to be greater than the benefit derived by nondisclosure, will be discussed together. The manifest purpose of the act is the reformation of wayward and delinquent children, in order to make worthy citizens of those who otherwise probably would become criminals. The jurisdiction of the court has been strictly and specifically limited to cases of this sort. *Colias v. People*, 60 Colo. 230, 153 Pac. 224; *Re Songer*, 65 Colo. 460, 177 Pac. 141. That this jurisdiction should be upheld and the relationship thereby created be fostered is manifest from the mere fact that, with general approval, the law creating such tribunal has been enacted and provision made for its support and maintenance. Plainly, to destroy this relationship would in effect be to nullify and set aside the chief end and purpose of the enactment itself. It seems plain that anything which would probably bring about such a disaster would do more harm than could possibly be accomplished in good by allowing such testimony to be received because not privileged.

In discussing a juvenile court law similar to the one now under consideration here, in *State v. Scholl*, 167 Wis. 504, at page 508, 167 N. W. 831, the supreme court of that state said: "A democracy cannot long exist unless the great body of its voters be not merely intelligent, but

moral. The children of to-day are the voters of to-morrow. It is the greatest concern of the state, therefore, that its children be preserved from vicious habits, for the vicious child is the father of the vicious man. The law before us may be said to be founded on these propositions. Its aim is to keep something like a parental watch over children who are neglected or wayward, or both, and hence are subject to vicious influences; to bring them and their parents or guardians before an experienced and humane judge, who shall inquire into the situation, not with the awe-inspiring and frigid methods of a criminal court, but informally and intimately, like a wise and gentle elder brother, or like the good Samaritan of Holy Writ, and who shall, when fully advised, do that which is best for the child's future, either by way of sending it to an institution, or by providing for kind and tactful, but in no sense degrading, surveillance for a limited time at home. It would be a public misfortune to set aside a law so designed, even though it were not perfect in its details. Only the most weighty and convincing considerations could justify such action, and we do not think they exist here.

"It is sufficient to say on this point that the proceedings under this law are in no sense criminal proceedings, nor is the result in any case a conviction or punishment for crime. They are simply statutory proceedings by which the state in the legitimate exercise of its police power, or, in other words, its right to preserve its own integrity and future existence, reaches out its arm in a kindly way and provides for the protection of its children from parental neglect or from vicious influences and surroundings, either by keeping watch over the child while in its natural home, or, where that seems impracticable, by placing it in an institution designed for the purpose."

In Illinois, the state which furnished the model for the juvenile

courts of this state, the supreme court in upholding the constitutionality of the statute creating such court, in *Lindsay v. Lindsay*, 257 Ill. 328, 45 L.R.A. (N.S.) 908, 100 N. E. 892, Ann. Cas. 1914A, 1222, said: "The purpose of this statute is to extend a protecting hand to unfortunate boys and girls who, by reason of their own conduct, evil tendencies, or improper environment, have proven that the best interests of society, the welfare of the state, and their own good demand that the guardianship of the state be substituted for that of natural parents."

No more important and wholesome benefit in general is possible of attainment than that of making wayward and delinquent children clean, upright and useful citizens. That any relationship which tends to promote this highly desirable object should be encouraged goes as a matter of course. It is equally plain that anything which tends to destroy the trust of the child in the court which has jurisdiction over such matters must necessarily nullify all possibility of good which otherwise might thereby be accomplished. To permit the violation of a confidence made by a delinquent to the judge of the court having such matters in charge would at once remove the cornerstone of his faith in the one to whom he is authorized to appeal for help and protection. It may be that the broad powers and authority conferred by statute upon judges of juvenile courts are such that, in rare and exceptional cases, some judges may take advantage of them for ulterior motives; still, in determining the questions involved, we are not dealing with isolated cases, or with any individual judge, but in a general way with a most important system of jurisprudence, highly designed to promote the public welfare through the reclamation and betterment of delinquents, and which, as maintained and ordinarily administered, is a vast power for good, concerning which no narrow construction

should be indulged tending to weaken or discredit its work. In view of the wise and humanitarian object of the statute, which should be supported and upheld to the utmost legal extent, we are of the opinion that the communication in question falls within well-recognized limitations governing privileged communications, and should, in the interest of the general good, be so treated by the courts.

It is argued, however, that the interview referred to was had before proceedings had been commenced in the juvenile court. The killing of the father took place about the middle of April, 1915. On May 18, the son was sent, either by the prosecuting attorney, or by a minister of the Gospel who had interested himself in the case, to the juvenile court, where the interview in question with the judge was had. Between that date and the 8th of June no formal proceedings were instituted in the court against the boy. On the latter date the judge was called upon to state what took place between himself and the boy at that interview. It is contended that no official relation whatever had been established between the two, and therefore the communication was not privileged. It seems to be conceded, had such official relation been established, that then the communication would have been of that character.

The statute provides that all juvenile proceedings shall be informal, and that no record thereof shall be published. That the wards of the court are not criminals, but children needing helpful advice and kindly assistance. It is clear that these children are not to be dealt with formally, or in a distant and repelling manner. Upon the whole record, it is manifest that the boy appealed to the court for the purpose of invoking its jurisdiction. He came in voluntarily, submitted all the facts to the judge of the juvenile court, seeking his advice and protection, and was therefore as much in court as if complaint

LINDSEY v. PEOPLE EX REL. RUSH.

(66 Colo. 343, 181 Pac. 531.)

had been filed against him and process duly issued and served. The plaintiff in error in his capacity as such judge, therefore, unquestionably acted in a confidential and official capacity, and not otherwise. Upon the undisputed facts the communication, in our opinion, should be held privileged, even under the terms of the 5th paragraph of § 7274, Rev. Stat. 1908, relative to that subject, as follows: "Fifth. A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure."

In any event it is apparent from the record that the relations established between the parties were such as to render the communication in question, in the strictest sense, privileged, independent of statutory provision. To hold otherwise would be to declare that a judge of a juvenile court might, by fair promises, gain the trust and confidence of a child, and then betray it. This is not only repugnant to good morals, but to every principle of fairness and common justice. Such a rule would go far to utterly destroy the highly important object for which that court, with its special and peculiar jurisdiction, was primarily created.

A close analysis of the majority opinion plainly discloses that it is

highly technical in character in construction, and cululated to give helpful assistance in the enforcement of Juvenile Court Law, but needlessly hamper and be the end that its wise purposes are in the main utterly defeated. I am of the opinion that the construction to be accorded this statute is the very nature of thing and liberal. It is manifestly one announced by the majority in this court fails utterly to take into consideration the material which has been made in providing for the care, maintenance, and uplift of delinquent and wayward children through the establishment of courts of juvenile delinquency under consideration, and the construction act by the majority opinion is in harmony with modern enlightened jurisprudence. The judgment, therefore, of the majority should be reversed and dismissed.

I am authorized to state that **Scott and Allen** concur in the dissenting opinion.

Petition for rehearing denied June 2, 1919.

Dismissed by the Supreme Court of the United States, June 1, 1921, 255 U. S. 560, 65 L. Ed. 321, 322.

ANNOTATION.

Evidence: privilege of communication made to public officer.

The earlier cases on this question are discussed in the note in 9 A.L.R. 1099 et seq.

Since the preparation of the earlier note, only a few cases have passed upon the question under annotation.

Error to the decision of the supreme court of Colorado in **LINDSEY v. PEOPLE** (reported herewith) ante, 1250, was dismissed by the Supreme Court of the United States for want of jurisdiction, under the Act of September 6th, 1916 (39 Stat. at L. 726,

chap. 448, Comp. Stat. § 1099, Stat. Anno. Supp. 1918, p. 1099).

Communications by the defendant to an attorney who acted with reference to the execution and delivery of the deed, in the capacity of scrivener and notary public, were held not privileged in **People v. Mason** (1921) — Mo. — 971. See earlier note, page 1250, for earlier cases dealing with communications to notaries.

The privileged character

munications made to a deputy prosecuting attorney by one accused of crime is denied in *Fisher v. State* (1921) — Ark. —, 231 S. W. 181, and accordingly the deputy prosecuting attorney was permitted to testify, upon the trial of the accused for murder, that the accused came to his house on the evening before the killing and asked him a number of questions relative to whether the decedent and the accused's wife had violated the criminal law. In support of its holding the court said: "The defendant did not consult Dearing for the purpose of employing him as his attorney. He only consulted him as a public prosecutor. His testimony did not concern any communication made to him as attorney, by the defendant as his client, or his advice thereon. Therefore no confidential relation existed between them which would prevent the witness from testifying concerning the matters talked about, without the consent of the defendant."

The privilege of communications between an accomplice who was a witness in a criminal prosecution and the district attorney was denied in *Needham v. State* (1921) — Tex. Crim. Rep. —, 233 S. W. 966.

Communications to a district attorney are stated in *Atty. Gen. v. Tufts* (1921) — Mass. —, 132 N. E. 322, to be privileged and confidential in the sense that they cannot be revealed at the instance of private parties in aid of actions at law, but this rule is held to have no application in a proceedings for the removal of the district attorney.

The general rule that communications made to prosecuting officers by complaining witnesses are privileged is recognized in *Centoamore v. State* (1920) — Neb. —, 181 N. W. 182. But it is held in that case that that rule should not, in every instance, be followed absolutely and without qualification, in criminal proceedings growing out of the information in question. Applying the exception, the court held that the accused might be allowed to inquire specifically as to whether the prosecuting witness did not make certain statements in denial of the guilt of the accused, and, if so, to develop what those statements were in a prosecution for statutory rape.

See subd. III. of earlier note for discussion of communications to prosecuting officers. W. A. E.

**MRS. MARTHA A. TISDALE et al., Plffs. in Err.,
v.
PANHANDLE & SANTA FE RAILWAY COMPANY.**

Texas Commission of Appeals (Sec. B.)—March 2, 1921.

(— Tex. —, 228 S. W. 133.)

Railroads — duty to maintain flagman at crossing.

1. A railroad company is not absolved from the duty of maintaining a flagman at a highway crossing when needed, by the fact that there are times when there would be no need of such person at that crossing.

[See note on this question beginning on page 1273.]

Trial — jury — duty to maintain flagman at crossing.

2. Whether or not any given state of facts describing the surroundings of any particular railroad crossing is such as to make such crossing one attended with unusual danger or extraordinary hazards, so to require the maintenance of a flagman there, is a question solely for the determination

of the jury, unless only one conclusion could be drawn therefrom by all reasonable minds.

[See 22 R. C. L. 1009.]

— facts requiring flagman at crossing.

3. The jury must determine whether or not it is negligence not to maintain a flagman at a crossing of the switch yards of a railroad company,

by the main street of a town of 800 to 1,500 inhabitants, where the view of the track is obstructed by standing cars and structures along the track, and it is difficult to hear ordinary signals by reason of the confusion incident to operation of trains.

[See 22 R. C. L. 1009.]

Railroads — population as element.

4. The duty of a railroad company to maintain a flagman at a highway crossing in a town or city does not depend alone upon the population of the place.

[See 22 R. C. L. 1009.]

Appeal — submission of erroneous issue to jury.

5. The erroneous submission of one

of several issues in a case is ground for reversal if it is possible to determine upon what issues the verdict was found.

— reversal — question of affirmance of judgment.

6. The supreme court can reversing a judgment of the intermediate appellate court, which is reversed, because of want of evidence, a submission of an issue to jury, affirm the judgment of the court, since the decision is a question of evidence over which the court has no jurisdiction.

[See 2 R. C. L. 2087.]

ERROR to the Court of Civil Appeals to review a judgment of the District Court for Gray County (Ewing, J.) in an action brought to recover damages for the alleged killing of the husband and father. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles C. Cook and Kimbrough, Underwood, & Jackson, for plaintiffs in error:

Defendant's negligence and carelessness were the direct and proximate cause of the injuries to and the death of said C. R. Tisdale.

33 Cyc. 954; 29 Cyc. 565.

A person is not required to stop, look, and listen on approaching a crossing, as a matter of law, but he is only required to exercise ordinary care and prudence; and it is a question for the jury as to whether or not he has exercised ordinary care and prudence.

Frugia v. Texarkana & Ft. S. R. Co. 36 Tex. Civ. App. 648, 82 S. W. 814; *International & G. N. R. Co. v. Tinon*, — Tex. Civ. App. —, 117 S. W. 936; *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272, 6 Am. Neg. Cas. 462; *Pecos & N. T. R. Co. v. McMeans*, — Tex. Civ. App. —, 188 S. W. 692; *Galveston, H. & S. A. R. Co. v. Tirres*, 33 Tex. Civ. App. 362, 76 S. W. 806; *St. Louis Southwestern R. Co. v. Matthews*, 34 Tex. Civ. App. 302, 79 S. W. 73; *Gulf, C. & S. F. R. Co. v. Dolson*, 38 Tex. Civ. App. 324, 85 S. W. 444; *Gulf, C. & S. F. R. Co. v. Melville*, — Tex. Civ. App. —, 87 S. W. 863; *Missouri, K. & T. R. Co. v. Butts*, 62 Tex. Civ. App. 539, 132 S. W. 88; *Hovey v. Sanders*, — Tex. Civ. App. —, 174 S. W. 1025; *Missouri P. R. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Houston & T. C. R. Co. v.* 16 A.L.R.—80.

Wilson, 60 Tex. 143; *Gulf, C. & S. F. R. Co. v. Anderson*, 76 Tex. W. 196; *Missouri, K. & T. R. Co. v. Cox*, — Tex. Civ. App. —, 1050; *Galveston, H. & S. A. R. Co. v. Huebner*, — Tex. Civ. App. W. 1021; *St. Louis Southwestern R. Co. v. Carwile*, 28 Tex. Civ. 67 S. W. 160; *Texas & P. R. Co. v. Moody*, — Tex. Civ. App. —, 1057; *International & G. N. R. Co. v. Walker*, — Tex. Civ. App. W. 961; *Galveston, H. & S. A. R. Co. v. Linney*, — Tex. Civ. App. W. 1035; *St. Louis Southwestern R. Co. v. Waits*, — Tex. Civ. App. S. W. 870; *St. Louis Southwestern R. Co. v. Shelton*, 52 Tex. Civ. 115 S. W. 877; *Texas & P. R. Co. v. Stoker*, 52 Tex. Civ. App. 41 W. 910; *Boyd v. St. Louis Southern R. Co.* 101 Tex. 416, 108 S. W. 108; *Missouri, K. & T. R. Co. v. ...* Tex. Civ. App. 588, 120 S. W. 408, 36 L. ed. 485, 12 Am. Rep. 679, 12 Am. Neg. Cas. 6; *C. & S. F. R. Co. v. Gaddis* Civ. App. —, 166 S. W. 166; *Worth & D. C. R. Co. v. ...* — Tex. Civ. App. —, 151 S. W. 599; *Choate v. San Antonio P. R. Co.* 90 Tex. 82, 36 S. W. 319; *International & N. R. Co. v. Starling*, 16

App. 365, 41 S. W. 181; *International & G. N. R. Co. v. Dalwigh*, — Tex. Civ. App. —, 48 S. W. 577.

The court did not err in overruling defendant's written exception to the main charge in submitting to the jury, as a controverted issue under the evidence, the question as to whether or not the defendant was negligent in failing to keep a watchman at the crossing in the town of Pampa at the time of the accident.

10 Cyc. 943; *Missouri, K. & T. R. Co. v. Magee*, 92 Tex. 616, 50 S. W. 1014; *Central Texas & N. W. R. Co. v. Gibson*, — Tex. Civ. App. —, 83 S. W. 862.

It was not error for the court to submit, in its charge to the jury the question as to whether or not the defendant was guilty of negligence in failing to have someone stationed at the east end of the caboose.

10 Cyc. 954; *El Paso & S. W. R. Co. v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998.

In rapidly moving the train, as it did, without blowing the whistle or ringing the bell, defendant was guilty of negligence.

Ft. Worth & D. C. R. Co. v. Taylor, — Tex. Civ. App. —, 153 S. W. 357; *Paris & G. N. R. Co. v. Lackey*, — Tex. Civ. App. —, 171 S. W. 540; *Missouri K. & T. R. Co. v. Thomas*, 87 Tex. 282, 28 S. W. 343.

Messrs. Terry, Cavin, & Mills, Hoover & Dial, and H. E. Hoover, for defendant in error:

The undisputed evidence showing that deceased, C. R. Tisdale, was guilty of contributory negligence which not only contributed to his death, but was the proximate cause thereof, it was error to submit the question of the deceased's contributory negligence to the jury.

Galveston, H. & S. A. R. Co. v. Bracken, 59 Tex. 75; *Texas & P. R. Co. v. Huber*, — Tex. Civ. App. —, 95 S. W. 571; *Houston & T. C. R. Co. v. Kauffman*, 46 Tex. Civ. App. 72, 101 S. W. 818; *Sabine & E. T. R. Co. v. Dean*, 76 Tex. 73, 13 S. W. 45; *Missouri P. R. Co. v. Ponter*, 73 Tex. 304, 11 S. W. 324; *Bennett v. St. Louis Southwestern R. Co.* 36 Tex. Civ. App. 459, 82 S. W. 333; *St. Louis Southwestern R. Co. v. Branon*, — Tex. Civ. App. —, 73 S. W. 1064; *Texas & P. R. Co. v. Johnson*, 59 Tex. Civ. App. 354, 125 S. W. 934; *Texas Midland R. Co. v. Tidwell*, — Tex. Civ. App. —, 49 S. W. 641;

Texas & N. O. R. Co. v. Brown, 2 Tex. Civ. App. 281, 21 S. W. 425; *Missouri, K. & T. R. Co. v. Eyer*, 96 Tex. 72, 70 S. W. 529; *Texas & P. R. Co. v. Shoemaker*, 98 Tex. 451, 84 S. W. 1051; *Texas Midland R. Co. v. Wiggins*, — Tex. Civ. App. —, 161 S. W. 448; *Haass v. Galveston, H. & S. A. R. Co.* 24 Tex. Civ. App. 135, 57 S. W. 855; *Missouri, K. & T. R. Co. v. Martin*, — Tex. Civ. App. —, 44 S. W. 703; *Teetz v. International & G. N. R. Co.* — Tex. Civ. App. —, 162 S. W. 1000; *Chicago, R. I. & G. R. Co. v. LaGrone*, — Tex. Civ. App. —, 167 S. W. 7; *Pecos & N. T. R. Co. v. McMeans*, — Tex. Civ. App. —, 188 S. W. 692; *Patton v. Dallas Gas Co.* 108 Tex. 321, 192 S. W. 1060.

A person who voluntarily exposes himself to danger which he might have avoided by the use of his proper senses in law contributes to his own injury, and is not entitled to recover, and it is the duty of the court to so charge the jury.

Texas & P. R. Co. v. Johnson, 59 Tex. Civ. App. 354, 125 S. W. 933; *Galveston, H. & S. A. R. Co. v. Bracken*, 59 Tex. 74; *Patton v. Dallas Gas Co.* 108 Tex. 321, 192 S. W. 1060.

Powell, J., delivered the opinion of the court:

This is an action in damages, instituted in the district court of Gray county, Texas, by Martha A. Tisdale and May Bell Tisdale, for themselves and others, against the Panhandle & Santa Fé Railway Company, for the alleged negligent killing of C. R. Tisdale by said railway company on a public crossing near the depot in the town of Pampa on the 15th day of June, 1915. Plaintiffs alleged three grounds of negligence on the part of said railway company in the killing of the said C. R. Tisdale, as follows: (1) Failure to keep a watchman at the crossing; (2) pushing the train over the crossing without having anyone stationed on the east (rear) end of the caboose while said train was being backed over the crossing; (3) pushing the train rapidly and hurriedly from a point a short distance from said crossing over the same, without blowing the whistle or ringing the bell.

Defendant answered by general and special exceptions, general denial, and pleas of contributory negligence and assumed risk.

A trial was had before a jury, which, in response to a general charge of the court, returned a verdict in favor of Mrs. Martha A. Tisdale for \$5,000 and May Bell Tisdale for \$1,500. Judgment was entered accordingly.

Defendant in error perfected its appeal from said judgment, and presented various assignments of error in the court of civil appeals. Said court overruled all of the assignments of error, except those which attacked the action of the trial court in submitting to the jury the issue of negligence on the part of defendant in failing to have a flagman or watchman at the public crossing where this accident occurred. The defendant in error contended that, as a matter of law, there was not sufficient evidence to warrant the court in submitting this issue to the jury, and this contention became the basis of two assignments of error, which the court of civil appeals sustained and reversed the judgment of the trial court, and remanded the cause. See — Tex. Civ. App. —, 199 S. W. 347.

The sole question for determination in this connection by this court is whether or not the trial court erred in submitting the aforesaid issue to the jury. There was no objection to the form of the charge used by the trial court in doing so. It was in the usual form, the court asking the jury to determine whether or not an ordinarily prudent person, under the same or similar circumstances, would have provided a flagman at said crossing.

Were the facts in this case sufficient to raise said issue and require its submission to the jury? The relevant facts, as found by the court of civil appeals, are: "It appears that, prior to the accident, Tisdale, accompanied by R. P. Porter, in the former's buggy, was driving south on a main street of the town of Pampa, with the intention

of crossing appellant's line of railway. It appears that there was north of the main line what is known as the house track, which left the main line several hundred feet west of the place of the accident, and ended at the west line of the street along which Tisdale and Porter were traveling; that there was one car loaded with ice, and possibly others, standing on the house track. This track was about 30 feet north of the main track. It is clear that after passing south beyond the car standing on the end of the house track the view of the main track toward the west was further obstructed by a temporary depot, situated on the north side of the main track. This depot was a box car, without the wheels, resting upon supports near the main track. Besides the house track, northwest of the temporary passenger depot, at a distance not shown by the testimony, was another old box car, which was used as a freight depot. If the map attached to the statement of facts correctly shows the location of the ice car and the two old box cars used for passenger and freight depots respectively, appellant's insistence that deceased was guilty of contributory negligence as a matter of law cannot be sustained. It appears from the evidence that the train which caused the death of Tisdale was a work train; that it came into Pampa from some point west of the town, and had pulled in on what is known as the passing track, some 6 feet south of the main line, in order that a through freight train which had already whistled for the station might have the right of way over the main track."

Again: "The court, in a general charge, submitted to the jury the issue as to whether or not the appellant was negligent in failing to keep a watchman at the crossing where the accident occurred. The evidence upon this issue was uncontroverted to the effect that no watchman or flagman was kept there. Several witnesses testified to facts bearing upon this issue,

showing that Pampa was a town of from 500 to 1,500 people, that the crossing was frequently used by the public, and that there was considerable traffic over it during the season of the year in which the accident occurred. It was shown that there were no factories or anything else that would make an unusual noise in the neighborhood of the crossing, and nothing that would keep a person from hearing the movement of freight trains. One witness testified that he had lived at Pampa a great many years, and that the principal noise to be heard in the town was the movement of trains."

Again, in the opinion on rehearing: "We find that the street upon which the accident occurred was the main crossing of the railroad in the town of Pampa; that it was the main business street; that, as shown by the map in evidence, the accident occurred 210 feet east of Hobart's office on the main street; that, after leaving Hobart's office, going toward the main track, there was no obstruction until Tisdale reached the point in the street where the house track ended; that there were several cars on the house track, extending from the line of the street west; that, as shown by the map, it was 50 feet from the house track to the main line where the accident occurred. Between the house track and the main line there was located a box car, about 60 feet west of the street; this box car was on the ground by the side of the main track, and was used as a temporary depot; further west, 50 feet, and near the house track, was another old box car used for a freight depot; 600 feet west of the street, and located between the house track and the main track, was a well house and pump house; that the crossing was used by the town people and by the rural population living 15 or 20 miles southward and eastward from the crossing; that such farming population averaged about one family to each section of land; that at the time of the acci-

dent the wheat harvest was on, when travel was most active over the crossing; that there was a considerable transient population in the town at that time; that several buildings were in progress in the town, amongst them a new depot for the appellant; that at the time of the accident work on the depot had been stopped. Appellant's employees operating the train knew that the crossing was an important one, and that at times there was heavy traffic over it."

It is admitted that, at the time of this accident, there was no statute or city ordinance requiring defendant in error to maintain a flagman at this crossing.

The rule of law applicable to the determination of the issue now before this court has been well stated, as follows: "In order to raise the issue whether the railway company is guilty of negligence in failing to station a watchman at a public crossing, it is not necessary to show that persons about to use the crossing are prevented from discovering the approach of trains by permanent obstructions, as appellant seems to contend. If the location of the crossing and the conditions surrounding it, together with the switching of cars and the operation of its trains by the company, rendered the same unusually hazardous, then it was a question of fact for the determination of the jury whether the company, in the exercise of reasonable care, should have stationed a watchman at the crossing." *Missouri, K. & T. R. Co. v. Hurdle*, — Tex. Civ. App. —, 142 S. W. 992 (writ of error denied by the supreme court).

The opinion above quoted was justified by a former opinion of the supreme court of Texas, in which Judge Brown used the following language: "The court charged the jury, in effect, that if a person of ordinary prudence would, under all the circumstances, have kept a flagman or watchman at the crossing where the plaintiff was injured, then the failure on the part of the

railroad company to keep such flagman or watchman was negligence. It is objected to this charge that the law does not require a railroad company to keep a watchman or flagman at crossings on public highways, and that if the train itself is properly managed, there can be no liability on the part of the railroad company; that it is not required to provide a person to notify travelers upon the public highway of the approach of its trains. There is a conflict of authority upon this question, but the weight of authority and sound reasoning sustains the charge given by the court." *Missouri, K. & T. R. Co. v. Magee*, 92 Tex. 616, 50 S. W. 1013.

Judge Brown, in the opinion just above quoted, cited a decision of the United States Supreme Court in support of his position. Said latter court, in the case referred to by Judge Brown, in a very learned opinion by Justice Lamar, spoke as follows: "As a general rule, it may be said that whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous is a question of fact for a jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence, although in some cases it has been held that it is a question of law for the court. It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is in a thickly populated portion of a town or city; or that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or that the crossing is a much-traveled one, and the noise of approaching trains is rendered indistinct and the ordinary signals

difficult to be heard by reason of bustle and confusion incident to railway or other business, or by reason of some such like cause; and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country." *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659.

Judge Lamar, in this opinion, approved the following charge by the trial court: "So, if you find that because of the special circumstances existing in this case, such as that this was a crossing in the city much used and necessarily frequently presenting a point of danger, where several tracks run side by side, and there is consequent noise and confusion and increased danger, that, owing to the near situation of houses, barns, fences, trees, bushes, or other natural obstructions which afforded less than ordinary opportunity for observation of an approaching train, and other like circumstances of a special nature, it was reasonable that the railroad should provide special safeguards to persons using the crossing in a prudent and cautious manner, the law authorizes you to infer negligence on its part for any failure to adopt such safeguards as would have given warning," etc.

In this same case Judge Lamar speaks again as follows: "In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons passed each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient."

The authorities above cited abundantly sustain the proposition that railway companies owe the public the duty of maintaining a flagman in towns and cities at all crossings which are unusually dangerous

or attended with more than ordinary hazard. It will not be contended, of course, that they owe the public this duty at ordinary crossings in the country, where there could be no unusual danger or extraordinary hazard. In cases of that kind, as stated by Justice Lamar in the Ives Case, *supra*, the law would impose no such duty upon railway companies. Whether or not any given state of facts describing the surroundings of any particular crossing is such as to mark such crossing as one attended with unusual danger or extraordinary hazard is a question solely for the determination of the jury, unless only one conclusion could be drawn therefrom by all reasonable minds.

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crossing.**

It is elementary, of course, that where all reasonable minds would draw the same conclusion from a given state of facts, the effect of such state of facts would become a question of law for the court, rather than a question of fact for the jury. The authorities cited in Michie's Digest of Texas Civil Cases, vol. 14, p. 688, fully sustain this fundamental proposition. Therefore, if the facts in this case might lead to different conclusions by reasonable minds as to whether or not the crossing in question was attended with unusual danger or extraordinary hazard, then it became the duty of the trial court to submit to the jury the issue of negligence in the failure to have a watchman at said crossing.

We think the facts were such that reasonable minds might easily draw different conclusions therefrom, and were amply sufficient to warrant the submission of this charge to the jury. The issue was clearly raised by the evidence. In fact, by way of parenthesis, we will say that the record contains evidence that the division superintendent and the train master of defendant in error had already decided, before this accident, that this crossing was attended with unusual danger, and that the situation would at least demand the installation of bell alarms

or signals which would warn people desiring to pass over said crossing of the approach of trains.

A brief analysis of the facts as found by the court of civil appeals shows the following: The town of Pampa had a population estimated at between 800 and 1,500 residents; that the town was filled with transients at the time of this accident, by reason of the fact that it was the harvest season in that territory, and by reason of the further fact that many improvements were going on and new buildings were being erected; that the main line of defendant in error ran east and west through said town; that Cuyler street, which crossed the defendant in error's tracks, was the main business street of the town; that it crossed said tracks, running north and south, and just east of a temporary depot; that practically all of the traffic of the city was upon and over said Cuyler street and across said railroad tracks where this accident occurred; that the crossing was in the switch yards of defendant in error at Pampa; that about 30 to 50 feet north of the main-line track was what is known as the house track; that this house track branched off from the main line several hundred feet west of the temporary depot, and paralleled said main-line track to the west boundary of Cuyler street; that between the main-line and house tracks were many obstructions; that an old box car was being used as a temporary depot, and it was located near the western edge of Cuyler street; that about 50 feet west of this temporary depot was another box car and platform adjacent thereto, used as a temporary freight depot; that a few hundred feet west of Cuyler street was a well house and also a pump house; that there were several box cars on the house track; that there was also another railroad track south of the main-line track and about 6 feet therefrom, and this was known as the passing track; that at the time of the accident to Mr. Tisdale the work train which struck him was

backing into Pampa from the west, and using the passing track aforesaid; that it took this track in order that a through freight might pass through Pampa on the main-line track; that a new depot was being erected near the site of and across the street from the temporary passenger depot aforesaid.

From aforesaid brief analysis of the facts it is established, among other things, that the crossing in this case was situated in the thickly populated portion of a town. The view of the track was obstructed by the company itself in the erection of temporary freight and passenger depots between the main-line track and the house track, and in other ways. The crossing was a much-traveled one, and it was difficult to hear the ordinary signals, by reason of the confusion incident to the operation of trains. Under the authority of the case of *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659, this combination of facts was certainly sufficient to justify the trial court in submitting the issue in question to the jury.

The court of civil appeals in its opinion stated that the house track was not shown to be full of cars ordinarily, although there were obstructions to the view at the time of the accident, as claimed by plaintiffs in error. It seems possible that the court of civil appeals may entertain the view that, unless it be necessary at all times to maintain a flagman at a certain crossing, it is not necessary at any time to do so. We cannot concur in any such theory. Conditions surrounding a crossing may, and do, change materially from time to time. A flagman might not be required under the law at a certain crossing at one time, and yet it might be negligence to fail to provide one there at another time. The sole question for determination is whether or not, at the time of the accident, the conditions surrounding the

crossing in question rendered it more than ordinarily hazardous or unusually dangerous.

For instance, the jury may well have decided that during the construction of the new depot at Pampa, necessitating the obstruction of the view of the tracks and approaching trains by the use of old box cars as temporary freight and passenger depots, a flagman was necessary, even though it would not have been necessary to maintain a flagman at the crossing in question under ordinary conditions.

Nor can we agree that the proper test in the decision of this question is the population of the town or city. In fact, a review of the authorities shows that the courts have approved the submission of this issue to juries in towns and cities with populations ranging from 3,500 inhabitants to several hundred thousand. The accident in the case of *Missouri, K. & T. R. Co. v. Hurdle*, — *Tex. Civ. App.* —, 142 S. W. 992, happened at a public crossing in the town of Winnsboro, with a population of 3,500. Other Texas cases have been read in which the accidents occurred in towns like Waxahachie, Terrell, and Del Rio.

In this connection one can easily see that some crossings in the smaller towns and cities might be attended with greater danger than other crossings in the larger cities; in other words, a crossing on the main thoroughfare of a town of 2,000 people, or less, might be much more dangerous than a crossing in the residential section of a city of a half million people. Consequently we cannot concur in any view based upon the theory that the proper test for the determination of this question is the population of the town or city in which the crossing is located. The sole and only test is whether or not the crossing, in view of its environment and use, was unusually dangerous, or attended with more than ordinary hazard at the time of the accident in question.

Our views of the law governing this case have been sustained by

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flagman at
crossing.

—population as
element.

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many other Texas decisions. In the case of *Central Texas & N. W. R. Co. v. Gibson*, — Tex. Civ. App. —, 83 S. W. 862, Justice Talbot uses the following language: "A view of the railroad track on either side of the street to persons traveling on the street and approaching the crossing in question was obstructed by trees or buildings until a point within about 25 or 30 feet of the track is reached. People are almost constantly passing along the street and over the crossing, and may be expected there at any time of the day. Before the jury was authorized, under the charge complained of, to find that appellant was guilty of negligence in the particular mentioned, they were required to find that the crossing, by reason of its surroundings, was more than usually dangerous and hazardous, and to such an extent that persons of ordinary care, engaged in operating railway trains under similar circumstances, would have kept a flagman at said crossing. It is true that railway companies are not required to have a flagman posted at every crossing to give warning to travelers about to pass over them of the danger of approaching trains. This duty they owe the public at such crossings only as are, by reason of their location and the circumstances surrounding them, rendered unusually dangerous. In such a case the failure of the railway company to have a flagman at such a crossing becomes a proper and legitimate subject of inquiry and question of culpable negligence in determining the liability of the company for damages at the suit of an injured person by collision with its trains or cars in attempting to pass over such crossing." Affirmed by the supreme court, 99 Tex. 98, 87 S. W. 814.

We refer also to the following Texas cases: *Missouri, K. & T. R. Co. v. Bratcher*, 54 Tex. Civ. App. 10, 118 S. W. 1092; *St. Louis Southwestern R. Co. v. Waits*, — Tex. Civ. App. —, 164 S. W. 870; *Galveston, H. & S. A. R. Co. v. Linney*, — Tex. Civ. App. —, 163 S. W.

1035; *Texas Midland R. Co. v. Wiggins*, — Tex. Civ. App. —, 161 S. W. 445; and *International & G. N. R. Co. v. Walker*, — Tex. Civ. App. —, 171 S. W. 264.

The principles of law announced herein are also followed generally in other jurisdictions. See *Illinois C. R. Co. v. Coley*, 121 Ky. 385, 1 L.R.A.(N.S.) 370, 89 S. W. 234; *Anaker v. Chicago, R. I. & P. R. Co.* 81 Iowa, 267, 47 N. W. 68; *Southern R. Co. v. Winchester*, 127 Ky. 144, 105 S. W. 167; *Cincinnati, N. O. & T. P. R. Co. v. Champ*, 31 Ky. L. Rep. 1054, 104 S. W. 989; *Delaware & H. Co. v. Larnard*, 88 C. C. A. 462, 161 Fed. 520, and *Illinois C. R. Co. v. O'Neill*, 100 C. C. A. 658, 177 Fed. 330.

In view of what has heretofore been said, we conclude that the trial court, under the evidence in this case, properly submitted to the jury the issue as to whether or not defendant in error was guilty of negligence in failing to have a watchman at the crossing when and where Tisdale was killed, and that the court of civil appeals was in error in sustaining the assignments of error attacking said action of the trial court.

Plaintiffs in error contend that, even though the trial court had erroneously submitted to the jury the issue in question, such fact did not require a reversal of the judgment, because three issues of negligence were submitted, and there is nothing in the record to show that the verdict was not returned on one or both of the other issues. We think this contention is unsound. The judgment was based upon a general verdict. It was impossible for the court of civil appeals to know, or for the plaintiffs in error to show, that the verdict was not based upon the charge complained of and held by said court to have been erroneously submitted. Viewing the case as it did, the court of civil appeals did not err in reversing the judgment of the district court. The following authorities are

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decisive of this question: *Gulf, C. & S. F. R. Co. v. Johnson*, 91 Tex. 569, 44 S. W. 1067; *Gulf, C. & S. F. R. Co. v. Greenlee*, 62 Tex. 349; *Emerson v. Mills*, 83 Tex. 388, 18 S. W. 805; *Schaff v. Gooch*, — Tex. Civ. App. —, 218 S. W. 788.

We are urged to affirm the judgment of the trial court in the event we have decided that the issue in question was raised by the evidence and properly submitted to the jury. In view of the action of the court of civil appeals in reversing and remanding the case for reasons shown, we think the supreme court is without authority to set aside its judgment and affirm that of the district court. The rule laid down by Chief Justice

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—affirmance of
judgment.

Phillips in the case of *Tweed v. Western U. Teleg. Co.* 107 Tex. 247, 166 S. W. 696, 177 S. W. 957, and authorities there cited, is clear and conclusive upon this point.

Therefore we recommend that the judgment of the Court of Civil Appeals be affirmed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Phillips, Ch. J.:

The judgment recommended in the report of the Commission of Appeals is adopted, and will be entered as the judgment of the Supreme Court.

We approve the holding of the Commission of Appeals on the question discussed in its opinion.

Petition for rehearing denied.

ANNOTATION.

Duty of railroad company to maintain flagman at crossing.

- I. Failure to maintain flagman as negligence per se, 1273.
- II. Failure to maintain flagman as evidence of negligence:
 - a. Generally, 1275.
 - b. Dangerous crossing:
 1. Generally, 1277.
 2. Absence of statute or order requiring flagman, 1280.
 3. Obstruction of view, 1281.
 4. Amount of travel, 1284.
 5. Noise, 1284.
 - c. Absence of customary flagman, 1285.

I. Failure to maintain flagman as negligence per se.

The general rule is that, in the absence of a statutory requirement, there is no general duty on the part of a railroad company to place watchmen or flagmen at grade crossings of public roads or highways, and that therefore the failure to maintain a watchman or flagman at a particular crossing is not negligence per se.

United States. — *Grand Trunk R. Co. v. Ives* (1892) 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Latham v. Staten Island R. Co.* (1907) 150 Fed. 235. See also *Illinois C. R. Co.*

v. O'Neill (1910) 100 C. C. A. 658, 177 Fed. 328, which has writ of certiorari denied in (1910) 217 U. S. 604, 54 L. ed. 899, 30 Sup. Ct. Rep. 694.

California. — *Carraher v. San Francisco Bridge Co.* (1889) 81 Cal. 98, 22 Pac. 480.

District of Columbia. — *Baltimore & O. R. Co. v. Adams* (1879) 10 App. D. C. 97.

Illinois. — *Chicago & I. R. Co. v. Lane* (1889) 130 Ill. 116, 22 N. E. 513; *Peoria & P. Union R. Co. v. Herman* (1891) 39 Ill. App. 287, *Opp. v. Pryor* (1920) 294 Ill. 538, 128 N. E. 580. See also *Perkins v. Wabash R. Co.* (1908) 233 Ill. 458, 84 N. E. 677.

Indiana. — *Evansville & T. H. R. Co. v. Clements* (1904) 32 Ind. App. 659, 70 N. E. 554.

Iowa. — *Glanville v. Chicago & I. & P. R. Co.* (1920) — Iowa, —, 180 N. W. 152.

Kentucky. — *Hutcherson v. Louisville & N. R. Co.* (1899) 21 Ky. L. Rep. 733, 52 S. W. 955; *Louisville & N. R. Co. v. Cummins* (1901) 111 Ky. 333, 63 S. W. 594.

Louisiana. — *Hammers v. Colorado Southern, N. O. & P. R. Co.* (1911) 128

La. 648, 34 L.R.A.(N.S.) 685, 55 So. 4.

Maryland. — State use of Foy v. Philadelphia, W. & B. R. Co. (1877) 47 Md. 76; Maryland C. R. Co. v. Neubeur (1884) 62 Md. 391; Cowen v. Dietrick (1905) 101 Md. 46, 60 Atl. 282, 4 Ann. Cas. 292; Evans v. Baltimore, C. & A. R. Co. (1918) 133 Md. 31, 104 Atl. 112.

Massachusetts. — Com. v. Boston & W. R. Corp. (1869) 101 Mass. 201; Giacomo v. New York, N. H. & H. R. Co. (1907) 196 Mass. 192, 81 N. E. 899; Trask v. Boston & M. R. Co. (1914) 219 Mass. 410, 106 N. E. 1022.

Michigan. — Hass v. Grand Rapids & I. R. Co. (1882) 47 Mich. 401, 11 N. W. 216; Freeman v. Duluth, S. S. & A. R. Co. (1889) 74 Mich. 86, 3 L.R.A. 594, 41 N. W. 872.

Missouri. — Becke v. Missouri P. R. Co. (1890) 102 Mo. 544, 9 L.R.A. 157, 13 S. W. 1053.

New Jersey. — Pennsylvania R. Co. v. Matthews (1873) 36 N. J. L. 531; Delaware, L. & W. R. Co. v. Toffey (1876) 38 N. J. L. 525; Siracusa v. Atlantic City R. Co. (1902) 68 N. J. L. 446, 53 Atl. 547; Danskin v. Pennsylvania R. Co. (1909) 76 N. J. L. 660, 22 L.R.A.(N.S.) 232, 72 Atl. 32 (later appeals not involving this point are (1910) 79 N. J. L. 526, 76 Atl. 975; 83 N. J. L. 522, 83 Atl. 1006).

New York. — Ernst v. Hudson River R. Co. (1868) 39 N. Y. 61, 100 Am. Dec. 405; Beisiegel v. New York C. R. Co. (1869) 40 N. Y. 9; Grippen v. New York C. R. Co. (1869) 40 N. Y. 34; Weber v. New York C. & H. R. R. Co. (1874) 58 N. Y. 451; Culhane v. New York C. & H. R. R. Co. (1875) 60 N. Y. 133; Pakalinsky v. New York C. & H. R. R. Co. (1880) 82 N. Y. 424; Martin v. New York C. & H. R. R. Co. (1897) (Sup. Ct. App. T.) 20 Misc. 363, 45 N. Y. Supp. 925; Cohn v. New York C. & H. R. R. Co. (1896) 6 App. Div. 196, 39 N. Y. Supp. 986.

Ohio. — Lake Shore & M. S. R. Co. v. Gaffney (1894) 6 Ohio C. D. 94; Cleveland, C. C. & St. L. R. Co. v. Richerson (1899) 10 Ohio C. D. 326; Lake Shore & M. S. R. Co. v. Reynolds (1901) 23 Ohio C. C. 199.

Pennsylvania. — Seifred v. Pennsylvania R. Co. (1903) 206 Pa. 399, 55 Atl. 1061; Pennsylvania R. Co.'s Case

(1906) 213 Pa. 373, 3 L.R.A.(N.S.) 140, 62 Atl. 986, 5 Ann. Cas. 299; Davis v. Pennsylvania R. Co. (1907) 34 Pa. Super. Ct. 388. See also Burns v. Pennsylvania R. Co. (1906) 213 Pa. 280, 62 Atl. 845.

South Carolina. — Callison v. Charleston & W. C. R. Co. (1916) 106 S. C. 123, 90 S. E. 260.

Texas. — Central Texas & N. W. R. Co. v. Gibson (1904) 35 Tex. Civ. App. 66, 79 S. W. 351; Chicago, R. I. & G. R. Co. v. Shockley (1919) — Tex. Civ. App. —, 214 S. W. 716; Baker v. Hodges (1921) — Tex. Civ. App. —, 231 S. W. 844.

Utah. — Christensen v. Oregon Short Line R. Co. (1905) 29 Utah, 192, 80 Pac. 746.

England. — Stubbley v. London & N. W. R. Co. (1865) L. R. 1 Exch. 13, 35 L. J. Exch. N. S. 3, 11 Jur. N. S. 954, 13 L. T. N. S. 376, 14 Week. Rep. 133; Cliff v. Midland R. Co. (1870) L. R. 5 Q. B. 258, 22 L. T. N. S. 382, 18 Week. Rep. 456.

Thus, in the leading case of Grand Trunk R. Co. v. Ives (1892) 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659, it was said: "It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is in a thickly populated portion of a town or city; or that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or that the crossing is a much-traveled one, and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railway or other business; or by reason of some such like cause; and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country."

The absence of a flagman required by an ordinance is, of itself, sufficient to sustain a finding of negligence

(*Summer v. Chicago & N. W. R. Co.* (1913) 122 Minn. 44, 141 N. W. 854), and has been said to be negligence per se (*Yonkers v. St. Louis, I. M. & S. R. Co.* (1914) 182 Mo. App. 558, 168 S. W. 307; *Butler v. Southern R. Co.* (1911) 90 S. C. 273, 73 S. E. 185. And see *Hall v. Georgia Southern & F. R. Co.* (1915) 144 Ga. 145, 86 S. E. 316; *Pennsylvania Co. v. Mosher* (1911) 47 Ind. App. 556, 94 N. E. 1033; *Hines v. Partridge* (1921) — Tenn. —, 231 S. W. 16; *Baker v. Hodges* (1921) — Tex. Civ. App. —, 231 S. W. 844).

H. Failure to maintain flagman as evidence of negligence.

a. Generally.

The failure to keep a flagman at a crossing may be submitted to the jury in connection with the other evidence in a case, for the purpose of enabling them to determine whether, under all the circumstances, the railroad company was guilty of negligence at the time of the accident.

Alabama. — *Louisville & N. R. Co. v. Davener* (1909) 162 Ala. 660, 50 So. 276.

California. — *Antonian v. Southern P. R. Co.* (1909) 9 Cal. App. 718, 100 Pac. 877; *Green v. Southern P. Co.* (1921) — Cal. App. —, 199 Pac. 1059.

Illinois. — *Chicago, B. & Q. R. Co. v. Gunderson* (1898) 174 Ill. 495, 51 N. E. 708; *Lake Shore & M. S. R. Co. v. Foster* (1898) 74 Ill. App. 387; *Illinois C. R. Co. v. Ebert* (1874) 74 Ill. 399.

Indiana. — *Pittsburgh, C. & St. L. R. Co. v. Yundt* (1881) 78 Ind. 373, 41 Am. Rep. 580.

Iowa. — *Hart v. Chicago, R. I. & P. R. Co.* (1881) 56 Iowa, 166, 41 Am. Rep. 93, 7 N. W. 9, 9 N. W. 116; *Tierney v. Chicago & N. W. R. Co.* (1892) 84 Iowa, 641, 51 N. W. 175; *Pratt v. Chicago, R. I. & P. R. Co.* (1899) 107 Iowa, 287, 77 N. W. 1064; *Bradley v. Interurban R. Co.* (1921) — Iowa, —, 183 N. W. 493.

Kansas. — *Kansas P. R. Co. v. Richardson* (1881) 25 Kan. 391.

Michigan. — *Barnum v. Grand Trunk Western R. Co.* (1907) 148 Mich. 370, 111 N. W. 1036.

New Jersey. — *New Jersey R. &*

Transp. Co. v. West (1866) 32 N. J. L. 91, 12 Am. Neg. Cas. 276, affirmed on another point in (1867) 33 N. J. L. 430, 12 Am. Neg. Cas. 281.

New Hampshire. — See *Folsom v. Concord & M. R. Co.* (1896) 68 N. H. 454, 38 Atl. 209.

New York. — *Grippen v. New York C. R. Co.* (1869) 40 N. Y. 34; *Casey v. New York C. & H. R. R. Co.* (1879) 78 N. Y. 518, 12 Am. Neg. Cas. 309; *Houghkirk v. Delaware & H. Canal Co.* (1883) 92 N. Y. 219, 44 Am. Rep. 370; *Brown v. Rome, W. & O. R. Co.* (1888; Sup. Gen. T.) 16 N. Y. S. R. 456, 1 N. Y. Supp. 286; *Reid v. New York, N. H. & H. R. Co.* (1892; Sup. Gen. T.) 44 N. Y. S. R. 688, 17 N. Y. Supp. 801; *Coyle v. Long Island R. Co.* (1884) 33 Hun, 37; *McCallum v. Long Island R. Co.* (1886) 38 Hun, 569; *McSorley v. New York C. & H. R. R. Co.* (1901) 60 App. Div. 267, 70 N. Y. Supp. 10; *Harrington v. Erie R. Co.* (1903) 79 App. Div. 26, 79 N. Y. Supp. 930. See also *McAuliffe v. New York C. & H. R. R. Co.* (1903) 88 App. Div. 356, 84 N. Y. Supp. 607, affirmed without opinion in (1905) 181 N. Y. 537, 73 N. E. 1126.

Pennsylvania. — *Seifred v. Pennsylvania R. Co.* (1903) 206 Pa. 399, 55 Atl. 1061; *Pennsylvania R. Co.'s Case* (1906) 213 Pa. 373, 3 L.R.A.(N.S.) 140, 62 Atl. 986, 5 Ann. Cas. 299.

Utah. — *Christensen v. Oregon Short Line R. Co.* (1905) 29 Utah, 192, 80 Pac. 746.

Vermont. — *Carrow v. Barre R. Co.* (1902) 74 Vt. 176, 52 Atl. 537.

Washington. — *Grant v. Oregon R. & Nav. Co.* (1909) 54 Wash. 678, 25 L.R.A.(N.S.) 925, 103 Pac. 1126.

Wisconsin. — *Hoye v. Chicago & N. W. R. Co.* (1886) 67 Wis. 1, 29 N. W. 646; *Heddles v. Chicago & N. W. R. Co.* (1889) 74 Wis. 239, 42 N. W. 237; *Abbot v. Dwinnell* (1889) 74 Wis. 514, 43 N. W. 496; *Winchell v. Abbot* (1890) 77 Wis. 371, 46 N. W. 665.

"There is no common-law duty on the part of the company to station a flagman or erect gates at a crossing; but the failure of the company to do so is to be considered with other facts in every given case in determining whether the company was negligent."

Pennsylvania R. Co's Case (Pa.) supra.

In *Barnum v. Grand Trunk Western R. Co.* (Mich.) supra, wherein it appeared that an engine was backed over a street crossing, it was held that the trial court properly left to the jury the elements of obstruction of view, the absence of a flagman and gates, the passing of a freight train immediately before the backing of the engine, and the absence of a lookout on the engine. The appellate court said: "It is quite possible that no one of these facts by itself would constitute, or even evidence, negligence, and yet, when all are taken together, a jury be fully justified in finding negligence."

In *Baker v. Hodges* (1921) — Tex. Civ. App. —, 231 S. W. 844, the question of the negligence of the conductor of a freight train in failing to place one of his crew at the crossing as a flagman until a passenger train had gone over the crossing was held to be for the jury, upon evidence that the freight train, which had gone on the passing track to allow the passenger train to pass, obstructed the view, and left a passage of only about 16 feet in width over the crossing, which was quite extensively used by the public.

It has been held that where evidence that there was no flagman at the crossing is admitted over objection, and the trial court instructs the jury that such evidence has been admitted, not as tending to show any neglect on the part of the railroad company in that regard, but solely as bearing on the alleged negligence on the part of the company in running its train, the instruction is not erroneous, since, though "the absence of a flagman was not negligence, yet such absence, in connection with proof of the condition of things in respect to population, travel, and otherwise, in that particular locality, would shed light upon the question of the care and caution on the part of appellant [railroad company] in running its trains that the safety of the public would reasonably require." *Chicago & I. R. Co. v. Lane* (1889) 130 Ill. 116, 22 N. E. 513. That case

was followed in *New York C. & St. L. R. Co. v. Luebeck* (1895) 157 Ill. 595, 41 N. E. 897. See also *Peoria & P. Union R. Co. v. Herman* (1891) 39 Ill. App. 287.

That the failure to maintain a flagman or safety devices at a crossing may, in some circumstances, present a question of negligence for the jury, is recognized in *Dyer v. Maine C. R. Co.* (1921) — Me. —, 113 Atl. 26; *Hume v. Duluth & I. R. Co.* (1921) — Minn. —, 183 N. W. 288, and *Engel v. Minneapolis Street R. Co.* (1921) — Minn. —, 183 N. W. 842, although it was held that the facts and circumstances in relation to the location of the crossing and the dangers attendant upon its use did not justify the submission of the question to the jury in those cases.

"The question to be submitted to the jury is not . . . whether, in their judgment, due care required the railroad company to keep a flagman at the station to give warning; not whether that was a suitable mode of giving notice of the approach of a train; not, 'what signal would be sufficient' to give such notice. But the question is, whether, under the actual circumstances of the case, the company exercised reasonable care and prudence in what they did, and whether its neglect caused the injury complained of." *Grippen v. New York C. R. Co.* (1869) 40 N. Y. 46. See also *Beisiegel v. New York C. R. Co.* (1869) 40 N. Y. 9; *Weber v. New York C. & H. R. R. Co.* (1874) 53 N. Y. 451; *McGrath v. New York C. & H. R. R. Co.* (1876) 63 N. Y. 522; *McCallum v. Long Island R. Co.* (1886) 38 Hun (N. Y.) 569; *Brown v. Rome, W. & O. R. Co.* (1887; Sup. Gen. T.) 16 N. Y. S. R. 456, 1 N. Y. Supp. 286; *Heddles v. Chicago & N. W. R. Co.* (1889) 74 Wis. 239, 42 N. W. 237.

It is erroneous to instruct the jury that it may base a finding of negligence on the absence of a flagman. *McGrath v. New York C. & H. R. R. Co.* (1876) 63 N. Y. 522; *Pakalinsky v. New York C. & H. R. R. Co.* (1880) 82 N. Y. 424; *Houghkirk v. Delaware & H. Canal Co.* (1883) 92 N. Y. 219, 44 Am. Rep. 370; *Coyle v. Long Island*

R. Co. (1884) 33 Hun (N. Y.) 37; Crawford v. Delaware, L. & W. R. Co. (1887) 23 Jones & S. (N. Y.) 50; Winchell v. Abbot (1890) 77 Wis. 371, 46 N. W. 665. See also Evansville & T. H. R. Co. v. Clements (1904) 32 Ind. App. 659, 70 N. E. 554.

The failure to maintain a flagman may have an important bearing on the question of excessive speed. Chicago & E. R. Co. v. Biddinger (1916) 63 Ind. App. 30, 113 N. E. 1027; Folkmire v. Michigan United R. Co. (1909) 157 Mich. 159, 121 N. W. 811, 17 Ann. Cas. 979; Serano v. New York C. & H. R. Co. (1907) 188 N. Y. 156, 117 Am. St. Rep. 833, 80 N. E. 1025, reversing (1906) 114 App. Div. 684, 99 N. Y. Supp. 1103; Schwarz v. Delaware, L. & W. R. Co. (1905) 211 Pa. 625, 61 Atl. 255.

Thus, in Lawler v. Minneapolis, St. P. & S. Ste. M. R. Co. (1915) 129 Minn. 506, 152 N. W. 582, it was said: "It is true that defendant was not required by statute to station a flagman at this crossing, or required to maintain gates or a signal bell, in view of which it is probable that its failure to do so does not constitute actionable negligence. But those warning precautions could have been provided, and their absence is an element proper for consideration in determining the question whether it is negligence to run a train through such a village at a high and dangerous speed, imperiling, as it may, the lives of citizens making use of the street over which the train passes."

But in Burns v. Pennsylvania R. Co. (1906) 213 Pa. 280, 62 Atl. 845, it was held that where the only negligence charged was excessive speed, the evidence of the failure to provide a flagman or gates should be limited to its bearing on the question of excessive speed. See to a similar effect, Baltimore & O. S. W. R. Co. v. Moloney (1906) 30 Ohio C. C. 792. See also Rogers v. West Jersey & Seashore R. Co. (1907) 75 N. J. L. 568, 68 Atl. 148.

b. Dangerous crossing.

1. Generally.

Where a railroad crossing is, for

any reason, particularly dangerous, it is a question for the jury whether the care which a railroad company is required to exercise to avert accidents at crossings imposes on the company the duty to station a flagman at that crossing.

United States.—Grand Trunk R. Co. v. Ives (1892) 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Panama R. Co. v. Pigott (U. S. Adv. Ops. 1920-21, p. 242) 254 U. S. 552, 65 L. ed. —, 41 Sup. Ct. Rep. 199; Lapsley v. Union P. R. Co. (1891) 50 Fed. 172; Chicago & N. W. R. Co. v. Netolicky (1895) 14 C. C. A. 615, 32 U. S. App. 168, 406, 67 Fed. 665; Chicago G. W. R. Co. v. Kowalski (1899) 34 C. C. A. 1, 92 Fed. 310, affirming (1898) 84 Fed. 586; St. Louis & S. F. R. Co. v. Chapman (1905) 71 C. C. A. 523, 140 Fed. 129; Delaware & H. Co. v. Larnard (1908) 88 C. C. A. 462, 161 Fed. 520; Illinois C. R. Co. v. O'Neill (1910) 100 C. C. A. 658, 177 Fed. 328, writ of certiorari denied in (1910) 217 U. S. 604, 54 L. ed. 899, 30 Sup. Ct. Rep. 694; Evans v. Erie R. Co. (1914) 129 C. C. A. 375, 213 Fed. 129.

Alabama.—Atlantic Coast Line R. Co. v. Jones (1918) 16 Ala. App. 447, 78 So. 645, reversed on other grounds in (1918) 202 Ala. 222, 80 So. 44.

Arkansas.—Tiffin v. St. Louis, I. M. & S. R. Co. (1906) 78 Ark. 55, 93 S. W. 564.

California.—Carraher v. San Francisco Bridge Co. (1889) 81 Cal. 98, 22 Pac. 480.

Idaho.—Fleenor v. Oregon Short Line R. Co. (1909) 16 Idaho, 781, 102 Pac. 897.

Illinois.—Chicago & I. R. Co. v. Lane (1889) 130 Ill. 116, 22 N. E. 513; Peoria & P. Union R. Co. v. Herman (1891) 39 Ill. App. 287.

Indiana.—Cleveland, C. C. & St. L. R. Co. v. Starks (1910) 174 Ind. 345, 92 N. E. 54; Pittsburgh, C. C. & St. L. R. Co. v. Tatman (1919) — Ind. App. —, 122 N. E. 357.

Iowa.—Annaker v. Chicago, R. I. & P. R. Co. (1890) 81 Iowa, 267, 47 N. W. 68. And see Barrett v. Chicago, M. & St. P. R. Co. (1920) — Iowa, —, 175 N. W. 950.

Kentucky.—Newport News & M. Valley R. Co. v. Stuart (1896) 99 Ky. 496, 36 S. W. 528; Chesapeake & O. R. Co. v. Gunter (1900) 108 Ky. 362, 56 S. W. 527; Illinois C. R. Co. v. Coley (1905) 121 Ky. 385, 1 L.R.A. (N.S.) 370, 89 S. W. 234; Southern R. Co. v. Winchester (1907) 127 Ky. 144, 105 S. W. 167; Cincinnati, N. O. & T. P. R. Co. v. Champ (1907) 31 Ky. L. Rep. 1054, 104 S. W. 988; Louisville & N. R. Co. v. Lucas (1906) 30 Ky. L. Rep. 359, 98 S. W. 308.

Maine.—Webb v. Portland & K. R. Co. (1869) 57 Me. 117; Lesan v. Maine C. R. Co. (1885) 77 Me. 85.

Massachusetts.—Eaton v. Fitchburg R. Co. (1880) 129 Mass. 364; Boucher v. New York, N. H. & H. R. Co. (1907) 196 Mass. 355, 13 L.R.A. (N.S.) 1177, 82 N. E. 15.

Michigan.—Guggenheim v. Lake Shore & M. S. R. Co. (1887) 66 Mich. 163, 33 N. W. 161; Freeman v. Duluth, S. S. & A. R. Co. (1889) 74 Mich. 86, 3 A.L.R. 594, 41 N. W. 872; Willet v. Michigan C. R. Co. (1897) 114 Mich. 411, 72 N. W. 260; Philip v. Heraty (1904) 135 Mich. 446, 97 N. W. 963, 100 N. W. 186; Barnum v. Grand Trunk Western R. Co. (1907) 148 Mich. 370, 111 N. W. 1036; Folkmire v. Michigan United R. Co. (1909) 157 Mich. 159, 121 N. W. 811, 17 Ann. Cas. 979.

Minnesota.—Bollinger v. St. Paul & D. R. Co. (1887) 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856.

Missouri.—Welsch v. Hannibal & St. J. R. Co. (1880) 72 Mo. 451.

Nebraska.—Union P. R. Co. v. Connolly (1906) 77 Neb. 254, 109 N. W. 368; Kafka v. Union Stock Yards Co. (1910) 87 Neb. 331, 127 N. W. 129.

New Jersey.—Pennsylvania R. Co. v. Matthews (1873) 36 N. J. L. 531.

North Carolina.—Bradley v. Ohio River & C. R. Co. (1900) 126 N. C. 735, 36 S. E. 181.

Ohio.—Cleveland, C. C. & I. R. Co. v. Schneider (1888) 45 Ohio St. 678, 17 N. E. 321, 12 Am. Neg. Cas. 428; Cleveland, C. C. & St. L. R. Co. v. Richerson (1899) 10 Ohio C. D. 326.

Oregon.—Russell v. Oregon R. & Nav. Co. (1909) 54 Or. 128, 102 Pac. 619.

Pennsylvania.—Davis v. Pennsylvania R. Co. (1907) 34 Pa. Super. Ct. 388.

South Carolina.—Callison v. Charleston & W. C. R. Co. (1916) 106 S. C. 123, 90 S. E. 260.

Texas.—Missouri, K. & T. R. Co. v. Magee (1899) 92 Tex. 616, 50 S. W. 1013; Central Texas & N. W. R. Co. v. Gibson (1904) 35 Tex. Civ. App. 66, 79 S. W. 351; International & G. N. R. Co. v. Jones (1901) — Tex. Civ. App. —, 60 S. W. 978; Central Texas & N. W. R. Co. v. Gibson (1904) — Tex. Civ. App. —, 83 S. W. 862; St. Louis Southwestern R. Co. v. Moore (1908) — Tex. Civ. App. —, 107 S. W. 658; Missouri, K. & T. R. Co. v. Bratcher (1909) 54 Tex. Civ. App. 10, 118 S. W. 1091; Missouri, K. & T. R. Co. v. Hurdle (1911) — Tex. Civ. App. —, 142 S. W. 992; Texas Midland R. Co. v. Wiggins (1913) — Tex. Civ. App. —, 161 S. W. 445; Galveston, H. & S. A. R. Co. v. Linney (1914) — Tex. Civ. App. —, 163 S. W. 1035; Baker v. Hodges (1921) — Tex. Civ. App. —, 231 S. W. 844. And see the reported case (TISDALE v. PANHANDLE & S. F. R. Co. ante, 1264).

Wisconsin.—See Kinney v. Crocker (1864) 18 Wis. 74.

England.—Bilbee v. London, B. & S. C. R. Co. (1865) 18 C. B. N. S. 584, 144 Eng. Reprint, 571, 34 L. J. C. P. N. S. 182, 11 Jur. N. S. 745, 13 L. T. N. S. 146, 13 Week. Rep. 779. Compare Cliff v. Midland R. Co. (1870) L. R. 5 Q. B. 258, 22 L. T. N. S. 382, 18 Week. Rep. 456.

"The settled rule in reference to the issue here raised is that, if a person of ordinary prudence would, under all the circumstances, have maintained a flagman or watchman at the crossing where the plaintiff was injured, then the failure on the part of the railroad company to keep such flagman or watchman was negligence." Texas Midland R. Co. v. Wiggins (1913) — Tex. Civ. App. —, 161 S. W. 445.

So, in Illinois C. R. Co. v. O'Neill (1910) 100 C. C. A. 658, 177 Fed. 328 (which has writ of certiorari denied in (1910) 217 U. S. 604, 54 L. ed. 894, 30 Sup. Ct. Rep. 694), it was held to be proper, in an action for death oc-

curing at a city crossing, no description of which appears in the report, to charge as follows: "I charge you that, while that defendant was not required by law to employ a flagman, the defendant was required to exercise all due and reasonable care for the protection of others who had the right to use that crossing consistent with the reasonable running of its trains, and it is for you to determine whether or not the failure to employ a flagman or watchman at that crossing was, or was not, violative of its duty."

In *Pittsburgh, C. C. & St. L. R. Co. v. Tatman* (1919) — Ind. App. —, 122 N. E. 357, the court, after reviewing the cases, said: "From the foregoing authorities it clearly appears that whenever, in the exercise of due care and caution in running its trains, it becomes reasonably necessary, considering the nature, location, and surroundings of a crossing of railroad and public highway or street, that a watchman should be placed at such crossing, to give notice to travelers of approaching danger, and to signal to them when it will be reasonably safe for them to make such crossing, it is the duty of such railroad corporation, independent of any statute or ordinance in that behalf, to place a flagman at such dangerous crossing to perform said duties."

Before it can be said that it was negligence for a railroad company to fail to station a flagman at a crossing, "it should be made to appear that the danger was altogether exceptional; that there was something in the case which rendered ordinary care on the part of the traveler an insufficient protection against injury, and therefore made the assumption of this burden on the part of the railroad company, of the employment of a flagman, a matter of common duty for the safety of others." *Haas v. Grand Rapids & I. R. Co.* (1882) 47 Mich. 401, 11 N. W. 216. See also *Grand Trunk R. Co. v. Ives* (1892) 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; *Baltimore & O. R. Co. v. Adams* (1897) 10 App. D. C. 97; *Freeman v. Duluth, S. S. &*

A. R. Co. (1889) 74 Mich. 86, 3 L.R.A. 594, 41 N. W. 872; *Lake Shore & M. S. R. Co. v. Reynolds* (1901) 23 Ohio C. C. 199; *Central Texas & N. W. R. Co. v. Gibson* (1904) 35 Tex. Civ. App. 66, 79 S. W. 351.

"It should have appeared that there was something to distinguish this from ordinary crossings,—some peculiarity in the character of the ground, which so plainly indicated the necessity of a flagman as to leave no doubt of the obligation of the company to put one there. The company should not have been held liable on this ground, unless for the neglect of a very manifest duty,—one which the company could not have failed to perceive without great carelessness." *Telfer v. Northern R. Co.* (1862) 30 N. J. L. 188.

"Whether such omission is negligence depends upon the circumstances,—such as the frequency with which trains are passing, the amount of travel, the opportunities, or want of opportunities, for travelers' observing the approach of trains, and the like." *Annaker v. Chicago, R. I. & P. R. Co.* (1890) 81 Iowa, 267. See also *Lapsley v. Union P. R. Co.* (1891) 50 Fed. 172.

In an action against a railroad company to recover damages for injuries sustained at a crossing, the defendant cannot question witnesses, whom it introduces and who qualify as experts, as to the custom of railroads in maintaining flagmen at similar crossings, as the need of a flagman depends much on the situation and circumstances of each particular crossing, and these must be known in order to determine whether there ought to be a flagman there. *Bailey v. New Haven & N. Co.* (1871) 107 Mass. 496.

The rule requiring the maintenance of a flagman to signal the approach of trains at peculiarly dangerous crossings has frequent illustration in cases where trains or engines have been backed over crossings. *Illinois C. R. Co. v. Coley* (1905) 121 Ky. 385, 1 L.R.A.(N.S.) 370, 89 S. W. 234; *Maher v. Louisiana R. & Nav. Co.* (1919) 145 La. 733, 82 So. 872;

Barnum v. Grand Trunk W. R. Co. (1907) 148 Mich. 370, 111 N. W. 1036; Union P. R. Co. v. Connolly (1906) 77 Neb. 254, 109 N. W. 368; Norfolk & W. R. Co. v. Holmes (1909) 109 Va. 407, 64 S. E. 46; Norfolk & W. R. Co. v. Munsell (1909) 109 Va. 417, 64 S. E. 50. See also Southern R. Co. v. Shipp (1910) 169 Ala. 327, 53 So. 150; Grant v. Oregon R. & Nav. Co. (1909) 54 Wash. 678, 25 L.R.A.(N.S.) 925, 103 Pac. 1126. And see Delaware & H. Co. v. Larnard (1908) 88 C. C. A. 462, 161 Fed. 520, wherein it appeared that the conditions were complicated by the fact that the safety gate was open.

2. Absence of statute or order requiring flagman.

The mere absence of a statute requiring flagmen at crossings will not, of itself, relieve the railroad company from the duty to maintain one at a crossing where the situation is such as to demand a flagman.

United States.—Illinois C. R. Co. v. O'Neill (1910) 100 C. C. A. 658, 177 Fed. 328, writ of certiorari denied in (1910) 217 U. S. 604, 54 L. ed. 899, 30 Sup. Ct. Rep. 694; Kowalski v. Chicago & G. W. R. Co. (1898) 84 Fed. 586, affirmed on other grounds in (1899) 34 C. C. A. 1, 92 Fed. 310. See also Chesapeake & O. R. Co. v. Dandridge (1909) 96 C. C. A. 178, 171 Fed. 74.

Florida.—Atlantic Coast Line R. Co. v. Wallace (1911) 61 Fla. 93, 54 So. 893.

Idaho.—Fleenor v. Oregon Short Line R. Co. (1909) 16 Idaho, 781, 102 Pac. 897.

Kentucky.—Cincinnati, N. O. & T. P. R. Co. v. Champ (1907) 31 Ky. L. Rep. 1054, 104 S. W. 988.

Minnesota.—Gowan v. McAdoo (1919) 143 Minn. 227, 173 N. W. 440.

Montana.—Riley v. Northern P. R. Co. (1908) 36 Mont. 545, 93 Pac. 948.

Virginia.—Norfolk & W. R. Co. v. Holmes (1909) 109 Va. 407, 64 S. E. 46; Norfolk & W. R. Co. v. Munsell (1909) 109 Va. 417, 64 S. E. 50.

The jury may find that the crossing was so dangerous that the maintenance of a flagman was a reasonably necessary precaution, notwithstanding

the fact that it was not ordered by the authorities. Grand Trunk R. Co. v. Ives (1892) 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Rep. 659; Chicago, B. & Q. R. Co. v. Perkins (1888) 125 Ill. 127, 17 N. E. 1; Chesapeake & O. R. Co. v. Gunter (1900) 108 Ky. 362, 56 S. W. 527; Eaton v. Fitchburg R. Co. (1880) 129 Mass. 364; Shaw v. Boston & W. R. Corp. (1857) 8 Gray (Mass.) 45; Guggenheim v. Lake Shore & M. S. R. Co. (1887) 66 Mich. 150, 33 N. W. 161.

The failure of a railroad commission to exercise its statutory power to require a flagman at a certain crossing does not excuse the failure to provide one if the conditions are such that due care requires such a precaution. Evans v. Erie R. Co. (1914) 129 C. C. A. 375, 213 Fed. 129.

Under a statute making it the duty of a railroad company to station a flagman at any crossing specified by the commissioners of a county as being dangerous, it is not negligence per se for a railroad company to fail to maintain a flagman at a crossing which the county commissioners have not declared in the manner provided by the statute, to be dangerous. Northern C. R. Co. v. Mediary (1897) 86 Md. 168, 37 Atl. 796, 3 Am. Neg. Rep. 411.

But in Sykes v. Maine C. R. Co. (1913) 111 Me. 182, 88 Atl. 478, it was held that where a statute provides that a flagman shall be provided at a crossing on request of the local authorities, it cannot be "said as a matter of law" that it is negligence to have no flagman, in the absence of such a request. See, to the same effect, Conant v. Grand Trunk R. Co. (1915) 114 Me. 92, 95 Atl. 444.

In Canada it seems that where the municipal authorities have omitted to apply to the government to require a watchman at a certain railway crossing, the omission of the railroad company to provide a watchman is not negligence. Quebec & L. St. J. R. Co. v. Girard (1905) Rap. Jud. Quebec 15 B. R. 48. It was held, however, in the case of the Intercolonial Railway, that while the omission of the minis-

ter of railways to order a flagman would save the failure to provide one from being negligence, the lack of a flagman at a dangerous crossing might require greater care in the running of trains and engines over such crossing. *Harris v. Rex* (1904) 9 Can. Exch. 206.

3. Obstruction of view.

Obstructions to view are material on the question of danger, and may render a flagman necessary, as where the railroad track enters a curving cut near the crossing (*Cincinnati, N. O. & T. P. R. Co. v. Champ* (1907) 31 Ky. L. Rep. 1054, 104 S. W. 989), or at the crossing (*Russell v. Oregon R. & Nav. Co.* (1909) 54 Or. 128, 102 Pac. 619), or where the view is obstructed by buildings or fences (*Chicago G. W. R. Co. v. Kowalski* (1899) 92 Fed. 310; *Central Pass. R. Co. v. Kuhn* (1887) 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; *Kafka v. Union Stock Yards Co.* (1910) 87 Neb. 331, 127 N. W. 129; *Norfolk & W. R. Co. v. Holmes* (1909) 109 Va. 407, 64 S. E. 46; *Norfolk & W. R. Co. v. Munsell* (1909) 109 Va. 417, 64 S. E. 50). See also *Barnum v. Grand Trunk Western R. Co.* (1906) 148 Mich. 370, 111 N. W. 1036; *Missouri, K. & T. R. Co. v. Bratcher* (1909) 54 Tex. Civ. App. 10, 118 S. W. 1091; *St. Louis Southwestern R. Co. v. Waits* (1914) — Tex. Civ. App. —, 64 S. W. 870.

In *Panama R. Co. v. Pigott* (1921) (U. S. Adv. Ops. 1920–21, p. 242) 254 U. S. 552, 65 L. ed. —, 41 Sup. Ct. Rep. 199, it was held to be proper to submit to the jury the question whether due care required a flagman at a much-used city crossing, where the view of the track was somewhat obscured by a hedge.

In *Latham v. Staten Island R. Co.* (1907) 150 Fed. 235, it was held that an averment by the plaintiff, who was injured at a crossing, that, by reason of the running of the defendant's locomotive across the public highway at a high rate of speed, and by reason "of the obstruction to view erected and also permitted" by the defendant, the crossing was "dangerous to life and limb," and therefore that it was

the duty of the defendant to keep a flagman at the crossing or take other precautions, did not sufficiently allege the duty to maintain a flagman, as that duty could not be inferred from the high speed alone, and it was not stated that the obstruction cut off the plaintiff's view.

In *Continental Improv. Co. v. Stead* (1877) 95 U. S. 161, 24 L. ed. 403, it was held that the duties of the railroad company and a traveler at a crossing were mutual; and that, where the view was obstructed by a cut, so that plaintiff could not see a special train approaching from the north, the company was liable if due care, in accordance with the peculiar circumstances, was not exercised, it being its duty in such cases, if an unslackened speed was desirable, to keep a watchman on duty, or some other sufficient means of warning travelers.

In *Louisville & N. R. Co. v. Hackman* (1895) 17 Ky. L. Rep. 81, 30 S. W. 407, the defendant was held to be liable for injuries to the plaintiff, received at a city crossing which was unguarded, the view being obstructed by buildings and a high board fence, and the bell and whistle not being sounded. The jury were instructed that, if they believed the obstructions were such that the plaintiff, by exercising ordinary care, could not have seen the train in time to avoid the injury, the defendant's failure to have some person there to give warning was negligence.

In *Newport News & M. Valley Co. v. Stuart* (1896) 99 Ky. 496, 36 S. W. 528, wherein it appeared that the plaintiff's intestate was killed at a crossing near a populous town, the surrounding country being such that the approach of trains was hidden from a traveler's view until within 12 to 15 feet of the track, it was held to be proper to direct that if, under such conditions, the approach of the train could not be heard, the company should be required to have a flagman at that point, or to adopt some other reasonably safe way to give warning.

In *Hubbard v. Boston & A. R. Co.* (1894) 162 Mass. 132, 38 N. E. 366,

a finding of negligence for failure to keep a gateman or flagman at a public crossing was upheld, where a pedestrian was hit by an express train, the approach of which could not be seen from the road because of a rocky ridge, until within 12 to 15 feet of the track, which ridge also tended to cut off the sound of the whistle.

In *Freeman v. Duluth, S. S. & A. R. Co.* (1889) 74 Mich. 86, 3 L.R.A. 594, 41 N. W. 872, it was held that where an engineer approaching a crossing on an upgrade, where a high rate of speed was required, was unable to see a traveler on the highway on one side of the track until the locomotive was within 75 feet of the crossing, and a traveler on that side could not see an approaching locomotive until he was within 40 feet of the track, and the train was within 175 feet of the crossing, if the train could not be so run over the crossing that it could be stopped at once, a flagman ought to be stationed where he could give warning of its approach.

In *Central, T. & N. W. R. Co. v. Gibson* (1904) 35 Tex. Civ. App. 66, 79 S. W. 351, it was shown that the plaintiff was injured at a crossing by a car being shunted across the road without warning. The view on each side of the track was obstructed by trees and buildings, and the street was a busy one. It was held that the evidence warranted an instruction that, if the place was peculiarly dangerous, so that a person using ordinary care would have placed a flagman at the crossing, the company was liable for failure to keep one there.

In *Vallance v. Boston & A. R. Co.* (1893) 55 Fed. 364, the evidence was held to be insufficient to warrant a finding of negligence for the defendant's failure to keep a gateman at a crossing, it appearing that an embankment on one side obstructed the view until a person was within about 30 to 60 feet of the track, but there was no evidence of the volume of travel at such point.

In *Evansville & T. H. R. Co. v. Clements* (1904) 32 Ind. App. 659, 70 N. E. 554, it was held that maintaining buildings near the track, which

obstructed the view of a crossing in a small village, did not render the company liable for injuries at the crossing because of failure to keep a watchman.

In *Haas v. Grand Rapids & I. R. Co.* (1882) 47 Mich. 401, 11 N. W. 216, the fact that, owing to a cut, a train approaching a country crossing was obscured from view except at intervals, when the top of the train could be seen, was held to be insufficient to render the crossing so exceptionally dangerous as to make it negligence for the company not to keep a flagman, in the absence of statute.

It has been held that the fact that brush or woods obstructing the view at a crossing existed when the railroad was located does not of itself suffice to raise a duty of extra precautions. *Danskin v. Pennsylvania R. Co.* (1909) 76 N. J. L. 660, 22 L.R.A. (N.S.) 232, 72 Atl. 32 (later appeals not involving this point are (1910) 79 N. J. L. 526, 76 Atl. 975; 83 N. J. L. 522, 83 Atl. 1006).

So, a temporary obstruction may require a temporary flagman at a place where a permanent flagman is not necessary. *Baker v. Streater* (1920) — Tex. Civ. App. —, 221 S. W. 1039, wherein it was said: "It might be conceded that there was not sufficient evidence to raise the question of the duty of appellant to maintain a regular or permanent flagman at this crossing, but we think there was evidence enough to present the issue as to negligence in failing to place a flagman or other employee at the crossing at the particular time, under the circumstances of this case. This duty may exist independently of statute, and it is ordinarily a question for the jury, dependent upon the circumstances of the particular case, as to whether or not ordinary care would require a railroad company to station a flagman or other employee at the crossing. In our opinion, the situation of this crossing at the time made it a question for the jury to say whether the duty existed, and whether the failure constituted negligence."

The foregoing case was followed in *Chicago, R. I. & G. R. Co. v. Zumwalt*

(1920) — Tex. Civ. App. —, 226 S. W. 1080, wherein it was said: "The facts in the instant case show that a strong wind was blowing from the south and that air was full of dust and dirt. Defendant's passenger train was about ten minutes behind the schedule time. The view of anyone approaching the main track, upon which this train came into Vega, was obstructed by a long freight train on one track, several cars on another, and a number of buildings and structures standing near the right of way. It is true that appellee might have avoided the accident by stopping and alighting from his truck and walking onto the main track, where he could have seen in both directions for several miles; but, in our opinion, the law does not require the use of such extraordinary precaution. He did not know when the passenger train was due. He had reduced the speed of his truck to something like 3 or 4 miles an hour, and had, as far as he was able, looked west for the purpose of ascertaining whether or not a train was approaching from that direction. The force of the wind probably kept the smoke of the passenger train from rising to where it could be seen by him, and, as explained by the engineer Copp, the roaring of the wind, together with the intervening buildings and freight train, prevented appellee from hearing either the bell or whistle. In accordance with the holding in the Baker Case, we think it is not requiring too much of appellant to say that, under such unusual circumstances, it should have provided a flagman at that time and place, at least until after its passenger train had arrived and departed."

"In order to raise the issue, whether a railway company is guilty of negligence in failing to station a watchman at a public crossing, it is not necessary to show that persons about to use the crossing are prevented from discovering the approach of trains by permanent obstructions; as appellant seems to contend. If the location of the crossing and the conditions surrounding it, together with the switching of cars and the opera-

tion of its trains by the company, rendered the same unusually hazardous, then it was a question of fact for the determination of the jury, whether the company, in the exercise of reasonable care, should have stationed a watchman at the crossing." Missouri, K. & T. R. Co. v. Hurdle (1911) — Tex. Civ. App. —, 142 S. W. 992, wherein the court said further: "The population of Winnsboro; the location of the railway in the town; the number of tracks which crossed Walnut street, and the purposes for which they were commonly used; the proximity of the crossing to the switches; the situation of objects near the tracks, which, to some extent, obstructed the view; the location and importance of the crossing with reference to the residences, business district, and schools of the town; the large number of men, women, and children who commonly used the Walnut street crossing, and the frequency of their using it, especially about the time of day when this accident occurred; the number of trains, locomotives, and cars which, every day about that time and at other times, stood and were operated on these tracks near this crossing and over it; the movements which these locomotives and cars had to make on these tracks, near and over the crossing, to do the switching and avoid each other; the probability, illustrated by the circumstances in which Mrs. Hurdle was killed, that one or more of these trains, standing or moving, would prevent a person about to use the crossing from discovering the approach of another locomotive or train intending to pass over the crossing at the same time,—authorized the court to submit the issues whether the operation of appellant's locomotives and cars across Walnut street imposed extraordinary hazards upon persons traveling the street at that place, and whether ordinary care to avoid injuring such persons required appellant to station a watchman at the crossing." See to the same effect Illinois C. R. Co. v. Coley (1905) 121 Ky. 385, 1 L.R.A.(N.S.) 370, 89 S. W. 234.

4. Amount of travel.

The amount of travel on a crossing is a material circumstance in considering the necessity of a flagman.

United States.—*Chicago G. W. R. Co. v. Kowalski* (1899) 34 C. C. A. 1, 92 Fed. 310.

Idaho.—*Fleenor v. Oregon Short Line R. Co.* (1909) 16 Idaho, 781, 102 Pac. 897.

Indiana.—See *Cleveland, C. C. & St. L. R. Co. v. Starks* (1910) 174 Ind. 345, 92 N. E. 54.

Kentucky.—*Illinois C. R. Co. v. Coley* (1905) 121 Ky. 385, 1 L.R.A. (N.S.) 370, 89 S. W. 234; *Southern R. Co. v. Winchester* (1907) 127 Ky. 144, 105 S. W. 167; *Central Pass. R. Co. v. Kuhn* (1888) 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; *Cincinnati, N. O. & T. P. R. Co. v. Champ* (1907) 31 Ky. L. Rep. 1054, 104 S. W. 988.

Michigan.—*Barnum v. Grand Trunk Western R. Co.* (1907) 148 Mich. 370, 111 N. W. 1036.

Nebraska.—*Union P. R. Co. v. Connolly* (1906) 77 Neb. 254, 109 N. W. 368; *Kafka v. Union Stock Yards Co.* (1910) 87 Neb. 331, 127 N. W. 129.

Pennsylvania.—*Davis v. Pennsylvania R. Co.* (1907) 34 Pa. Super. Ct. 388.

Texas.—*St. Louis Southwestern R. Co. v. Moore* (1908) — Tex. Civ. App. —, 107 S. W. 658; *Texas & N. O. R. Co. v. Pearson* (1920) — Tex. Civ. App. —, 224 S. W. 708. And see the reported case (*TISDALE v. PANHANDLE & S. F. R. Co.* ante, 1264).

Virginia.—*Norfolk & W. R. Co. v. Holmes* (1909) 109 Va. 407, 64 S. E. 46; *Norfolk & W. R. Co. v. Munsell* (1909) 109 Va. 417, 64 S. E. 50.

In *Texas & N. O. R. Co. v. Pearson* (Tex.) supra, the court stated the facts as follows: "Without reviewing the testimony on this point, it is sufficient to say that Englewood crossing was, under the strictest construction of the rule, 'much traveled' by the public. It was about 3 miles east of Houston, a city with a population of something like 150,000; practically the only crossing for a distance of 20 miles. About twelve passenger trains and equally as many freight trains passed this point daily. It was

within the yard limits out of Houston. As one approached the crossing from the east, the dirt road ran parallel with the railroad about 50 feet distant. At this point it made a sharp right-angle turn, crossed the track, made another sharp right-angle turn, then ran west toward Houston, parallel with the track, and about 50 feet distant. The right of way was about 100 feet wide; the railroad track being near the center. At the crossing the track is slightly elevated. A large signboard about 10 feet high and 29 feet long had been placed on the east side of the track, just at the turn in the public road, facing those approaching the crossing from the east. At the time of this accident, this board had been there two or three years. The board so obstructed the view of one approaching the crossing from the east that a train coming from the west would be within about 600 feet of the crossing before it could be seen at the time of making the turn to cross the railroad track."

In *Zenner v. Great Northern R. Co.* (1916) 135 Minn. 37, 159 N. W. 1087, it was held that a jury might properly find it to be a negligence not to provide a flagman or some equivalent precaution at the "busiest crossing" in a city of 10,000 inhabitants. That decision was followed in *Gowan v. McAdoo* (1919) 143 Minn. 227, 173 N. W. 440,—a case involving an accident at a crossing in a village of less than 500 inhabitants.

In *Glanville v. Chicago, R. I. & P. R. Co.* (1920) — Iowa, —, 180 N. W. 152, it was held that a jury were not justified in predicating a finding of negligence on the failure to provide a flagman at a crossing in a village of 750 inhabitants, where only about fifteen trains passed daily, and the view of approaching trains was clear.

5. Noise.

The element of noise may be important on the question of danger. Thus, where the noise of a neighboring waterfall and windmill made it difficult to hear trains, and the echoes of the canyon through which they passed often deceived travelers as to

the direction of the sound of the trains or their whistles, and the view was obstructed by a curving cut, it was held that the court properly left to the jury the question whether the railroad was negligent in omitting to keep a watchman at the crossing. *Russell v. Oregon R. & Nav. Co.* (1909) 54 Or. 128, 102 Pac. 619. See also *Sefcik v. Pennsylvania R. Co.* (1909) 223 Pa. 348, 72 Atl. 787, 16 Ann. Cas. 357.

Where a street crossed by a railroad was covered by a viaduct carrying heavy and noisy traffic, the element of noise was held to be an important consideration on the question of the railroad's care for the safety of foot passengers. *Kafka v. Union Stock Yards Co.* (1910) 87 Neb. 331, 127 N. W. 129.

So, in *Texas Midland R. Co. v. Wiggins* (1913) — Tex. Civ. App. —, 161 S. W. 445, the court referred to the noise of adjacent factories as an element tending to sustain a finding that prudence demanded a flagman at a certain crossing.

And in *Chicago G. W. R. Co. v. Kowalski* (1899) 34 C. C. A. 1, 92 Fed. 310, in which it appeared that the view of the track was more or less obstructed by buildings, by a fence and a grapevine growing thereon, and by telegraph and telephone poles, so that a traveler approaching the crossing could not see up the track until he was about 30 feet from the crossing, and then could see only about 100 feet; and it also appeared that there was a factory in the immediate neighborhood of the crossing, containing machinery which made considerable noise when in operation, and that, on the morning of the accident, a gang of men were engaged in macadamizing the street near the crossing, and that, by reason of their work, the street was quite rough, and that the gang of workmen made more or less noise,—it was held that it was within the province of the jury rather than the court to decide whether the exercise of ordinary prudence on the part of the railroad company, and a proper regard for human life, did or did not require it to station a

watchman at the crossing, or to maintain gates thereat.

c. Absence of customary flagman.

Though no rule of law requires railroad companies to keep flagmen at all crossings, the companies, "by their own practice, may make a law for themselves. If they had an established and hitherto uniform practice on the subject, which was notorious, and known to be so, then to withdraw the flagman, when their own conduct had justified the expectation of all who were in the habit of using the highway, that warning by the flag would be given, would be improper, and be a neglect of suitable precautions, unless increased vigilance and care in the management of the train, or the employment of other means, furnished equivalent assurance of safety." *Ernst v. Hudson River R. Co.* (1868) 39 N. Y. 61, 100 Am. Dec. 405. See also *Pittsburgh, C. & St. L. R. Co. v. Yundt* (1881) 78 Ind. 373, 41 Am. Rep. 580; *Midland Valley R. Co. v. Shores* (1913) 40 Okla. 75, 49 L.R.A. (N.S.) 814, 136 Pac. 157.

In *Chicago & A. R. Co. v. Wright* (1905) 120 Ill. App. 218, the court said: "It is . . . the law that, where it assumes the duty, it is immaterial whether or not the duty to maintain a flagman has been imposed by law upon a railroad. If it assumes that duty, it is bound to perform it with due care. . . . By placing and keeping a flagman at the crossing of its own volition, appellant recognized that the crossing was a dangerous one, and that the ordinary precautions required by the statutes were inadequate and insufficient to protect the public."

Where a railroad assumes the duty of maintaining a flagman at a crossing, it is its duty to require him to be at his post and to warn travelers of the approach of trains. *Cross v. Illinois C. R. Co.* (1908) 33 Ky. L. Rep. 432, 110 S. W. 290; *Montgomery v. Missouri P. R. Co.* (1904) 181 Mo. 477, 79 S. W. 930. See also *Sights v. Louisville & N. R. Co.* (1904) 117 Ky. 436, 78 S. W. 172; *Hodgin v. Southern R. Co.* (1906) 143 N. C. 93, 55 S. E. 413, 10 Ann. Cas. 417.

Evidence that a flagman customarily maintained was absent from his post at the time of the accident is competent as bearing on the question whether the railroad company was negligent. *Dolph v. New York, N. H. & H. R. Co.* (1902) 74 Conn. 538, 51 Atl. 525; *Roby v. Kansas City & Southern R. Co.* (1912) 130 La. 880, 41 L.R.A. (N.S.) 355, 58 So. 696; *Battishill v. Humphreys* (1887) 64 Mich. 494, 31 N. W. 894; *McGrath v. New York C. & H. R. R. Co.* (1876) 63 N. Y. 522; *St. John v. New York C. & H. R. R. Co.* (1901) 165 N. Y. 241, 59 N. E. 3; *Waldele v. New York C. & H. R. R. Co.* (1896) 4 App. Div. 549, 38 N. Y. Supp. 1009; *Brender v. New York, O. & W. R. Co.* (1919) 188 App. Div. 314, 177 N. Y. Supp. 469; *Burns v. North Chicago Rolling-Mill Co.* (1886) 65 Wis. 312, 27 N. W. 43. See also *Chicago, St. L. & P. R. Co. v. Hutchinson* (1887) 120 Ill. 587, 11 N. E. 855; *Philadelphia & R. R. Co. v. Killips* (1879) 88 Pa. 405. Compare *McGrath v. New York C. & H. R. R. Co.* (1875) 59 N. Y. 468, 17 Am. Rep. 359.

Thus, in a case wherein it appeared that the plaintiff was injured at night by a train backing over a crossing, and he testified that on occasions pre-

vious to the accident, when he had used the same crossing at night, he had always seen a person there to give warning, it was held that this was proper evidence for the jury on the question of the railroad company's negligence in failing to keep a watchman at the crossing. *St. Louis Southwestern R. Co. v. Boyd* (1909) 56 Tex. Civ. App. 282, 119 S. W. 1154.

It has been held that the mere fact that the flagman is not at his post does not, of itself, justify a finding of negligence. *Pakalinsky v. New York C. & H. R. R. Co.* (1880) 82 N. Y. 424. On the other hand, it has been held that where the crossing is so dangerous that a flagman is necessary, his absence is gross negligence. *St. Louis, V. & T. H. R. Co. v. Dunn* (1875) 78 Ill. 197.

But where it appeared that a railroad company maintained gates at a crossing till 7 or eight o'clock in the evening, but did not use them or the service of the flagman after that hour, it was held that the influence, if any, from that fact alone, was that, after that time, such precautions were unnecessary. *Giacomo v. New York, N. H. & H. R. Co.* (1907) 196 Mass. 192, 81 N. E. 899. W. A. S.

RE ESTATE OF EVAN JONES, Deceased.

MARGARET ADAMS, Appt.,

v.

J. J. SMITH, Admr., etc., of Evan Jones, Deceased, et al.

Iowa Supreme Court — April 7, 1921.

(— Iowa, —, 182 N. W. 227.)

Domicil — change — death en route.

1. One having secured citizenship at his domicil of choice does not, by abandoning such domicil to return to his domicil of origin, lose his former domicil so far as the question of descent of personal property is concerned, if he dies en route before reaching his destination.

[See note on this question beginning on page 1298.]

— number — descent of property.

2. A person can have but one domicil for the purpose of descent of personal property.

[See 9 R. C. L. 539.]

(— Iowa, —, 188 N. W. 227.)

APPEAL by plaintiff from a judgment of the District Court for Wapello County (Vermilion, J.) dismissing a suit brought to declare her sole heir of Evan Jones, deceased, as his illegitimate child. *Reversed.*

Statement by Faville, J.:

Plaintiff claims that she is the illegitimate child of the decedent, Evan Jones, and as such is his sole heir and entitled to his entire estate. The administrator of the estate is made a party, and also the brothers and sisters of the said decedent, who claim that the estate of the decedent descends to them. The court denied the plaintiff the relief sought, and she prosecutes this appeal.

Messrs. Jaques & Jaques and Gillies & Daugherty, for appellant:

The court should have found for plaintiff (claimant) on the issue of her paternity and her having been recognized by deceased as his child.

Blair v. Howell, 68 Iowa, 619, 28 N. W. 199; *Morgan v. Strand*, 133 Iowa, 299, 110 N. W. 596; *Tout v. Woodin*, 157 Iowa, 518, 137 N. W. 1001; *Van Horn v. Van Horn*, 107 Iowa, 247, 45 L.R.A. 93, 77 N. W. 846; *Alston v. Alston*, 114 Iowa, 29, 86 N. W. 55; *Luce v. Tompkins*, 177 Iowa, 168, 158 N. W. 535; *Robertson v. Campbell*, 168 Iowa, 47, 147 N. W. 301; *Trier v. Singmaster*, 184 Iowa, 307, 167 N. W. 538; *McLean v. McLean*, 92 Kan. 326, 140 Pac. 847; *Townsend v. Meneley*, 37 Ind. App. 127, 74 N. E. 274, 76 N. E. 321; *Smith v. Smith*, 105 Kan. 294, 182 Pac. 538.

This cause should have been left on the probate docket, as the probate court has sole jurisdiction of the administration of estates, and the question of deceased's domicil is not a question for a court of equity.

Ashlock v. Sherman, 56 Iowa, 311, 9 N. W. 242; 14 Cyc. 865; *Lewis v. Missouri, K. & T. R. Co.* 82 Kan. 351, 108 Pac. 95; *Cochrane v. Boston*, 4 Allen, 177; *Venable v. Paulding*, 19 Minn. 488, Gil. 422; *Foss v. Foss*, 58 N. H. 283; *Murphy v. Hunt*, 75 Ala. 488; *Moore v. Harvey*, 128 Mass. 219.

Deceased's domicil was in Iowa at the time of his death. Both the intention and the fact must concur to effect a change of domicil.

Re Titterington, 130 Iowa, 356, 106 N. W. 760; *Barhydt v. Cross*, 156 Iowa, 271, 40 L.R.A.(N.S.) 986, 136 N. W. 525, Ann. Cas. 1915C, 792; *Tuttle v. Wood*, 115 Iowa, 507, 88 N. W. 1056;

Mitchell v. United States, 21 Wall. 350, 22 L. ed. 584; *Jacobs, Domicile*, § 125; *Glottfelty v. Brown*, 148 Iowa, 124, 126 N. W. 797; 14 Cyc. 851; *First Nat. Bank v. Balcom*, 35 Conn. 351.

Defendants are estopped from claiming that deceased was domiciled in Wales.

Criley v. Cassel, 144 Iowa, 685, 123 N. W. 348; *Brown v. Lambe*, 119 Iowa, 404, 93 N. W. 352; *Hubbard v. Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 125; *Caldwell v. Morris*, 120 La. 879, 15 L.R.A.(N.S.) 423, 124 Am. St. Rep. 446, 45 So. 927, 14 Ann. Cas. 1043; *Long v. Lockman*, 135 Fed. 197; *Schutte v. Douglass*, 90 Conn. 529, 97 Atl. 906; *Lumley v. Wabash R. Co.* 71 Fed. 21.

Messrs. J. J. Smith and Roberts & Webber, for appellees:

A national character, acquired in a foreign country by residence, changes when the party has left the country *animo non revertandi*, and is on his return to the country where he had his antecedent domicil. The moment a foreign domicil is abandoned, the native domicil is reacquired.

Story, Conf. L. § 47; *Marks v. Marks*, 75 Fed. 321; *Re Robitaille*, 78 Misc. 108, 138 N. Y. Supp. 391; *Catlin v. Gladding*, 4 Mason, 308, Fed. Cas. No. 2,520; *The Venus*, 8 Cranch, 278, 3 L. ed. 561; *The Indian Chief*, 3 C. Rob. 12; *Re Grant*, 83 Misc. 257, 144 N. Y. Supp. 567; *Allen v. Thomason*, 11 Humph. 536, 54 Am. Dec. 55; *Wadsworth v. McCord*, 12 Can. S. C. 466; *Porter v. Buckfield Branch R. Co.* 32 Me. 539; *Udny v. Udny*, L. R. 1 H. L. Sc. App. Cas. 441, 9 Eng. Rul. Cas. 782, 1 Eng. Rul. Cas. 223; *White v. Brown*, 1 Wall. Jr. 217, Fed. Cas. No. 17,538.

The abandonment of an acquired domicil may be proved without showing that a new domicil has been acquired.

Ludlow v. Szold, 90 Iowa, 175, 57 N. W. 676; *Re Murray*, 145 Iowa, 368, 124 N. W. 193; *Olson's Will*, 63 Iowa, 145, 18 N. W. 854; *Botna Valley State Bank v. Silver City Bank*, 87 Iowa, 479, 54 N. W. 472; *Nugent v. Bates*, 51 Iowa, 77, 33 Am. Rep. 117, 50 N. W. 76.

The personal estate of deceased must be distributed according to the law of his domicil.

Re Titterington, 130 Iowa, 356, 106 N. W. 761; 14 Cyc. 21; 12 C. J. 476; Moultrie v. Hunt, 23 N. Y. 394; Cross v. United States Trust Co. 131 N. Y. 330, 15 L.R.A. 606, 27 Am. St. Rep. 597, 30 N. E. 125; Colvin v. Jones, 194 Mich. 670, 161 N. W. 849; Graham v. Public Administrator, 4 Bradf. 127; Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 625.

Defendants are not estopped from showing the true domicil of the deceased. Plaintiff did not alter her position to her prejudice by reason of the allegation contained in the petition for the appointment of the administrator.

Brown v. Lambe, 119 Iowa, 404, 93 N. W. 486; Re Grant, 83 Misc. 257, 144 N. Y. Supp. 567; Thormann v. Frame, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446; Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224; Garretson v. Equitable Mut. Life & Endowment Asso. 93 Iowa, 402, 61 N. W. 952; Beechley v. Beechley, 134 Iowa, 75, 9 L.R.A.(N.S.) 955, 120 Am. St. Rep. 412, 108 N. W. 762, 13 Ann. Cas. 101; Wishard v. McNeill, 85 Iowa, 474, 52 N. W. 484; Durlam v. Steele, 88 Iowa, 498, 55 N. W. 509.

Faville, J., delivered the opinion of the court:

The decedent, Evan Jones, was a native of Wales. When he was about thirty-three years of age, he came to America as an immigrant. This was in 1883. He came over on the same ship with the wife and children of one David P. Jones. At that time, David P. Jones was living in Oskaloosa, Iowa, to which place the decedent went. After the death of David P. Jones, the decedent married his widow, who subsequently died in January, 1914. The decedent, Evan Jones, was a coal miner, an industrious, hard-working, thrifty Welshman, who accumulated a considerable amount of property. In 1896, he was naturalized in the district court of Wapello county, Iowa, and thereafter voted at elections. The reason for his leaving Wales at the time he did was because of bastardy proceedings which had been instituted against him by the mother of the appellant. In 1915, the decedent disposed of his property, which

then consisted of two farms and some city real estate. He was advised by his banker to leave the greater part of his money in a bank at Ottumwa until he got to Wales, and did so deposit it. He purchased a draft for about \$2,000, and left some \$20,000 on deposit in the bank, and also a note and mortgage for collection, and left with the banker the address of a sister in Wales, stating that he intended to live with said sister. He sailed from New York on May 1, 1915, on the ill-fated Lusitania, and was drowned when the boat was sunk by a German submarine on May 7, 1915. The Lusitania was a vessel of the Cunard line, flying the British flag. Thereafter the brothers and sisters of the decedent secured the appointment of an administrator in Wapello county, Iowa. Various proceedings were had, which finally resulted in the trial of the issues in this cause.

I. The question for our determination in this case is whether or not, under the facts stated, the domicil of the decedent at the time of his death was in Wapello county, Iowa, or in Wales. If his domicil at the time that the Lusitania sank was legally in Wales, then it is conceded by all the parties that, under the laws of the British Empire, the appellant, as his illegitimate child, would have no interest in his estate. On the other hand, if the decedent at said time legally had his domicil in Wapello county, Iowa, then the property passed to the appellant as his sole heir under the laws of this state.

For the purposes of the present discussion, it may be conceded that the evidence is sufficient to justify a finding that the appellant was the child of the decedent, and had been so recognized and declared to such an extent as to satisfy the requirements of Code, § 3385.

It may also be conceded, for present purposes, that it is established by the evidence in the case that the decedent had, by acts and declarations, evinced a purpose to leave his

home in Iowa permanently, and to return to his native country, Wales, for the purpose of living there the remainder of his life.

The question of what constitutes domicile has often been passed upon by the courts, but the cases are so unlike in their facts that precedents to aid us in the determination of this precise question are difficult to find.

In *White v. Brown*, 1 Wall. Jr. 217, Fed. Cas. No. 17,538, Mr. Justice Grier well said: "There are few subjects presented to courts for their decision which are surrounded with so many practical difficulties as questions of domicil."

The words "domicil" and "residence" are not always synonymous at law nor are they convertible terms. *Ludlow v. Szold*, 90 Iowa, 175, 57 N. W. 676; *Mann v. Taylor*, 78 Iowa, 355, 43 N. W. 220; *Fitzgerald v. Arel*, 63 Iowa, 104, 50 Am. Rep. 733, 16 N. W. 712, 18 N. W. 713; *Cohen v. Daniels*, 25 Iowa, 88.

A person may have his residence in one place, while his domicil is in another. *Re Titterington*, 130 Iowa, 356, 106 N. W. 761; *Fitzgerald v. Arel*, 63 Iowa, 104, 50 Am. Rep. 733, 16 N. W. 712, 18 N. W. 713; *Cohen v. Daniels*, 25 Iowa, 88; *Love v. Cherry*, 24 Iowa, 204.

A person may have more than one residence at the same time, but can have only one domicil; at least, for purposes of succession. *Farrow v. Farrow*, 162 Iowa, 87, 143 N. W. 856; *Savage v. Scott*, 45 Iowa, 130; *Love v. Cherry*, *supra*.

It is well settled that every person, under all circumstances and conditions, must have a domicil somewhere. *Barhydt v. Cross*, 156 Iowa, 271, 40 L.R.A. (N.S.) 986, 136 N. W. 525, Ann. Cas. 1915C, 792; *Re Titterington*, *supra*.

There are different kinds of domicils recognized by the law. It is generally held that the subject may be divided into three general classes: (1) Domicil of origin. (2) Domicil of choice. (3) Domicil by operation of law. *Smith v. Croom*, 7 Fla. 81; *Louisville & N. R. Co. v.*

Kimbrough, 115 Ky. 512, 74 S. W. 229.

The "domicil of origin" of every person is the domicil of his parents at the time of his birth. In *Prenstiss v. Barton*, 1 Brock. 389, Fed. Cas. No. 11,384, Circuit Justice Marshall said: "By the general laws of the civilized world, the domicil of the parents at the time of birth, or what is termed 'the domicil of origin,' constitutes the domicil of an infant, and continues until abandoned, or until the acquisition of a new domicil in a different place."

The "domicil of choice" is the place which a person has elected and chosen for himself to displace his previous domicil. *Warren v. Warren*, 73 Fla. 764, L.R.A. 1917E, 490, 75 So. 35; *Boyd v. Com.* 149 Ky. 764, 42 L.R.A. (N.S.) 580, 149 S. W. 1022, Ann. Cas. 1914B, 481; *Mather v. Cunningham*, 105 Me. 326, 29 L.R.A. (N.S.) 761, 74 Atl. 809, 18 Ann. Cas. 692; *Duke v. Duke*, 70 N. J. Eq. 135, 62 Atl. 466; *Price v. Price*, 156 Pa. 617, 27 Atl. 291.

"Domicil by operation of law" is that domicil which the law attributes to a person, independent of his own intention or action of residence. This results generally from the domestic relations of husband and wife, or parent and child. *Hindorff v. Sovereign Camp*, W. W. 150 Iowa, 185, 129 N. W. 831; *Re Benton*, 92 Iowa, 202, 54 Am. St. Rep. 546, 60 N. W. 614; *Jenkins v. Clark*, 71 Iowa, 552, 32 N. W. 504.

In the instant case, we have to deal only with the first two kinds of domicil; that is, domicil of origin and domicil of choice. Applying these general definitions to the facts of this case, the domicil of origin of Evan Jones was in Wales, where he was born, and the domicil of choice was Wapello county, Iowa. The question that concerns us is: Where was his domicil, for the purpose of descent of personal property, on the 7th day of May, 1915, when the *Lusitania* was sunk off the western coast of the British Isles?

The matter of the determination of any person's domicile arises in different ways, and is construed by the courts for a variety of different purposes. Apparent inconsistencies occur in the authorities because of the failure to clearly preserve the distinctions to be made by reason of the purpose for which the determination of one's domicile is being legally ascertained. The question frequently arises where it becomes important to determine the domicile for the purpose of taxation, or for the purpose of attachment, or for the levy of execution, or for the exercising of the privilege of voting, or in determining the Statute of Limitations, or in ascertaining liability for the support of paupers, and perhaps other purposes. Definitions given in regard to the method of ascertaining the domicile for one purpose are not always applicable in ascertaining the domicile for another purpose. Some of the courts have made the broad assertion that a person can have only one domicile. We appear to have so declared in *Farrow v. Farrow*, 162 Iowa, 87, 143 N. W. 856; *Savage v. Scott*, 45 Iowa, 130; and *Love v. Cherry*, 24 Iowa, 204. While other courts have declared that a person may have a domicile at one place for one purpose, and at another place for another purpose. *Smith v. Croom*, 7 Fla. 81; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517. Confusion has frequently arisen because of a failure to distinguish between domicile and residence.

Generally speaking, it is an established rule that a person can have but one domicile at the same time for the same purpose. In any event, it is the uniform holding that a person can have only one domicile for the purpose of descent of personal property. *White v. Brown*, *supra*; *Merrill v. Morrisett*, 76 Ala. 433; *Mather v. Cunningham*, 105 Me. 326, 29 L.R.A. (N.S.) 761, 74 Atl. 809, 18 Ann. Cas. 692; *Greene v. Greene*, 11 Pick. 410; *Isam v. Gib-*

bons, 1 Bradf. 69; *Somerville v. Somerville*, 5 Ves. Jr. 750, 31 Eng. Reprint, 839, 5 Revised Rep. 155, 9 Eng. Rul. Cas. 730; *Smith v. Croom*, *supra*.

In the instant case, we are concerned only in the matter of the domicile of the decedent, Evan Jones, as it affects the question of the descent of his personal estate. An examination of the record satisfies us that the evidence is sufficient to amply justify a finding that the said decedent disposed of his property in Wapello county, Iowa, and converted the same into money or securities, and left Wapello county, Iowa, with the present intention of abandoning his domicile there, and without any present intention of returning thereto, and also with the express intention of returning to his native country, Wales, to make his permanent home there. Or, in the language of the books, decedent's intention was to abandon his domicile of choice and return to his domicile of origin. He died in itinere. It is needless for us to cite the vast number of cases announcing the general rule that the acquisition of a new domicile must have been completely perfected, and hence there must have been a concurrence both of the fact of removal and the intent to remain in the new locality, before the former domicile can be considered lost. The cases from many of the states are collected in 19 C. J. p. 423.

At the outset, it is obvious that, under the circumstances of the instant case, the domicile of the decedent at the time of his death must in any event be determined by the assumption of a fiction. All will agree that the decedent did not have a domicile on the *Lusitania*. In order to determine his domicile, then, one of two fictions must be assumed; either that he retained the Iowa domicile until one was acquired in Wales, or that he acquired a domicile in Wales the instant he abandoned the Iowa domicile and started for Wales, with the intent and purpose of residing there. Which one of these fictions shall we assume for

Domicil—
number—
descent of
property.

the purpose of determining the disposition of his personal property? This question first came before the courts at an early day, long before our present easy and extensive methods of transportation, and at a time before the present ready movement from one country to another. At that time men left Europe for the Western Continent, or elsewhere, largely for purposes of adventure, or in search of an opportunity for the promotion of commerce. It was at a time before the invention of the steamboat and before the era of the oceanic cable. Men left their native land knowing that they would be gone for long periods of time, and that means of communication with their home land were infrequent, difficult, and slow. The traditions of their native country were strong with these men. In the event of death, while absent, they desired that their property should descend in accordance with the laws of the land of their birth. Many such men were adventurers who had the purpose and intent to eventually return to the land of their nativity. There was a large degree of patriotic sentiment connected with the first announcement of the rules of law in the matter of the estates of such men. The idea found expression in the phrase, "Once an Englishman, always an Englishman," and in the kindred declaration, "A man must intend to become a Frenchman instead of an Englishman." *Moorhouse v. Lord*, 10 H. L. Cas. 272, 11 Eng. Reprint, 1030, 1 New Reports, 555, 32 L. J. Ch. N. S. 295, 9 Jur. N. S. 677, 8 L. T. N. S. 212, 11 Week. Rep. 637. This popular and patriotic idea was expressed in the familiar lines of Sir Walter Scott:

"Breathes there the man, with soul so dead,
Who never to himself hath said,
"This is my own, my native land;"
Whose heart hath ne'er within him
burned,
As home his footsteps he hath turned,
From wand'ring on a foreign
strand?"

Many men, especially of English

birth, became traders in the American colonies or in India. The Englishman of that day was a firm believer in the law of primogeniture, and desired that his estate should descend according to the established law of his native land.

These reasons, which were, to an extent at least, historical and patriotic, found early expression in the decisions of the courts on the question of domicil. The general rule was declared to be that a domicil is retained until a new domicil has been actually acquired. At an early time, however, an exception was ingrafted upon this rule to the effect that, for the purposes of succession, a party abandoning a domicil of choice, with the intent to return to his domicil of origin, regains the latter the instant that the former domicil is abandoned.

It will be observed that this exception involves two elements: First, that the party is seeking to return from a domicil of choice to a domicil of origin; and second, that the question arises in a case involving succession to an estate. It is apparent that this exception to the general rule grew out of the conditions that we have before suggested, and was a recognition of the desire on the part of the English trader in distant lands to have his estate administered according to the laws of the land of his birth.

One of the earliest cases in the English courts upon this question was *Somerville v. Somerville*, 5 Ves. Jr. 750, 31 Eng. Reprint, 839, 5 Revised Rep. 155, 9 Eng. Rul. Cas. 730, decided in 1801. In that case Lord Somerville had a large estate of lands in Scotland. He also maintained a home in London, and spent a large portion of his time in each place. He had been educated in England and lived according to the fashion and style of an Englishman. He had declared that he considered himself an Englishman, and his only reason for spending any portion of his time on his estates in Scotland was because of a promise to his father that he would do so, and accordingly he spent about half

of his time in each country. He died at his London residence in 1796. The question arose as to the descent of his personal estate. The master of the rolls said: "The succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time." He further said: "Though a man may have two domicils for some purposes, he can have only one for purposes of succession."

Special stress was laid on the fact that the domicil of origin of the decedent was in Scotland, and the court held that the decedent "never ceased to be a Scotchman."

In the same year, 1801, the case of *The Indian Chief*, 3 C. Rob. 12, was decided by the admiralty court. In that case a ship and cargo were seized in the harbor of Cowes. The owner had been born in America, but had been living for some years in England, carrying on trade, and had also resided in France. Speaking of him, the court said: "He came, however, to this country in 1783, and engaged in trade, and has resided in this country until 1797. During that time he was undoubtedly to be considered as an English trader, for no position is more established than this: that, if a person goes into another country and engages in trade and resides there, he is by the law of nations to be considered as a merchant of that country. . . . It must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character and is to be considered as an American. The character that is gained by residence ceases by nonresidence. It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion bona fide to quit the country *sine animo revertendi*."

The reason for the rule, as it is announced by text-writers and courts, is well set forth in the foregoing case. The thought is evident that one who becomes domiciled in a foreign country for purposes of trade, and who abandons such domicil for the purpose of returning to his native land, reinvests himself at once with his domicil of origin.

A little later, in 1812, the question came before the United States circuit court in the case of *The Ann Green*, 1 Gall. 274, Fed. Cas. No. 414. Mr. Justice Story rendered the opinion in the case, and therein declared: "I accede to the doctrine that fewer circumstances are necessary to constitute domicil in case of native subjects than of foreigners; and that, as native allegiance easily reverts, so the presumption against the party is much heightened by the shipment being made from a port of his native country."

It is significant, in view of the pronouncements later made by this eminent jurist in his work on the "Conflict of Laws," that at this time he recognized the rule "native allegiance easily reverts."

In 1814, the question came before the Supreme Court of the United States in the case of *The Venus*, 8 Cranch, 253, 3 L. ed. 553. Mr. Justice Washington, speaking for the court, cited with approval the case of *The Indian Chief*, supra, and said: "Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he had thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, bona fide, and without an intention of returning."

In *Prentiss v. Barton*, 1 Brock. 389, Fed. Cas. No. 11,384, decided in 1819, it is said, referring to domicil: "As it gives political rights, which are not lost by a mere change of domicil, it is recovered by any manifestation of a disposi-

tion to resume the native character; perhaps, by a surrender of a new domicile. In fact, it may be considered rather as suspended, than annihilated."

It is apparent that the court gave consideration to the idea that "political rights" entered into a consideration of the matter, at least so far as furnishing a reason for the recognition of the rule that the domicile of origin easily reverts. It is the same idea as expressed by the English courts in establishing the rule of "native allegiance."

In 1829, the question was again before the English court of chancery, under circumstances more nearly like those of the instant case, in the case of *Munroe v. Douglas*, 5 Madd. Ch. 379, 56 Eng. Reprint, 940. In that case it appeared that Munroe was born in Scotland and went to Calcutta, India, to practise his profession as a surgeon. He married and lived in India for some time. He left India in 1815, declaring his purpose to spend the remainder of his days in Scotland. On the way, he stopped in England and took a house, and, on account of ill health, was unsettled and undetermined whether to continue to reside in England, or to spend the remainder of his days in Scotland, or to go to France. He went to Scotland on a visit, and while there died. The question in the case was where the decedent was domiciled at the time of his death. The vice chancellor held that a domicile cannot be lost by mere abandonment, and that it remains until a subsequent domicile is acquired, "unless the party die in itinere toward an intended domicile." Under the facts of the case, the court held that the decedent had formed no settled purpose to settle in Scotland at the time of his death, and that therefore his domicile was in India. The court said: "A domicile in India is in legal effect a domicile in the province of Canterbury, and the law of England, and not the law of Scotland, is, therefore, to be applied to his personal property."

In 1834, Mr. Justice Story wrote the first edition of his great work on the "Conflict of Laws." In it he stated (§ 47): "If a man has acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is reacquired even while he is on his way in itinere, for it reverts from the moment the other is given up."

In § 48, he said: "A national character acquired in a foreign country by residence changes when the party has left the country *animo non revertendi*, and is on his return to the country where he had his antecedent domicile. And especially, if he be in itinere to his native country with that intent, his native domicile revives while he is yet in transitu, for the native domicile easily reverts. The moment the foreign domicile is abandoned the native domicile is reacquired."

This pronouncement of Mr. Justice Story has been frequently referred to by the courts, both English and American, in discussing this question, and has been the basis for decisions, particularly in the English courts.

In the case of *The Goods of Bianchi*, 3 Swabey & T. 16, decided in 1862, the English court of probate said: "The deceased was originally domiciled in Genoa; he then became domiciled in the Brazils; and there is no doubt of the fact that he died in itinere as he was returning to Genoa to resume his permanent residence there. Then it may be said that, as soon as he had finally abandoned the acquired domicile by setting off on his journey to return to his domicile of origin, the latter revived."

From the meager statement in this case, it is apparent that the decedent was a trader, and was domiciled in Brazil solely for the purposes of trade.

The leading and most frequently cited English case is that of *Udny v. Udny*, L. R. 1 H. L. Sc. App. Cas. 441, 9 Eng. Rul. Cas. 782. In this case the question arose as to the

domicil of one Udny, who was born in Scotland and who afterward resided in England and in France. The lord chancellor declared: "But the domicil of origin is a matter wholly irrespective of any animus on the part of its subject. He acquires a certain status civilis, . . . which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicil being simply determined by that of his father."

It is further said: "It seems reasonable to say that if the choice of a new abode, and actual settlement there, constitute a change of the original domicil, then the exact converse of such a procedure, viz., the intention to abandon the new domicil, and an actual abandonment of it, ought to be equally effective to destroy the new domicil. . . . Why should not the domicil of origin, cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice."

Lord Chelmsford quotes with approval from Story, in his *Conflict of Laws*, and says: "The meaning of Story, therefore, clearly is, that the abandonment of a subsequently acquired domicil *ipso facto* restores the domicil of origin. And this doctrine appears to be founded upon principle, if not upon direct authority." And further states: "The domicil of origin always remains, as it were, in reserve, to be resorted to in case no other domicil is found to exist."

Lord Westbury, in discussing the case, also said: "When another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the

principles on which it is by law created and ascribed, to suppose that it is capable of being, by the act of the party, entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice. . . . Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and at the same time his domicil of origin revived."

The whole theory of this case, and the discussion throughout, illustrate the basis of the English rule that the domicil of origin is always retained, and that the acquisition of a domicil of choice constitutes a mere suspension, or holding in abeyance, of the domicil of origin.

In *Rex v. Foxwell*, L. R. 3 Ch. Div. 518, the court said: "A man . . . may abandon his domicil of choice without acquiring in strictness any new domicil, because his domicil of origin reverts."

In *White v. Brown*, 1 Wall. Jr. 217, Fed. Cas. No. 17,538, the court submitted the question of domicil to the jury, and stated: "The domicil of origin easily reverts, and . . . it requires fewer circumstances to constitute domicil in a *native subject or citizen* than to impress the *national character* on one who is originally of another character. The acquired domicil, however, must be finally abandoned before the domicil of origin can revert." (Italics are ours.)

The foregoing authorities are sufficient to indicate the origin of the exception to the general rule, and to illustrate its application by the courts. As early as 1868, the supreme court of the state of Connecticut made a clear and important distinction in the application of this rule in the case of *First Nat. Bank v. Balcom*, 35 Conn. 351. In it the court said: "But the prin-

ciple that a native domicil easily reverts applies only to cases where a native citizen of one country goes to reside in a foreign country, and there acquires a domicil by residence, *without renouncing his original allegiance*. In such cases his native domicil reverts as soon as he begins to execute an intention of returning; that is, from the time that he puts himself in motion bona fide to quit the country sine animo revertendi, because the foreign domicil was merely adventitious and de facto, and prevails only while actual and complete. . . .

This principle has reference to a national domicil in its enlarged sense, and grows out of native allegiance or citizenship. It has no application when the question is between a native and acquired domicil, where both are under the same national jurisdiction." (Italics are ours.)

The supreme court of Connecticut, in this case, evidently fully appreciated the source and origin of the rule as laid down by Story, and as announced by the English courts and the early Federal decisions. The basis of the rule was the fact of the native allegiance, which was assumed to revert the instant the foreign domicil had been abandoned.

It is true that the question of domicil is not to be determined by the question of citizenship, but when we are assuming the fiction that the domicil of origin reverts immediately upon the abandonment of a domicil of choice, and assume that fiction because of native allegiance to the land of one's birth, then the basis for the fiction and assumption is destroyed when it appears that the party has renounced his native allegiance and has secured citizenship in the land of his domicil of choice. The reason for the rule having failed, the rule fails also.

In *Plant v. Harrison*, 36 Misc. 649, 74 N. Y. Supp. 411, it is said: "While a domicil of origin reverts easily upon relinquishment of a domicil of choice, the American decisions have not gone the length of

the English authorities in the application of this principle. The English rule that the domicil of origin reverts at once upon the abandonment of the domicil of choice . . . has not been followed in this country, where the rule seems to be that a domicil, once acquired, continues not only until it is abandoned, but until another is acquired."

It has been held that the English rule only applies when the question arises where the domicil of origin is under one general government and the domicil of choice under another, and that it has no application where the native and the acquired domicil are under the same national jurisdiction. *First Nat. Bank v. Balcom*, supra. On the other hand, it has also been held that the rule applies to changes from one country to another, or from one state of the Union to another. *Denny v. Sumner County*, 134 Tenn. 468, L.R.A.1917A, 285, 184 S. W. 14.

Appellants cite *Re Robitaille*, 78 Misc. 108, 138 N. Y. Supp. 391. The party was an English subject, born in Canada, who removed to New York and there engaged in business. He became naturalized, and afterward closed out his business and declared his intention to return to the place of his birth to live the remainder of his life. Before doing so, however, he became insane, and a guardian was appointed for him who carried out his original wishes, and he was taken by the guardian to his destination in Canada, as he had intended, and there died. The question discussed in the case was largely whether, after having "put himself in motion to resume his domicil of origin," and having become incompetent, his guardian could carry out his intention, and acquire the intended domicil for him by actually transporting him there. The court held that a court of competent jurisdiction could authorize the guardian to change the domicil of an incompetent in a proper case, and held, under all of the facts, that the de-

cedent was domiciled in Canada at the time of his death.

In *Rudolph v. Wetherington*, 180 Ky. 271, 202 S. W. 652, a resident of Arkansas, having formed and expressed an intention to remove to and become a citizen of Ballard county, Kentucky, in furtherance of that intention, left her home in Arkansas, with her belongings, on or about November 20, 1916, arriving in the city of Paducah, Kentucky, November 24, where she died November 26, 1916, without ever having been in Ballard county, Kentucky. The question in the case was whether or not the residence of the decedent was in Ballard county at the time of her death. Following previous decisions that involved a question of taxation, the court of appeals of Kentucky held that at the time of the death of said decedent she was not yet a resident of Ballard county, Kentucky, and that the court of that county was without jurisdiction to grant administration upon her estate.

In *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61, a question of descent was involved. Cordelia D. Cooper was a resident of Bloomington, Illinois, when she married Edward T. Cooper, who was a resident of Cincinnati, Ohio. After the marriage, the parties acquired a residence in St. Louis, Missouri, which they afterward abandoned, intending to ultimately become residents of either Bloomington or Salem, in the state of Illinois; but before they had determined which place, or had adopted any home at either, Mrs. Cooper died. The question raised was as to her domicile at the time of her death. The court held that the proof failed to show with certainty a fixed and unalterable intention to make Illinois presently the home of the decedent, and held: "The domicile in Missouri remained the domicile of the Coopers, not only until it was abandoned, but also until a new domicile was acquired by actual residence within another jurisdiction, coupled with the intention of mak-

ing the last-acquired residence a permanent home."

In *Burnett v. Meadows*, 7 B. Mon. 277, 46 Am. Dec. 517, a resident of Virginia, contemplating a removal to Kentucky, died en route before he got out of the state of Virginia, but after he had, with his family and his property, commenced his intended journey. After his death, the family continued their journey, bringing their property with them, and settled in Kentucky. No part of the property was actually in Kentucky at the time of his death. The court said: "And had he been domiciled in the state of Virginia at the time of his death, and his property afterwards been brought into this state, no administration on it could have been granted here, as was decided by this court in the case of *Embry v. Millar*, 1 A. K. Marsh. 300, 10 Am. Dec. 732. Inasmuch, however, as this property was in transitu when he died, and afterwards reached its destination, and as many inconveniences would necessarily result from the absence of power in our county courts to regulate its administration, it should be regarded as being, at the time of his death, constructively in this state, under the circumstances here presented—solely however, for the purpose of enabling a county court in this state to grant an administration thereon."

In *Denny v. Sumner County*, supra, the supreme court of Tennessee said: "Reference may be made, parenthetically, to an exception recognized in this state to the rule that a domicile once fixed remains until another is actually acquired, arising in event of a change from a domicile of choice to that of origin. Then, if the removal be with the intention to resume his domicile of origin, the latter is re-acquired before it is reached, or even while the person is in itinere, 'for it reverts from the moment the other is given up.' *Allen v. Thomason*, 11 Humph. 536, 54 Am. Dec. 55, citing *Story on Conflict of Laws*. The doctrine touching this

exception is confined, however, to changes from *one country to another, or from one state of the Union to another.*" (Italics are ours.)

In *Graham v. Public Administrator*, 4 Bradf. 127, a woman was en route from Scotland, her domicil of origin, to Canada, and died on the way in a hospital in New York. It was held that the domicil of origin was retained until a new domicil was actually acquired.

The foregoing cases illustrate the various holdings of the authorities.

Perhaps no better case could be found than the instant case to illustrate the effect of the adoption of the exception to the general rule. The decedent in this case had not only acquired a domicil in the United States, but had become a citizen of this country. Under the general rule, if he had abandoned his domicil in Iowa with the intention of acquiring a domicil in Norway or in France, and had been on the ill-fated Lusitania, it would have been universally held that the domicil in Iowa was still retained. No one will dispute that proposition. But because, although a citizen of the United States and residing here for many years, he was en route to Wales, the land of his birth, instead of to some other country, it is contended that he acquired a domicil in that country instantly upon abandoning his domicil in Iowa. If some native of Iowa had done exactly what the decedent did, had disposed of his property with the avowed and declared intention of abandoning his domicil in Iowa and of securing one in Wales, and had accompanied Jones on his trip, and had gone down on the same boat, his estate would have been administered according to the laws of the state of Iowa, because he had not yet acquired a new domicil anywhere else while Jones's estate, under the theory of the English rule, would be administered according to the laws of Wales, because he happened to have been born in that country. If such a rule is to be applied as between different states of

the Union, with our freedom of movement between the various states, it would lead to very startling results. The laws of the states differ greatly in regard to descent. There is no logical reason why the rule should not be applied between different states of the Union as readily as between different governments. Under such a doctrine, if applied between the various states of the Union, if a man had been born in the state of New York, and at an early age had removed to Iowa, and had lived in this commonwealth for many years, had voted here and had become familiar with our laws, and should finally decide to remove to New York to live, and should die in itinere, he would be regarded as domiciled in New York. If, however, under identical circumstances, he intended to remove to Massachusetts, he would be regarded as domiciled in Iowa.

What good reason is there why "native allegiance" to the state of New York, where he was born, should be the determining factor which would prevail in such instance? One reason that is persuasive why such a rule should not be adopted is that a person who in these days abandons his domicil of origin, and acquires a legal domicil in another jurisdiction, presumably, at least, is familiar with the laws of the jurisdiction of the latter domicil; and there is, to say the least, as strong a presumption that he desires his estate to be administered according to the laws of that jurisdiction as of the jurisdiction of the domicil of origin. While there may have been a good reason for the establishment of the English rule at the time and under the conditions under which it was announced, we do not believe that any good reason exists for the recognition of such a rule under the circumstances disclosed in this case. The general rule that a domicil, once legally acquired, is retained until a new domicil is secured, and

that in the acquisition of such new domicile both the fact and the intention must concur, it seems to us, is a rule of universal and general application, and that there is neither good logic nor substantial reason for the application of an exception to that rule in the case where the party is in itinere toward the domicile of origin. In other words, going back to the original proposition, the fiction is assumed generally that any domicile, either of choice or of origin, is retained until a new domicile has been legally acquired. We see no good reason for changing that rule in the one instance where the descent of property is involved and the party is in itinere to the domicile of origin. We believe that the general rule is the better rule and that the exception laid down by Story, and followed by the English courts, should not be recognized, either as between the states of the Union, or between this coun-

—change—death
en route.

try and a foreign country, under the facts disclosed in this case.

It therefore follows that the domicile of the decedent was in the state of Iowa until a new domicile had been actually acquired in Wales. No such domicile having been acquired at the time of his death, his personal estate must be administered according to the laws of Iowa. We think the general rule should be followed, even though the decedent was in itinere to his domicile of origin at the time of his death. We have examined the record, and hold that the appellant was legally recognized as the child of the decedent, as required by our statute and the decisions of this court, and is his lawful heir.

It follows that the judgment of the trial court must be, and the same is, reversed.

Evans, Ch. J., and Stevens, Arthur, and De Graff, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Domicil while in itinere from old to new home.

This annotation is supplemental to the annotation in 5 A.L.R. 296, where the earlier cases are collected.

It will be seen that it is held in the reported case (*RE JONES*, ante, 1286) that a native of Wales, who acquired a domicile in Iowa, and who left there for Wales intending to resume his domicile of origin, but was lost at sea while en route, had at the time of his death his domicile in Iowa, the court declining to admit that there was an exception to the general rule in the case of one en route to resume his domicile of origin.

Only one other case in point has been found since the earlier annotation.

In *Colorado v. Harbeck* (1919) 189 App. Div. 865, 179 N. Y. Supp. 510, where the domicile of origin is not mentioned, a testator, having acquired a domicile in Boulder, Colorado, died in the city of New York, while en route from Boulder to Paris, France, with the intent to acquire a domicile in Paris, and it was held that his domicile at the time of his death was in Boulder, Colorado. B. B. B.

STATE OF SOUTH CAROLINA, Respt.,
v.

KENNETH GOSSETT, Appt.,

South Carolina Supreme Court—August 25, 1921.

(— S. C. —, 108 S. E. 290).

Constitutional law — provision for special court to try criminal — validity.

1. A provision for the designation by the governor of an extra term of the criminal court of a county upon application of the district attorney, stating that public interest demands it, deprives persons tried at such term for alleged crime of due process of law.

[See note on this question beginning on page 1306.]

Courts — authority to provide for special term.

2. Power to order special terms of trial courts, conferred by statute upon the judges of the supreme court and the circuit judge at the time holding circuit court in the county, to be held by duly designated judges or a person specially commissioned for that purpose by the governor, is sustained by the general legislative power of the legislature, and is impliedly authorized by a constitutional provision that the legislature shall provide for the temporary appointment of men learned in the law to hold either regular or special terms of the circuit court when necessary.

— power to order special term of trial court judicial.

3. The power conferred upon the presiding judge of the supreme court to order special terms of a trial court when necessary is not absolute, but is to be exercised in a fair, just, and reasonable manner, affording, in the judicial exercise of discretion, a sure guaranty of due process of law and the equal protection of the laws.

Definition — fair trial.

4. A fair trial means a trial before an impartial judge, an honest jury, and in an atmosphere of judicial calm.

APPEAL by defendant from a judgment of the Court of General Sessions for Abbeville County (Sease, J.) convicting him of rape. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Bonham & Price and M. L. Bonham, for appellant:

A change of venue may be granted if there is any question as to the obtaining of justice.

Carroll v. Charleston & S. R. Co. 61 S. C. 251, 39 S. E. 364; State v. Billings, 77 Iowa, 417, 42 N. W. 456, 8 Am. Crim. Rep. 329; Thompson v. State, 122 Ala. 12, 26 So. 141; Gallaher v. State, 40 Tex. Crim. Rep. 296, 50 S. W. 388, 11 Am. Crim. Rep. 207; Saffold v. State, 76 Miss. 258, 24 So. 314, 11 Am. Crim. Rep. 234.

The governor has the power to order a special term of court.

State v. Gallman, 79 S. C. 229, 60 S. E. 682; State v. Davis, 88 S. C. 208, 70 S. E. 417.

The provisions of the statute pro-

viding for the drawing of the jury are mandatory.

State v. Turner, 63 S. C. 548, 41 S. E. 778; State v. Johnson, 66 S. C. 31, 44 S. E. 58; State v. Smalls, 73 S. C. 519, 53 S. E. 976; State v. Smith, 38 S. C. 270, 16 S. E. 997.

The jury commissioners have no power to pass upon the competency of jurors.

State v. Cunningham, 87 S. C. 453, 69 S. E. 1093; State v. Tidwell, 100 S. C. 256, 84 S. E. 778.

Defendant was entitled to a new trial because certain jurors were not indifferent.

Robertson v. Western U. Teleg. Co. 90 S. C. 425, 73 S. E. 786; State v. McQuaige, 5 S. C. 429; State v. Odom, 96 S. C. 306, 80 S. E. 497; State v.

Weldon, 91 S. C. 40, 39 L.R.A.(N.S.) 667, 74 S. E. 43, Ann. Cas. 1913E, 801; State v. Cooler, 112 S. C. 95, 98 S. E. 845; State v. Foster, 80 S. C. 347, 61 S. E. 564.

Messrs. H. S. Blackwell, George Bell Timmerman, and J. Howard Moore for the State.

Cothran, J., delivered the opinion of the court:

The defendant, Kenneth Gossett, was indicted, with his cousin, John Gossett, at a special term of the court of general sessions for Abbeville county, upon the charge of rape. The crime was alleged to have been committed upon the person of a young woman of that county, near Abbeville, on March 14, 1920. A true bill was rendered on April 5, 1920. The trial was entered upon, after the usual three days allowed, on April 8th. After the testimony was concluded the presiding judge directed a verdict of not guilty in favor of defendant John Gossett, and he was discharged. The jury rendered a verdict of guilty, with recommendation to mercy, as to the defendant Kenneth Gossett, and, after the refusal of a motion for a new trial, he was sentenced to imprisonment for forty years. He has appealed to this court from said judgment.

Upon the threshold of this appeal we are confronted with the objection of the appellant to the legality of the court which condemned him. It is contended that § 3841, vol. 1, Code of Laws A. D. 1912, under which the special court was ordered and held, is violative of the 14th Amendment to the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and of article 1, § 5, of the Constitution of South Carolina, which provides: "Nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."

A determination of the issue thus raised requires a statement of the proceedings leading up to the ordering of the special term and the appointment of the presiding judge, and a consideration of the constitutional and statute law which controls the matter.

On March 18, 1920, four days after the commission of the alleged crime, the solicitor of the circuit made application in writing to the governor of the state, stating that the public interest demanded that a special term of the court of general sessions for Abbeville county be held, and petitioning that it be called to be held at Abbeville on April 5th. Acting upon that application and petition, the governor issued an order, dated March 18th, which, after reciting the fact of said application and petition, directed that such special term be held as requested.

Thereupon the chief justice of this court issued an order, which, after reciting the fact that the governor had ordered the special term as stated, assigned the Honorable Thomas S. Sease, judge of the seventh circuit, as a disengaged circuit judge, to hold the court. Accordingly Judge Sease appeared at the appointed time, opened the court, organized and charged the grand jury, and submitted to them the indictment against the defendants. The grand jury promptly returned a true bill against both of the defendants, and the other proceedings above narrated followed in due course.

Section 3841, vol. 1, Code of Laws A. D. 1912, reads thus: "Upon the application to the governor by the solicitor of any circuit, stating that the public interest demands an extra term of the court of general sessions in any county of the state, or upon the application of the majority of the members of the bar of any county, stating that the civil business demands an extra term of the court of common pleas, it shall be the duty of the governor to appoint some man, learned in the law,

and to be suggested by the chief justice of the supreme court of the state, to hold an extra term of said court or courts in said county, and notify the clerk of said court of said appointment."

Prior to the enactment of this statute the process for ordering special terms of court was as follows:

Section 33 of the Code of Civil Procedure provided (and still provides): "Special sessions of the courts of common pleas or general sessions may be held whenever so ordered, either by the chief justice or by the circuit judge at the time holding the circuit court of the county for which the extra term may be ordered, of which extra term such notice shall be given as the chief justice or the circuit judge so ordering the same may direct. If such extra term of either or both the courts aforesaid be ordered by the chief justice, he may order any one of the circuit judges to hold the same; but if such extra term be ordered by a circuit judge, as hereinbefore provided, then such extra term shall be held only by the circuit judge so ordering the same."

Section 3840 of volume 1 is as follows: "Whenever any circuit judge, pending his assignment to hold the courts of any circuit, shall die, resign, be disabled by illness, or be absent from the state, or in case of a vacancy in the office of circuit judge of any circuit, or in case the chief justice or presiding associate justice of the supreme court shall order a special court of common pleas and general sessions, or common pleas or general sessions, in any county in this state, upon a satisfactory showing that such special court is needed, the chief justice or presiding associate justice may assign any other circuit judge disengaged to hold the courts of such circuits, or to fill any appointment made necessary by such vacancy, or to hold such special court; and in the event that there be no other circuit judge disengaged, then the governor, upon the recommendation of the supreme court, or the chief jus-

tice thereof if the supreme court be not in session, shall immediately commission as special judge such person learned in the law as shall be recommended to hold courts of such circuit or to hold such special court for that term only."

The Constitution (article 5, § 6) provides: "The general assembly shall provide by law for the temporary appointment of men learned in the law to hold either special or regular terms of the circuit courts, whenever there may be necessity for such appointment."

From these provisions, it is apparent that at the time of the passage of the Act of 1900 (§ 3841) the following processes were ordained (and are still of force) with reference to the ordering of special terms:

(1) A special term might be ordered by the chief justice or presiding associate justice of the supreme court, upon a satisfactory showing that such court was needed.

(2) A special term might be ordered by the circuit judge at the time holding the circuit court of the county for which the special term was to be ordered.

(3) When the special term should be ordered by the chief justice or by the presiding associate justice, he was authorized to assign any disengaged circuit judge to hold the court, or, if there be none so disengaged, the supreme court, if in session, or the chief justice, if not, should recommend for appointment as special judge to hold the court some person learned in the law, whom the governor should immediately commission as special judge for the purpose.

(4) When the special term should be ordered by the circuit judge at the time holding court, it could be held only by the circuit judge who may have ordered it.

Thus, under the legislation as it stood then, the power to order a special term was vested exclusively in the chief justice, the presiding associate justice, and the circuit judge holding court at the time for the county in which the special

term was to be ordered. The persons authorized to preside as judge of such special court were limited to (1) a disengaged circuit judge, to be assigned by the chief justice or the presiding associate justice; (2) a person learned in the law, in the event that there should be no circuit judge disengaged, to be commissioned by the governor as special judge, upon the recommendation of the supreme court, if in session, or of the chief justice, if not; (3) the circuit judge who may have ordered the court.

The power thus conferred by § 33 of the Civil Code and § 3840 of the Code of Laws is easily sustainable under the provisions of the Constitution (article 5, section 6) quoted above, as necessarily implied therein, or referable to the general legislative powers of the general assembly, which are ample, except where limited by the Constitution.

It is not an absolute power, but is controlled by considerations which safeguard the rights and interests of those whose rights and interests will be determined by such tribunal. In the first place, the discretion to be exercised in ordering the special term is vested in the chief justice, the supreme custodian of the judicial interests of the state, absolutely impartial, nonpartisan, unmoved by the clamor of the mob. "Far from the madding crowd's ignoble strife," equally solicitous that harm may not come from the "law's delays" or from impetuous haste; a calm discretion to be exercised. In the next place, it is a discretion to be exercised as a judicial function: "Upon a satisfactory showing that such special court is needed." The chief justice hears and determines.

There cannot be a question but that the power thus conferred is directed to be exercised in a fair, just, and reasonable manner, affording, in the judicial exercise of

discretion by a supreme, impartial, judicial officer, a sure guaranty of due process of law and the equal protection of the laws. The law has been broken and demands prompt punishment of the offender; the law guarantees to the accused a fair trial; the public interest is as much involved in the sanctity of this guaranty as in the swift retribution which should follow crime. A fair trial means a trial before an impartial judge, an honest jury, and in an atmosphere of judicial calm. It requires a wise, fearless, and impartial mind to harmonize these elements of the public interest, lest in its haste to deal a blow the law may perpetrate a judicial wrong. Happily the law had provided for the just resolution of this difficulty.

Then followed the Act of 1900 (§ 3841), which has thrown to the winds the sensible and just guaranties afforded by the then-existing law. It makes no provision for a showing, a hearing, or a determination of the fact that the public interest, which, as we have seen, includes the guaranty of a fair trial to the accused, demands a special court. It makes no provision for the determination of this question, so vital to the rights of the accused, by an impartial authority. Unlimited, except by his conception of what the public interest demands, which is no limitation at all, the absolute power to set in motion the machinery which inevitably must result in the ordering of a special court is vested in the solicitor of the circuit, the paid prosecutor, representing an adverse interest, necessarily a partisan, a political, and not a judicial, officer. Upon his application to the governor, stating, without showing, that the public interest demands an extra term, the governor has no discretion: "It shall be the duty of the governor to appoint some man learned in the law and to be suggested by the chief justice . . . to hold an extra term. . . ." The chief justice has no discre-

Courts—
authority to
provide for
special term.

Definition—
fair trial.

—power to order
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trial court
judicial.

tion in the matter, except the naming of the special judge. The momentum of the solicitor's ipse dixit is irresistible. A startling difference between the two procedures,—the one, providing for due application, a presentation of reasons, and a judicial determination by a judicial officer; the other, a statement by a partisan official, without showing or determination of facts, and without the exercise of discretion by anyone. It enables him, without the slightest consideration for the rights of the accused, to select his own time for the sacrifice, close on the heels of the crime, when righteous indignation has degenerated into a rabble cry of "Crucify him!" Into that atmosphere he invites the accused to a "fair trial;" it would be indeed "committere agnum lupo."

The defendant, however guilty in point of fact he may be, is entitled to be tried in an orderly manner; not only by an impartial judge and a jury representative of the law-abiding intelligence of the county, but in a calm judicial atmosphere, where the serene deliberations of those arbiters of the law and the facts may not be affected by that subtle psychological influence of the mob, which, though silent and unseen, is sometimes tremendously felt. It was the influence of the mob that provoked the unrighteous and cowardly judgment of Pilate, who sought to wash his hands of his own bloodguiltiness, and yet delivered the Nazarene for crucifixion. The time of the trial, the circumstances surrounding the court, the inflamed condition of the public mind, the nature of the crime, are matters of the gravest concern to the defendant and bear heavily upon the opportunity for a fair trial guaranteed to him by the Constitution. Should the public prosecutor, the active, interested adversary of the defendant, be clothed with the absolute authority to prepare the altar for the sacrifice at a time and under circumstances which practically guarantee a sacrifice? Is that due process of law, and afford-

ing to the defendant the equal protection of the laws?

Under the section being discussed, the solicitor is not required to give the grounds of his opinion that the public interest demands a special court; he is not even required to have such an opinion, except what might be implied from the simple statement to that effect; he has shown no grounds suggesting that the public interest demanded such impetuous haste. The public interest is greater in securing the constitutional rights of the accused than in responding to public clamor for a victim. What was the reason, therefore, for ordering a special court? It could not have been the crowded condition of the docket, for the Gossett case was the only one contemplated to be tried, and when that trial was over the court was *functus officio*. It could not have been that the business of the court could not wait the regular term, soon to be held, for the reason that no other case was called. We are constrained to believe that it was called at the initiation of the able and zealous solicitor, for the purpose of securing the prompt punishment of the perpetrators of an abominable crime, under circumstances which would warrant that expectation, without consideration for the constitutional rights of the accused.

We do not intend the slightest criticism of his conduct in the matter; he had the right under that statute, if it was a valid statute, to do exactly as he did; the criticism is directed against the statute, which permits the occasion for and the selection of the time for holding the court to be fixed at the arbitrary suggestion of the state's prosecuting officer, without the slightest consideration for the interests of the accused, or of the necessarily prejudicial atmosphere which may, and in this case certainly did, surround the trial. This court has declared: "It is greatly to be regretted that it should be necessary to hold a trial in any

other than calm and judicial atmosphere." *State v. Bethune*, 93 S. C. 195, 200, 75 S. E. 281.

If that be true, it is a right of the accused, as near as may be, that he be tried in such an atmosphere. Should that right be annihilated at the arbitrary will of the prosecuting officer, the representative of the adversary interest? We use the word "arbitrary," not in an offensive sense, but in the sense of the uncontrolled exercise of will, responsible to no one, and operative without even the exercise of discretion. That such a procedure does not conform to the requirements of the Constitution is perfectly clear, from the following definitions of "due process of law."

"Due process of law requires judicial investigation and determination of the rights." *Ex parte Tillman*, 84 S. C. 552, 562, 26 L.R.A. (N.S.) 781, 66 S. E. 1049.

"In the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478.

"They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its Constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit." *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

"In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569.

"The clause in question means, therefore, that there can be no proceeding against life, liberty, or property, which may result in the deprivation of either, without the

observance of these general rules established in our system of jurisprudence for the security of private rights." *Hagar v. Reclamation Dist.* 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

"Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the state, the constitutional requisition is satisfied." *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.

And due process is so secured by laws operating on all alike, and not subjecting "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559.

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

The circumstances of this trial demonstrate beyond a doubt that the defendant, under the operations of this section

which we are considering, was not convicted by due process of law, and

was denied the equal protection of the laws. We refer to them, not so much for the purpose of granting the defendant a new trial upon that ground, but for the purpose of demonstrating the operation of the procedure under § 3841, and to sustain our conclusion that, at least so far as the criminal court is concerned, it is violative of the constitutional provisions that have been quoted.

The crime is alleged to have been committed on March 14th; on

Constitutional law—provision for special court to try criminal—validity.

March 16th, two other young men, not the defendants, were arrested at Greenwood, charged with the crime; they were not carried to the Abbeville jail, but were rushed to the state penitentiary in Columbia for safe-keeping; on March 16th, the young women involved went to Columbia to identify the prisoners; they stated that the young men arrested were not the guilty parties; on March 17th the defendants were arrested, one at his home in Honea Path, Anderson county, and the other in Greenville; they were taken to Anderson, not Abbeville, and were identified by the young women; thence they were taken, not to Abbeville, but by way of Greenville and Spartanburg, to the state penitentiary; on March 18th the solicitor made application for a special court, himself fixing the date, and on the same day the governor ordered a special court to be held at Abbeville on April 5th; on March 20th the chief justice designated Judge Sease to hold the court. The defendants were detained in the penitentiary for about a week, and were then transferred, not to Abbeville, but to Greenville jail, for convenient access by their counsel, attorneys of Greenville; there they were kept until the morning of the opening of the special court at Abbeville, when they were transferred to the Abbeville jail. The foreman of the grand jury of Abbeville county made affidavit to the effect that the defendants could not safely be brought to Abbeville county on account of prevailing hot sentiment; the sheriff of the county recommended to the governor military protection during the trial that was approaching; more than 100 affidavits were submitted by the defendants upon their motion for a change of venue on the ground that a fair trial could not be had; the motion was refused. The defendants moved for a continuance of the case upon the ground that defendants had not had sufficient time to prepare their defense, their counsel residing in another county, and

the defendants being a part of the time in the state penitentiary, and that every member of the bar of Abbeville had been approached for the purpose of assistance, but without avail; the motion was refused. The failure to employ local assistance in the defense among the members of the bar at Abbeville is a striking index of the condition of public sentiment.

Notwithstanding the fact that § 4020 of the Code of Laws requires that ten days' notice of the drawing of the jury shall be given, only five days had been given. A motion to quash the venue was made upon this ground and refused. If the statutory notice had been given, the court could not have been held at the appointed time. But it had to be held, and the slight matter of a statutory regulation must not stand in the way. If the special court had been legally ordered, of course every other case upon the calendar could have been tried. The trial of no other case than the Gossett case was suggested. The court was ordered to try the Gossetts. A side light on the drawing of the jury clearly shows this. The names of two jurors drawn were discarded—the one upon the ground that he was related to the prosecutrix in the Gossett case; the other upon the ground that he was related to the young woman who was a companion of the prosecutrix upon the occasion of the alleged crime. This may have presented a ground for objection to the competency of these jurors upon the trial of the case, but it presented no ground for excluding them from the panel, which in contemplation of law was drawn to try every case then on the docket. Their exclusion is conclusive of the purpose, which was in the minds of all concerned, of the ordering of the special court—to try the Gossetts.

A striking circumstance occurred during the trial which reflects the fully appreciated temper of the spectators and their sullen determination that justice as they

conceive it should not be balked. At the close of the testimony the circuit judge directed a verdict in favor of one of the defendants, John Gossett; the record contains this statement: "As soon as this motion was granted, under arrangement of the court and court officials, John Gossett was handcuffed as though he were being carried back to jail and quietly slipped out the rear entrance of the courthouse and placed in an automobile and sent out of the county with all possible speed."

We are convinced that the procedure provided in this section is a bald concession to the spirit of mob law, and presents the spectacle of the law, strong and mighty, bowing to the despotism of the mob, which has been declared to be greater than the tyranny of a despot. It provides a miserable compromise with lynch law, enabling the law to bargain with the mob to stay its hand, and allow the court, under the forms of law, to accomplish what is equally as reprehensible, a judicial lynching. It is notorious that such bargains have been made; the angry mob has been appeased by the promise of a quick special court to try the offender, under circumstances that render his conviction inevitable.

There can be no compromise with the spirit of lynching for any crime. Those who compose such a mob are themselves without the pale of law, and commit a crime, not only against the victim of their vengeance, but against the majesty of the law. They are not entitled to recognition as legitimate parties to a compact. They trample under their dusty feet the pandects of our civilization, and spit upon the sacred rights of the individual. The law ought to be, and is, strong enough to treat them as criminals. It seems hardly necessary to say that, in the discussion and decision of this question, the court is entirely impersonal, without the slightest purpose to reflect upon the character or conduct of the solicitor of the eighth circuit, whose ability and character render such reflection impossible.

The court deems it unnecessary to consider the other questions raised by the exceptions.

The judgment of this court is that the judgment appealed from be reversed, and that the case be remanded to the court of General Sessions for Abbeville County for proceedings conformable to law.

Gary, Ch. J., and Watts and Fraser, JJ., concur.

ANNOTATION.

Calling of special or extra term of court by governor.

- I. In general; validity of statutes, 1306.
- II. Governor as judge of necessity and time and place of holding of special term, 1308.
- III. Effect of designation of purpose or object of special term, 1309.
- IV. Miscellaneous, 1310.

I. In general; validity of statutes.

By statute in a number of states the legislature has attempted to confer upon the governor the power to call an extra or special term of court, and the question of the validity or effect of these statutes has come before the

courts in various cases. See the following:

Florida.—*Ex parte Daly* (1913) 66 Fla. 345, 63 So. 834.

New York.—*People v. Shea* (1895) 147 N. Y. 78, 41 N. E. 505; *People v. Gillette* (1908) 191 N. Y. 107, 33 N. E. 680; *People v. Neff* (1908) 191 N. Y. 210, 83 N. E. 970, affirming (1907) 122 App. Div. 135, 106 N. Y. Supp. 747; *People ex rel. Saranac Land & Timber Co. v. Supreme Ct.* (1917) 220 N. Y. 487, 116 N. E. 884; *Saranac Land & Timber Co. v. Roberts* (1919) 227 N. Y. 188, 125 N. E. 102; *People ex rel.*

Childs v. Extraordinary Trial Term (1920) 228 N. Y. 463, 127 N. E. 486, reversing (1918) 184 App. Div. 829, 171 N. Y. Supp. 922; *People v. McKane* (1894) 80 Hun, 322, 30 N. Y. Supp. 95, 9 N. Y. Crim. Rep. 352, affirmed in (1894) 143 N. Y. 455, 38 N. E. 950; *People v. Young* (1897) 18 App. Div. 162, 45 N. Y. Supp. 772, 12 N. Y. Crim. Rep. 287; *People v. Valentine* (1911) 147 App. Div. 31, 131 N. Y. Supp. 733, affirmed in (1912) 205 N. Y. 556, 98 N. E. 1111.

North Carolina.—*State v. Baker* (1869) 63 N. C. 276; *State v. Ketchey* (1874) 70 N. C. 621; *State v. Lewis* (1890) 107 N. C. 967, 11 L.R.A. 105, 12 S. E. 457, 13 S. E. 247; *State v. Turner* (1896) 119 N. C. 841, 25 S. E. 810; *State v. Register* (1903) 133 N. C. 746, 46 S. E. 21.

South Carolina.—*STATE v. GOSSETT* (reported herewith) ante, 1299; *State v. Gallman* (1907) 79 S. C. 229, 60 S. E. 682.

Philippine.—*United States v. Tan Baucó* (1915) 4 Philippine, 325.

The South Carolina statute providing that "upon the application to the governor by the solicitor of any circuit, stating that the public interest demands an extra term" of court in any county, "it shall be the duty of the governor to appoint some man, learned in the law, and to be suggested by the chief justice of the supreme court of the state, to hold an extra term" of court, was held unconstitutional in the reported case (*STATE v. GOSSETT*, ante, 1299), as a denial of due process and equal protection of the laws. It may be observed that the validity of this statute was apparently assumed in *State v. Gallman* (S. C.) supra.

In other cases, where the question has arisen as to the validity of statutes authorizing the governor to call an extra or special term of court, the statutes have been upheld.

Thus, the North Carolina statute authorizing the governor to appoint special terms of the superior court, which would have all the jurisdiction and powers that regular terms of such courts have, was held constitutional in *State v. Ketchey* (1874) 70 N. C.

621. The court does not set out the particular constitutional provisions which it was contended were violated, but stated merely that it saw no conflict between the Constitution and the statute, and that if indeed there were some apparent conflict, it would feel itself bound, after recognizing the validity of special terms in the most solemn cases, not to disturb a very convenient and beneficial method of dispensing justice.

In *State v. Baker* (1869) 63 N. C. 276, it was held that a statute which provided that, for good cause shown, the governor should issue commissions of oyer and terminer to the judges of the superior court, was not abrogated by the adoption of a Constitution specifying the courts of the state as supreme, superior, courts of justice of the peace, and special courts, and providing that the laws of the state not repugnant to the Constitution should remain in force, since a court of oyer and terminer so constituted was a superior court.

It was held, also, in *Ex parte Daly* (1913) 66 Fla. 345, 63 So. 834, that a statute authorizing the governor to assign the judge of one circuit to hold a special term in another circuit did not conflict with, but was expressly sanctioned by, the constitutional provision that the governor might, in his discretion, order a temporary exchange of circuits by the respective judges, or order any judge to hold one or more terms, or part or parts of any term, in any other circuit than that to which he was assigned.

And the constitutionality of the New York statute authorizing the governor to appoint an extraordinary term of court whenever in his opinion the public interests so required was sustained in *People ex rel. Saranac Land & Timber Co. v. Supreme Ct.* (1917) 220 N. Y. 487, 116 N. E. 384.

It was held in *People v. Young* (1897) 18 App. Div. 162, 45 N. Y. Supp. 772, 12 N. Y. Crim. Rep. 287, that constitutional provisions that the justices of the appellate division in each department should have power to fix the times and places for holding special and trial terms therein, and to

assign the justices in the departments to hold such terms, did not abrogate, as inconsistent or repugnant, an existing statutory provision authorizing the governor, when in his opinion the public interest so required, to appoint one or more extraordinary general or special terms of the supreme court, and to designate the time and place of holding the same and the name of the justice who should preside.

So, it was held in *People v. Gillette* (1908) 191 N. Y. 107, 83 N. E. 680, that constitutional provisions conferring upon the appellate division the power of appointing terms of the supreme court related to ordinary and usual terms of court, and did not conflict with or impliedly repeal the power reposed in the governor by statute to call extraordinary terms.

And on the authority of the last case, the court in *People v. Neff* (1908) 191 N. Y. 210, 83 N. E. 970, affirming (1907) 122 App. Div. 135, 106 N. Y. Supp. 747, where the defendant had been convicted at an extraordinary term of the supreme court convened by the governor for the special purpose of conducting his trial, overruled the contention that the governor did not have the power which he assumed to exercise, and that it was vested exclusively in the appellate division.

Also, in *People v. Valentine* (1911) 147 App. Div. 31, 131 N. Y. Supp. 733, where it was contended that the extraordinary trial term at which the defendant was convicted was unlawfully constituted because the place and the time were designated by the governor without action on the part of the appellate division, the court said that at the time of such designation there was statutory authority therefor, and that the statute was not unconstitutional.

See also, in this connection, *People v. Shea* (1895) 147 N. Y. 78, 41 N. E. 505, in which, under the New York statute providing for the designation by the justices of the supreme court of the times and places for holding the ordinary terms of court, and providing that the governor might, when in his opinion the public interest so re-

quired, appoint special terms, it was held that the governor might call an extraordinary term of the court of oyer and terminer to be held on the same day for which a regular term of the court in that county had previously been appointed by the justices of the supreme court.

II. Governor as judge of necessity and time and place of holding of special term.

Under the statutes of some states the governor is the sole judge of the sufficiency of the evidence to show that a special term of court is necessary.

Thus, under a statute providing that the governor may order a special term of court in any county whenever it appears to him, by the certificate of a judge or of the county commissioners, or otherwise, that a certain state of facts exists, it was held in *State v. Lewis* (1890) 107 N. C. 967, 11 L.R.A. 105, 12 S. E. 457, 13 S. E. 247, that he is the sole judge of the sufficiency of the evidence to satisfy him that a special term is required.

And it was held in *People ex rel. Saranac Land & Timber Co. v. Supreme Ct.* (1917) 220 N. Y. 487, 116 N. E. 384, that the court could not review the exercise of discretion by the governor in calling a special term of court, but that the question whether such a term was necessary was one exclusively for the governor, under the New York statute authorizing the governor to call an extraordinary term whenever in his opinion the public interests so required.

Also, in *People v. Shea* (1895) 147 N. Y. 78, 41 N. E. 505, the court said regarding the New York statute authorizing the governor, when in his opinion the public interest so required, to appoint special terms of court, and to designate the time and place of holding the same, that the discretion was vested wholly with the governor as to the occasion for appointing, and the proper time and place for holding, the extra terms of court.

And in *People v. Shea* (N. Y.) supra, it was held that the governor might call an extraordinary term of

the court of oyer and terminer to be held on the same day for which a regular term of the court had previously been called in the same county by the justices of the supreme court. The court said that there was no limitation in the grant of power to the governor by reason of which he could not designate a time and place for the holding of the court which was the same time and place previously designated by the justices of the supreme court for the holding of a regular term; that the statute was ample, and the discretion was in the governor.

A statute conferring on the Secretary of Finance and Justice the authority, "when in his judgment the emergency shall require, to direct any judge assigned to vacation duty to hold during vacation a special term of court in any district, there to hear civil or criminal cases and enter final judgments therein," was held in *United States v. Tan Bauco* (1905) 4 Philippine, 325, to authorize the calling of a special term of court at a place not regularly designated by law for the holding of regular terms of court for that province, the term "special term" not being limited in meaning merely to terms which were special as to time.

III. Effect of designation of purpose or object of special term.

The fact that the certificate to the governor recited that there was such an accumulation of "civil" actions in a certain superior court as required the holding of a special term for the disposal of such "civil" actions was held in *State v. Ketchey* (1874) 70 N. C. 621, not to preclude trial of a criminal case at the special term called by the governor. The court said that the governor was not bound to follow the certificate; that there was nothing to prevent him, after cause was laid before him to justify a special term, from exercising his discretion as to the extent of the jurisdiction for the trial of actions which he might see fit to confer on such special term.

So, where an accumulation of criminal business was recited by commissioners to the governor as rendering

a special term of court necessary, it was held in *State v. Register* (1903) 138 N. C. 746, 46 S. E. 21, that the power of a judge appointed by the governor to hold such special term was not restricted to the trial of indictments previously found, and that one indicted at such special term had no right to a continuance of the trial on the ground that the indictment was not a part of the accumulation of criminal business specified in the commission as a reason for ordering the special term, and that therefore the judge had no power to try him.

And the fact that, in his order or proclamation appointing a special term, the governor specifies the object or purpose for which the same is called, has been held immaterial as affecting the jurisdiction of that term; in other words, the stated purpose does not limit the jurisdiction. Thus, in *Saranac Land & Timber Co. v. Roberts* (1919) 227 N. Y. 188, 125 N. E. 102, where the governor called a special term of the supreme court for the purpose of hearing and determining motions for new trials in certain specified actions, it was said that the statement in the proclamation, of the purpose of the term, did not enlarge or diminish the rights of the litigants, but it became a term of the supreme court with the same jurisdiction belonging to any other term.

The order of the governor assigning a judge of one circuit to hold a special term of court in another circuit, it was held in *Ex parte Daly* (1913) 66 Fla. 345, 63 So. 834, need not specify any particular case there to be tried, but may be worded in general terms assigning the judge to hold a special term in such county at the particular date therein fixed to try any and all causes as might be there ready for trial; so that the misnomer of the party in the governor's order of assignment upon whom it was supposed the crime had been committed might be treated as surplusage, and did not detract from the effectiveness of the order of assignment.

And the fact that in his order for a special term of court the governor added the words, "to dispose of all

cases on the criminal docket in said county," was held in *State v. Gallman* (1907) 79 S. C. 229, 60 S. E. 682, not to render the order nugatory, such language being mere surplusage; and one convicted at such a term of court could not complain, at least where that part of the order was by the trial court treated as a nullity and did not affect the trial.

Attention is called to the fact that special terms may be called to try particular cases.

In *People v. Gillette* (1908) 191 N. Y. 107, 83 N. E. 680, a special term was appointed by the governor for the purpose of a particular trial, a prosecution for murder, and the legality of the term of court at which the defendant was tried and convicted was sustained.

And in *People v. Neff* (1908) 191 N. Y. 210, 83 N. E. 970, an extraordinary term of the supreme court was convened by the governor for the special purpose of conducting the trial of one for larceny, and the conviction was sustained.

IV. Miscellaneous.

In *People v. McKane* (1894) 80 Hun, 322, 30 N. Y. Supp. 95, 9 N. Y. Crim. Rep. 352, affirmed in (1894) 143 N. Y. 455, 38 N. E. 950, where the governor appointed "an extraordinary court" of oyer and terminer, instead of an extraordinary term of the court of oyer and terminer, as he was authorized to do by statute, it was held that there was only a verbal difference between the form of the statute and the form of the appointment, which was insufficient to render the appointment a nullity.

To the same effect is *People v. Shea* (1895) 147 N. Y. 78, 41 N. E. 505, where the court considered the objection to the form of the proclamation convening the extra term in that it appointed "an extraordinary court" of oyer and terminer, instead of an extraordinary term of the court, as provided by statute, as of insufficient merit to warrant discussion.

Failure to comply strictly with the governor's order directing the publication of notice of a special term of

court called by him has been held an irregularity merely, and not a jurisdictional defect, so as to justify the granting of a writ of prohibition against proceedings at such special term. *People ex rel. Childs v. Extraordinary Trial Term* (1920) 228 N. Y. 463, 127 N. E. 486, reversing (1918) 184 App. Div. 829, 171 N. Y. Supp. 922. The statute provided that the governor should designate the time and place of holding the special term, and should give notice of the appointment thereof in such manner as, in his judgment, the public interest required. In this case the governor ordered the notice to be published each week for two successive weeks in two newspapers. One of these papers did not comply with the order, in that it published the same for two successive days in the same week. The court said that the public interests, requiring that every citizen may freely attend the sittings of every court within the state and have some general notice thereof, were not promoted by exact compliance with the terms of the order; that the governor might as affectively have ordered but one publication in one paper; that the error was a mere irregularity, which might or might not be prejudicial, but did not, standing alone, divest the court of jurisdiction.

The case of *Hanley v. Medford* (1910) 56 Or. 171, 108 Pac. 188, in which a circuit judge was held to have no power to call a special term of court in another district although he did so at the direction of the governor, turns upon the construction and effect of the Oregon Statute of 1909, which provided for the appointment of an additional circuit judge for a certain district, defined his duties with relation to the other judges therein, and declared that "the duties and judicial labors of the judge provided for by this act, in addition to those already enumerated . . . shall be to hold such terms of court and perform such other judicial duties in any of the judicial districts of this state . . . as may be required of him by the governor." The statute

was construed as not intended to invest the judge with any additional or unusual judicial authority not previously possessed by all other circuit judges of the state, but merely to impose upon him an obligation of exercising the limited powers conferred in other statutory provisions, when directed so to do by the governor; in other words, the statute did

not authorize the governor to require of the judge the performance of a judicial act which previous to the enactment was not within the official power of any circuit judge, but its sole intent was that the judge should be required to hold such terms of court and perform such judicial duties as the law then contemplated he might perform.

R. E. H.

CHARLES BOYD ESHELMAN

v.

JAMES RAWALT, Plff. in Err.

Illinois Supreme Court—June 22, 1921.

(298 Ill. 192, 131 N. E. 675.)

Damages — punitive — criminal conversation.

1. Punitive damages may be allowed for criminal conversation, if the act was of a wanton or malicious nature.

[See note on this question beginning on page 1316.]

Appeal — admitting testimony of attorney — reversal.

2. Admitting testimony by an attorney on behalf of his client is not reversible error, although it is not proper practice and little weight can be given to such testimony.

[See 28 R. C. L. 469, 470.]

Trial — question for court or jury — punitive damages.

3. While the admeasurement of damages is for the jury, it is a question of law whether the facts in a particular case bring it within the rule allowing punitive damages.

[See 8 R. C. L. 660.]

Appeal — reversal for conduct of attorney.

4. A judgment for damages large in proportion to what the case justified will be reversed, where counsel for plaintiff, against objection of defendant's counsel and warnings of the court, kept up a running fusillade of interruptions, contradictions, cross talk, and side remarks, showing disrespect for all rules and ethics in the practice of the law.

[See 26 R. C. L. 1021, 1022.]

ERROR to the Appellate Court, Third District, to review a judgment affirming a judgment of the Circuit Court for Fulton County (Grier, J.) in favor of plaintiff in an action brought to recover damages for criminal conversation with his wife. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. M. P. Rice and Harvey H. Atherton, for plaintiff in error:

Judgment for plaintiff may be reversed for improper conduct of counsel.

Illinois C. R. Co. v. Seitz, 111 Ill. App. 242; West Chicago Street R. Co. v. Annis, 165 Ill. 475, 46 N. E. 264; Tole v. Tole, 149 Ill. App. 311; Donk Bros. Coal & Coke Co. v. Tetherington,

128 Ill. App. 256; Wallin v. Mitchell, 200 Ill. App. 324; Odett v. Chicago City R. Co. 166 Ill. App. 270; Haupt v. Chicago City R. Co. 197 Ill. App. 400; North Chicago Street R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899; Chicago City R. Co. v. Ahler, 107 Ill. App. 397; Parlin & O. Co. v. Scott, 137 Ill. App. 454; Marriage v. Electric Coal Co. 176 Ill. App. 451; Chicago Union Traction

Co. v. Lauth, 216 Ill. 183, 74 N. E. 738; McCoy v. Chicago & A. R. Co. 268 Ill. 255, 109 N. E. 1; Appel v. Chicago City R. Co. 259 Ill. 568, 102 N. E. 1021; Wabash R. Co. v. Billings, 212 Ill. 41, 72 N. E. 2; Chicago & A. R. Co. v. Scott, 232 Ill. 423, 83 N. E. 938; Bishop v. Chicago Junction R. Co. 289 Ill. 63, 124 N. E. 312; Eilers v. Peoria R. Co. 200 Ill. App. 493; Chicago Union Traction Co. v. Arnold, 131 Ill. App. 599; Pioneer Reserve Asso. v. Jones, 111 Ill. App. 160; Hall v. Chicago & A. R. Co. 188 Ill. App. 95; Lewman v. Danville Street R. & Light Co. 161 Ill. App. 582; North Chicago Street R. Co. v. Leonard, 67 Ill. App. 603.

It was highly improper for the state's attorney, after having been actively connected with criminal prosecutions arising out of the same state of facts, to participate in the prosecution of this case as chief counsel, and to testify as the principal witness.

People ex rel. Hutchison v. Hickman, 294 Ill. 471, 128 N. E. 484; Wilkinson v. People, 226 Ill. 135, 80 N. E. 699; Grindle v. Grindle, 240 Ill. 143, 83 N. E. 473; Wetzel v. Firebaugh, 251 Ill. 190, 95 N. E. 1085.

Messrs. W. S. Jewell, Claude E. Chipperfield, and Burnett M. Chipperfield, for defendant in error:

Alleged improper remarks of counsel not objected to, and a ruling obtained on the objection, cannot be assigned as error and present no question for review.

Appel v. Chicago City R. Co. 259 Ill. 561, 102 N. E. 1021; Waschow v. Kelly Coal Co. 245 Ill. 516, 92 N. E. 303; People v. Weil, 243 Ill. 208, 134 Am. St. Rep. 357, 90 N. E. 731; People v. Nall, 242 Ill. 284, 89 N. E. 1012; Peterson v. Pusey, 237 Ill. 204, 86 N. E. 692; Paige v. Illinois Steel Co. 233 Ill. 313, 84 N. E. 239; McCann v. People, 226 Ill. 562, 80 N. E. 1061; Chicago City R. Co. v. Gemmill, 209 Ill. 638, 71 N. E. 43; Salem v. Webster, 192 Ill. 369, 61 N. E. 323; North Chicago Street R. Co. v. Shreve, 171 Ill. 438, 49 N. E. 534; North Chicago Street R. Co. v. Leonard, 167 Ill. 618, 47 N. E. 752; West Chicago Street R. Co. v. Sullivan, 165 Ill. 303, 46 N. E. 234, 1 Am. Neg. Rep. 421; Boone v. People, 148 Ill. 440, 36 N. E. 99; Pike v. Chicago, 155 Ill. 656, 40 N. E. 567; McNeil & H. Co. v. Neenah Cheese & Cold Storage Co. 290 Ill. 449, 125 N. E. 251; Schroder v. People, 196 Ill. 214, 63 N. E. 678; West Chicago Street R.

Co. v. Levy, 182 Ill. 527, 55 N. E. 554; North Chicago Street R. Co. v. Anderson, 176 Ill. 637, 52 N. E. 21; West Chicago Street R. Co. v. Levy, 82 Ill. App. 209; South Chicago City R. Co. v. Kinnare, 117 Ill. App. 5; Eldorado Coal & Coke Co. v. Swan, 128 Ill. App. 237; Mueller Bros. Art. & Mfg. Co. v. Fulton Street Wholesale Market Co. 181 Ill. App. 685; Sackheim v. Miller, 136 Ill. App. 132; Chicago City R. Co. v. Sheehan, 110 Ill. App. 492; Kunkel v. Chicago Consol. Traction Co. 156 Ill. App. 393; Coffin v. Chicago, 159 Ill. App. 609; Blodgett v. Nevius, 189 Ill. App. 544; Sturonois v. Morris, 177 Ill. App. 514; Swan v. Boston Store, 191 Ill. App. 84; Meek v. Chicago R. Co. 183 Ill. App. 256; Illinois Steel Co. v. Paige, 136 Ill. App. 410; Waschow v. Kelly Coal Co. 151 Ill. App. 41, affirmed in 245 Ill. 516, 92 N. E. 303; Hale v. Hale, 169 Ill. App. 272.

The action of Attorney Cutler in testifying on the trial of the case in the lower court, after his withdrawal eight days before the trial as an attorney for plaintiff, does not constitute improper conduct, but affects, if at all, the credit and weight to be given to his testimony.

Onstott v. Edel, 232 Ill. 201, 83 N. E. 806, 13 Ann. Cas. 28; Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403; Glantz v. Ziabek, 233 Ill. 23, 84 N. E. 36; People v. White, 251 Ill. 67, 95 N. E. 1036; Landes v. Landes, 268 Ill. 11, 108 N. E. 691; Barto v. Kellogg, 289 Ill. 528, 124 N. E. 633.

Cartwright, J., delivered the opinion of the court:

Charles Boyd Eshelman, defendant in error, had a verdict and judgment in the circuit court of Fulton county in an action of trespass on the case, brought by him against James Rawalt, plaintiff in error, for criminal conversation with his wife, Rosa Eshelman. A writ of attachment was issued in aid of the suit, and plaintiff in error filed a plea of the general issue to the declaration, and traversed the affidavit for attachment. The issues were submitted to a jury, which found the defendant guilty and assessed the damages at \$13,500, and found the issue on the attachment for the plaintiff. The appellate court for the third district affirmed the judg-

ment, and a writ of certiorari was granted to bring the record to this court.

The plaintiff was a tenant on a farm in Fulton county, and his wife, Rosa, was thirty-four years old. They had three children, whose ages were thirteen, ten, and six years, respectively. The defendant was an unmarried man forty-seven years old, owning and operating a farm near plaintiff's home, and at times when he did not have people living in his house he took his meals at other places. In the fall of 1918 he took his meals at the home of the plaintiff during two different periods, the first of which lasted several weeks, when the plaintiff told him that he could not board him, and he said "All right," and left the house. Later plaintiff told the defendant he could board there if the plaintiff's wife would treat plaintiff as a husband and the defendant as a boarder. He returned and boarded at the plaintiff's home three or four weeks, and was then told by the plaintiff that he could not board him any longer; that he and his wife were getting "too thick," and the defendant said "All right," and left the house. The defendant was absent from the vicinity for some time in the winter of 1919, but returned in April and lived at his farm until about the 1st of June.

On June 10, 1919, while the defendant in error was absent in Lewistown, his wife left their home and drove to Avon, where she drew \$400 from the plaintiff's account at the bank and went to Chicago. On June 17 she registered under the name of Mrs. B. Ross at the Plaza Hotel, a family hotel near Lincoln park, and was assigned a room for a single person. The room was changed the same day to a room for two persons, and in the forenoon of the next day the defendant came to the hotel and registered as James Ross, husband of Mrs. B. Ross, and was assigned to the room occupied by her. The defendant and Rosa Eshelman occupied that room until June 21. On that day the plaintiff and the state's

attorney of Fulton county found the defendant and Rosa Eshelman on State street, in Chicago, and the state's attorney called a policeman and had them arrested. The state's attorney prosecuted the defendant in what he called the morals court of Chicago for the offense of adultery, and he was convicted. The state's attorney also caused a warrant to be issued in Fulton county for the arrest of the defendant and Rosa Eshelman for adultery, and had the sheriff of Fulton county go to Chicago and arrest her. She returned to Fulton county with sheriff, state's attorney, and her husband, and shortly afterwards returned to her own home, where she had continued to live with her husband and family at the time of the trial.

The judgment having been affirmed by the appellate court, the only questions subject to consideration in this court are questions of law.

The state's attorney of Fulton county was one of the attorneys who brought the suit and prosecuted it up to the time of the trial, and when offered as a witness for the plaintiff, an objection to his competency was made and overruled. The trial of the case was set for January 22, 1919, and on January 19, very shortly before the trial, the witness withdrew from the case as an attorney of record. He testified that he went to Chicago with the plaintiff as state's attorney; that Judge Fry, of the municipal court, appointed him state's attorney of Cook county to prosecute the defendant for adultery before Judge Hayes, and up to the time he testified he had been continuously advising and assisting in the trial of the case; that in the forenoon of that day he advised with the other attorneys for plaintiff in the selection of the jury, and in the afternoon, in the examination of witnesses, he called the attorneys for plaintiff to the corridor, and talked to them about the case and the conduct of it. It is apparent that from the time the suit was brought the testimony of the

witness would be important to his client, and his statement showed that his withdrawal in order to testify was merely nominal. He procured a warrant as state's attorney in Fulton county for the arrest of the defendant and Rosa Eshelman, but the offense was committed in Cook county, and there could not have been any prosecution in Fulton county, so that the warrant must have been used to bring Rosa Eshelman home. It therefore appears that the state's attorney did not come within the prohibition of the statute, and there was no error in the ruling of the court. It is not

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admitting
testimony of
attorney—
reversal.

unlawful, but it is not a proper practice, for an attorney connected with a case to appear as a witness, and this witness continued to be acting as an attorney in the case. He assumed the double burden of acting as attorney and furnishing evidence to insure success in his professional capacity. But little weight is given to the testimony of a witness who places himself in such a situation. *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085; *Grindle v. Grindle*, 240 Ill. 143, 88 N. E. 473. Part of his testimony, which is insisted upon as evidence of aggravation by defendant of his offense, was that, when he and the plaintiff met the defendant and Rosa Eshelman, the defendant had her by the arm and told her to come on, and they endeavored to escape by running down the street and going into a basement cafeteria, and then came out and took a taxicab, and the witness and plaintiff chased them in another taxi.

The verdict was for \$13,500, and it is beyond question that it is mainly for punitive or vindictive damages, which the court instructed the jury they might allow if they believed from the evidence that the defendant acted with an evil intent or motive to injure the plaintiff. The defendant owned 180 acres of land, worth about \$250 an acre, a

half interest in 160 acres, worth \$100 an acre, and \$5,000 or \$6,000 worth of personal property, so that he was worth about \$50,000. The record does not furnish any means of ascertaining what was allowed as punitive or vindictive damages, and the appellate court could not know how much the jury had allowed for damages of that character. *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *Chicago Union Traction Co. v. Lauth*, 216 Ill.

176, 74 N. E. 738. Punitive, vindictive, or exemplary damages are allowed in this state where a wrongful act is characterized by circumstances of aggravation, such as wilfulness, wantonness, malice, or oppression; but to warrant an allowance of such damages, the act complained of must not only be unlawful, but must partake of a wanton and malicious nature.

While the doctrine allowing such damages has been criticized, and in some states has been repudiated, it was said in *Holmes v. Holmes*, 64 Ill. 294, that the doctrine is too firmly rooted in our jurisprudence to be disturbed. It was said, however, that the rule allowing such damages has been severely questioned by many able jurists, one of whom is Professor Greenleaf, and the courts, recognizing the doctrine within its proper scope, ought to exercise a high degree of watchfulness to prevent it from being perverted and extended beyond the real principles upon which it is based, by allowing plaintiffs, through the instrumentality of instructions to the jury, to characterize the acts of the defendant with degrees of enormity and turpitude which the law does not affix to them. The universally recognized rule where the doctrine is in force is that such damages may be recovered only in cases where the wrongful act complained of is characterized by wantonness, malice, oppression, or circumstances of aggravation. *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590; *Pearson*

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versation.

v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854.

In the absence of these elements, the damages cannot exceed, and must be confined strictly to, compensation for the injury sustained. Where punitive, vindictive, or exemplary damages may be assessed, they are allowed in the interest of society in the nature of punishment, and as a warning and example to deter the defendant and others from committing like offenses in the future; and a frequent objection to the doctrine is in allowing an individual to recover and appropriate damages for an offense against the social order and in the interest of society. This consideration enforces the injunction of this court for watchfulness to see that the right is not abused.

The admeasurement of damages is for the jury under the evidence,

**Trial—question
for court or jury
—punitive
damages.**

but it is a question of law whether the facts of the particular case bring it

within the rule in which punitive damages may be assessed. In this case the jury, under the rule of law prevailing in this state, would have been justified in adding to the compensatory damages some further sum as vindictive or exemplary damages. The damages allowed, however, are very large indeed, and far beyond any punishment inflicted by the Criminal Code (Hurd's Rev. Stat. 1919, chap. 38) for the crime of adultery, which is a fine of a limited amount, or a jail sentence. It is true that the Criminal Code does not control the question, but there is no distinction between exemplary damages and damages allowed as a punishment (Lowry v. Coster, 91 Ill. 182), and the Criminal Code fixes a punishment designed to be adequate to prevent the offense for the protection of society.

It is claimed that there were circumstances of great aggravation, and, as before stated, the fact that the defendant attempted to escape and hurried Rosa Eshelman along is pointed out as such aggravation. It

was the natural thing to do, and the defendant would not be expected to welcome the state's attorney and the plaintiff. The defendant also wrote a letter to a woman about Rosa Eshelman's pocketbook, suit case, and other things left in Chicago, and said that he would like to hear how Rosa was getting along, and that he had not changed a bit in his feelings. That did not indicate any present intent to renew the offense. There was evidence of a want of harmony between the plaintiff and his wife before she left home, and that she had threatened to leave before, and complained of staying there. She went alone to Chicago and secured a room at the hotel, and while it was certainly understood that the defendant would meet her there, there was no evidence that he enticed her away from her home. After she returned to her home, her conduct and the relations between her and her husband were practically the same as before.

It is the province of the jury to determine the facts, but it is the province and the duty of the courts to see that every litigant has a fair trial in accordance with the law, and it is complained that the verdict, which was very large, was increased and brought about by the conduct of the attorney for the plaintiff on the trial. The record of the trial, from the time the jury were sworn until the argument began, contains 330 pages, and it is impracticable to give such a detailed statement as would furnish a complete understanding of the grounds for complaint. There were continual side remarks by plaintiff's attorney, interruptions in the examination of witnesses conducted by the attorneys for the defendant, comments on the evidence, assertions of fact that would be proved, epithets and remarks, and an attitude of disrespect toward the court, such as statements that the attorney was going to yield to the opinion of the court, but believed that he was right. His conduct was correctly characterized by the appellate court

as consisting of a running fusillade of interruptions, contradictions, cross talk, and side remarks, indulged in over repeated objections by counsel for the defendant, and persisted in over repeated warnings and admonitions of the court, and showing disrespect for all rules and ethics in the practice of the law. The appellate court said that the trial judge must certainly have been the personification of "patience on a monument" to be able to refrain from enforcing proper decorum, but said that it would be unwarranted to reverse the judgment, and thereby penalize plaintiff for the conduct of his counsel, for which it did not appear he was in any wise responsible.

We do not concur with the appellate court that the judgment for the complainant could not be reversed for the conduct of his counsel, or that he was not responsible for it. That would be to reverse every rule of law approved by the judgment of mankind as to the responsibility of a principal for acts of his agent, or an employer for acts of his servant. The law holds the principal responsible for the acts and derelictions of his agent within the authority conferred, and the master for the conduct of his servant and injuries occasioned by him within the scope of his employment. A client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of the attorney's authority, and to say that he is not responsible for misconduct of his attorney is to visit the evil consequences upon an un-

**Appeal—reversal
for conduct of
attorney.**

offending party. Not only is that true, but, if such a rule is adopted, the services of an attorney able to get unjust verdicts by unfair means, or prevent just verdicts by like means, would be in very great demand, and his professional prospects greatly enhanced, to the public injury. The appellate court did not find anything in the record to indicate that the defendant was injured by the course pursued by the attorney for the plaintiff, but we do not agree that such is a fact. Not only was it impossible to have a fair trial in the state of disorder, confusion, and disturbance unusual in a court of record, but it was impossible for the defendant to make any fair presentation of the situation. The conduct of the attorney was such as would naturally enhance the damages which the jury were advised they could allow in the exercise of their discretion.

The learned judge exhibited rare patience and ability in his rulings, and there was no error on his part in the trial or in instructing the jury. He protested constantly against the conduct of the attorney, and warned him how the record would appear; but when he said that the record would show matters that he was very much afraid of, and would not look very good, the attorney said, "I don't care how it looks." The verdict obtained by the means employed in this case cannot be permitted to stand.

The judgments of the Appellate Court and Circuit Court are reversed, and the cause remanded to the Circuit Court.

ANNOTATION.

Punitive or exemplary damages in action for alienation of affections or criminal conversation.

I. Allowance of punitive or exemplary damages:

a. Generally, 1316.

b. Regulation by statute, 1320.

II. Wealth of parties as element, 1321.

I. Allowance of punitive or exemplary damages.

a. Generally.

By the weight of authority, in ac-

tions for alienation of affections of a spouse, it is held that, where the act complained of was done with malice, punitive or exemplary damages are recoverable, and that the plaintiff is not limited merely to compensatory damages.

United States.—*Waldron v. Waldron* (1890) 45 Fed. 315, reversed on other grounds in (1895) 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383.

Delaware.—*Lupton v. Underwood* (1912) 3 Boyce, 519, 85 Atl. 965; *Rash v. Pratt* (1920) — Del. —, 111 Atl. 225.

Illinois.—*Taylor v. Wilcox* (1914) 188 Ill. App. 18; *ESHELMAN v. RAWALT* (reported herewith) ante, 1311.

Indiana.—*Gregg v. Gregg* (1905) 37 Ind. App. 210, 75 N. E. 674.

Kansas.—*Nevins v. Nevins* (1904) 68 Kan. 410, 75 Pac. 492; *White v. White* (1907) 76 Kan. 82, 90 Pac. 1087.

Kentucky.—*Scott v. O'Brien* (1908) 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. Rep. 419, 110 S. W. 260.

Maine.—*Jowett v. Wallace* (1914) 112 Me. 389, 92 Atl. 321, Ann. Cas. 1917A, 754; *Audibert v. Michaud* (1920) 119 Me. 295, 111 Atl. 305.

Maryland.—*Callis v. Merrieweather* (1904) 98 Md. 361, 103 Am. St. Rep. 404, 57 Atl. 201.

Missouri.—*Nichols v. Nichols* (1898) 147 Mo. 387, 48 S. W. 947; *Hartpence v. Rogers* (1898) 143 Mo. 623, 45 S. W. 650; *Leavell v. Leavell* (1905) 114 Mo. App. 24, 89 S. W. 55; *Butterfield v. Ennis* (1916) 193 Mo. App. 638, 186 S. W. 1173; *DeFord v. Johnson* (1915) — Mo. —, 177 S. W. 577.

North Carolina.—*Cottle v. Johnson* (1920) 179 N. C. 426, 102 S. E. 769.

Wisconsin.—*White v. White* (1909) 140 Wis. 538, 133 Am. St. Rep. 1100, 122 S. W. 1051.

And punitive or exemplary damages have also been allowed in actions for alienation of a wife's affections and for debauching her. *Woldson v. Larson* (1908) 90 C. C. A. 422, 164 Fed. 548; *Johnson v. Allen* (1888) 100 N. C. 131, 5 S. E. 666; *Cornelius v. Hambay* (1892) 150 Pa. 359, 24 Atl. 515.

So, also, punitive or exemplary dam-

ages are held recoverable in actions for criminal conversation. *Peters v. Lake* (1872) 66 Ill. 206, 16 Am. Rep. 593; *Browning v. Jones* (1894) 52 Ill. App. 597; *ESHELMAN v. RAWALT* (reported herewith) ante, 1311; *Wales v. Miner* (1888) 89 Ind. 118; *Mills v. Taylor* (1900) 85 Mo. App. 111; *Powell v. Strickland* (1913) 163 N. C. 393, 79 S. E. 872, Ann. Cas. 1915B, 709; *Cornelius v. Hambay* (1892) 150 Pa. 359, 24 Atl. 515; *Matheis v. Mazet* (1894) 164 Pa. 580, 30 Atl. 434; *Joseph v. Naylor* (1917) 257 Pa. 561, 101 Atl. 846.

And punitive damages may likewise be assessed in an action for unlawfully persuading plaintiff's wife to refuse to have intercourse with him. *Plourd v. Jarvis* (1904) 99 Me. 161, 58 Atl. 774.

The court in *Nevins v. Nevins* (1904) 68 Kan. 410, 75 Pac. 492, said: "The court also instructed the jury as to exemplary damages. No complaint is made of the rule laid down, if such damages may be given in cases of this kind; but it is contended that such damages are not recoverable, because malice, which furnishes the foundation for such damages, is a necessary ingredient of the principal cause of action, without which no recovery for compensatory damages can be had; and that to allow both compensatory and punitive damages, based on malice, would in effect be double damages for a single cause. There is no duplication of damages or any double allowance for the same cause. The fact that the wrong for which the action was brought is essentially malicious does not change the rule. A party is entitled to full compensation for actual losses resulting from a wilful and malicious wrong, but exemplary damages are allowed upon a wholly different principle. They rest upon the right to punish a wrongdoer, and not on the right of an individual to compensation for wrongs done to him. "They are not given upon any theory that the plaintiff has any just right to recover them, but are given only upon the theory that the defendant deserves punishment for his wrongful acts, and that

it is proper for the public to impose them upon the defendant as punishment for such wrongful acts, in the private action brought by the plaintiff for the recovery of the real and actual damages suffered by him.' *Schippel v. Norton* (1888) 38 Kan. 567, 16 Pac. 804. In this case, taking the testimony which was accepted by the jury, there was more than malice involved in the action of the defendant. His conduct was wanton, high-handed, and oppressive, and it is well established by a long line of decisions in this state that, wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows exemplary damages."

The court in *Butterfield v. Ennis* (1916) 193 Mo. App. 638, 186 S. W. 1173, said: "It is true punitive damages are not allowed in the absence of malice. But the enticing away of another man's wife is an act inherently wrong and necessarily known to be wrong, and if the alienation from the husband is intentionally done, the law implies malice from these facts."

In *Wales v. Miner* (1883) 89 Ind. 118, the court stated that an action for criminal conversation is not like ordinary actions for tort; that in actions for seduction, in all cases of guilt, exemplary damages may be allowed, since the offense is in the nature of a fraud upon the injured party.

And in *Hartpence v. Rogers* (1898) 143 Mo. 623, 45 S. W. 650, it was held that, where the evidence is such as to justify a finding that the defendant in an action for alienation of the affections of the plaintiff's wife, intentionally persuaded the plaintiff's wife to abandon him, it is not error materially affecting the merits of the action to give an instruction assuming the existence of wanton malice, and authorizing the allowance of punitive damages.

And in *Mills v. Taylor* (1900) 85 Mo. App. 111, it was held that a finding, in an action for wilfully seducing and debauching the plaintiff's wife, that the defendant was guilty of both charges, constituted a basis for the allowance of both actual and punitive damages.

In *Cottle v. Johnson* (1920) 179 N. C. 426, 102 S. E. 769, it was held incumbent on the plaintiff in an action for alienation of the affections of a wife and for criminal conversation, to show circumstances of aggravation or malice in addition to the malice implied by law, in order to justify the awarding of punitive damages. The court, speaking with respect to legal malice, said: "It does not necessarily mean ill will, and includes a wrongful act knowingly and intentionally done without just cause or excuse. *Stanford v. A. F. Messick Grocery Co.* (1906) 143 N. C. 427, 55 S. E. 815. When understood in this sense, and as a necessary element in establishing the plaintiff's cause of action for alienation of affections, the finding upon the first issue that the defendant alienated the affections of the plaintiff's wife and caused her to separate from him, as alleged in the complaint,—that is, maliciously,—entitled the plaintiff to recover compensatory damages, which include loss of the society of his wife, loss of her affection and assistance, as well as for his humiliation and mental anguish; but the right to punitive damages does not attach as matter of law, because the first issue was found for the plaintiff. "The right under certain circumstances to recover damages of this character is well established with us; but, as said in *Holmes v. Carolina C. R. Co.* (1886) 94 N. C. 318, such damages are not to be allowed "unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation, in the act which causes the injury." And again, in the concurring opinion in *Ammons v. Southern R. Co.* (1905) 140 N. C. 200, 52 S. E. 731, 19 Am. Neg. Rep. 474, it is said: "Such damages are not allowed as a matter of course, but only when there are some features of aggravation, as when the wrong is done wilfully, or under circumstances of oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." *Stanford v. A. F. Messick Grocery Co.* (1906) 143 N. C. 427, 55 S. E. 818. "This court has said in many cases that punitive damages may be allowed, or not, as the jury see proper;

but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other wilful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury.' *Hayes v. Southern R. Co.* (1906) 141 N. C. 199, 53 S. E. 848. 'In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages.' *Lake Shore M. S. R. Co. v. Prentice* (1893) 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261. 'While every legal wrong entitles the party injured to recover damages sufficient to compensate for the injury inflicted, not every legal wrong entitles the injured party to recover exemplary damages. To warrant the allowance of such damages the act complained of must not only be unlawful, but it must also partake somewhat of a criminal or wanton nature. And so it is an almost universally recognized rule that such damages may be recovered in cases, and in only such cases, where the wrongful act complained of is characterized by some such circumstances of aggravation as wilfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant.' 8 R. C. L. 585. 'In order that there may be a recovery of exemplary damages, there must be present in the circumstances some element of malice, fraud, or gross negligence; otherwise the measure of damages is such an amount as will constitute a just and reasonable compensation for the loss sustained, and nothing more. In other words, the wrongs to which exemplary damages are applicable are those which, besides

violating a right and inflicting actual damages, import insult, fraud, or oppression, and are not merely injuries, but injuries inflicted in a spirit of wanton disregard of the rights of others.' 17 C. J. 974. It follows, therefore, as it was incumbent on the plaintiff to show circumstances of aggravation, in addition to the malice implied by law from the conduct of the defendant in causing the separation of the plaintiff and his wife, which was necessary to sustain a recovery of compensatory damages, and as the evidence was conflicting as to the conditions which brought about the alienation and separation, it was error to charge the jury they could award punitive damages, without explaining to them that such damages could not be awarded unless the defendant acted from personal ill will to the plaintiff, or wantonly, or oppressively, or from reckless indifference to his rights."

It is the province of the jury to determine the allowance of exemplary damages, and it is error for the court not only to give coercive instructions as to the allowance of such damages, but to advise the allowance "on the grounds of public policy and for the protection of the home." *Browning v. Jones* (1894) 52 Ill. App. 597.

In *DeFord v. Johnson* (1915) — Mo. —, 177 S. W. 577, the question of exemplary damages in an action for alienation of a wife's affections was held properly left to the jury, where there was evidence that the plaintiff's wife, before she became acquainted with the defendant, was a good wife, and that subsequently, because of her intimacy with defendant, the plaintiff and his wife went to another state, and that the defendant wrote her salacious letters in which he entreated her to stick to him and obtain a divorce from the plaintiff, and save her money to help fight her husband. The court here said: "Punitive damages are no anomaly in the administration of the common law. By their allowance the burden of a wilful wrong is distributed to the shoulders of those who ought in good conscience to bear it. One might, through unjustifiable carelessness, or

under an honest but mistaken belief that he was justified in doing so, destroy the favorite dog upon which the owner had set his affections. In such a case, although the value of the animal might bear slight proportion to the pain inflicted by the loss, the law would content itself with an award of damages to the extent of the pecuniary injury. But if the wrongdoer had acted purposely with the intention of inflicting distress upon his neighbor, to whom an attempt to recover the slight compensation represented by the value of the animal would be attended with prohibitive expense and difficulty, the law ought to, and would, afford practical redress by the addition of punitive damages. So, if a man covet his neighbor's wife, and by his action corrupt her, it no more consists with private justice than with public policy that the law should permit him to appropriate her to himself at a price to be fixed by a jury at the money value of those elements which enter into the assessment of compensatory damages. It is not to be tolerated that a man should be permitted to acquire by wilful trespass that which his neighbor will not sell. To prevent such wrongs, as well as to afford redress when they are committed, punitive damages are allowed in every case of injury from a wrongful act, intentionally done, without just cause or excuse."

In *Jennings v. Cooper* (1921) — Mo. App. — 230 S. W. 325, an instruction in an action for alienation of a husband's affections was held correct, in which the jury were told that there was no law which required them to give punitive damages over and above compensatory damages, but that if, under the evidence and instructions, they found for the plaintiff, and should further find from the evidence that, in alienating the affections of the husband, the defendant "acted recklessly and in wanton disregard of the rights of plaintiff," the jury might, if they saw proper to do so, after assessing her actual damages, add thereto such exemplary or punitive damages as, under all the facts and circumstances, the defendant ought to pay by way of

punishment, the court holding that the instruction was not erroneous in using the words, "recklessly and in wanton disregard of plaintiff's rights," instead of the word "maliciously," stating that one of the meanings of the word "wanton" was "heartlessly; evincing a wicked or mischievous intent."

In England, in early actions for criminal conversation and alienation of affections, as well as in cases of similar claims under the Matrimonial Causes Act, it is held that the damages recoverable are merely compensatory, and that punitive damages cannot be had. *James v. Biddington* (1834) 6 Car. & P. (Eng.) 589; *Wilton v. Webster* (1835) 7 Car. & P. (Eng.) 198; *Keyes v. Keyes* (1886) L. R. 11 Prob. Div. (Eng.) 100, 55 L. J. Prob. N. S. 54, 34 Week. Rep. 791; *Evans v. Evans*, L. R. [1899] Prob. (Eng.) 195, 68 L. J. Prob. N. S. 70, 81 L. T. N. S. 60; *Darbishire v. Darbishire* (1890) 62 L. T. N. S. (Eng.) 664, 54 J. P. 408; *Butterworth v. Butterworth*, L. R. [1920] Prob. (Eng.) 126, 89 L. J. Prob. N. S. 151, 122 L. T. N. S. 804, 36 Times L. R. 265.

And in some of the American cases it has been held that compensatory damages, and not exemplary damages, are recoverable in actions for alienation of affections. *French v. Deane* (1894) 19 Colo. 504, 24 L.R.A. 387, 36 Pac. 609; *Phillips v. Thomas* (1912) 70 Wash. 533, 42 L.R.A. (N.S.) 583, 127 Pac. 97, Ann. Cas. 1914B, 800.

b. Regulation by statute.

In some jurisdictions the allowance of punitive or exemplary damages is regulated by statute.

Thus, in *Moelleur v. Moelleur* (1918) 55 Mont. 30, 173 Pac. 419, where a statute authorized such damages when the defendant had been guilty of malice, it was held that a recovery of punitive damages might be had in an action for alienation of affections, as malice might be implied.

And in *Williams v. Williams* (1894) 20 Colo. 51, 37 Pac. 614, where the action for alienation of affections of a husband arose after Sess. Laws 1889, p. 64, restoring exemplary damages,

the injury was held a "wrong done to the person" within the meaning of the statute providing for exemplary damages. The court said: "The cause of action in this case arose after the taking effect of the act restoring exemplary damages. Sess. Laws 1889, p. 64. But it is insisted that the injury complained of was not a wrong done to the person of plaintiff. As we have seen, anyone who wrongfully induces a husband to desert and abandon his wife commits an actionable injury against the wife. Such injury is a wrong done to the wife as an individual—as a person. The statute does not specify that the wrong shall be a physical or bodily injury. On the contrary, it allows exemplary damages when 'the injury complained of shall be attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings.' These words clearly import wrongs and injuries other than mere bodily wounds or pecuniary losses. They include, as well, injuries affecting the mind and sensibilities of the individual, which are often more grievous and painful than mere material injuries. The whole language of the act, construed together, forbids that the words 'wrong done to the person' should be restricted to physical or bodily injuries."

In *Lindblom v. Sonsteli* (1901) 10 N. D. 140, 86 N. W. 357, where a statute authorized the assessing of exemplary damages in case the defendant had been guilty of oppression, fraud, or malice, actual or presumed, an instruction in an action for maliciously alienating the wife's affections was held erroneous, where it told the jury that they might add such an amount for exemplary damages as they saw fit; since they should have been told that exemplary damages could be allowed only when fraud or malice existed, and that the amount of such damages should be assessed after weighing all of the evidence, both incriminatory and mitigatory.

II. *Wealth of parties as element.*

Where punitive or exemplary dam-

ages are allowed in actions for alienation of affections, it is held that the wealth or financial condition of the defendant is a proper element for the jury to consider in finding the damages.

Illinois.—*Taylor v. Wilcox* (1914) 188 Ill. App. 18.

Kansas.—*White v. White* (1907) 76 Kan. 82, 90 Pac. 1087.

Maine.—*Aubibert v. Michaud* (1920) 119 Me. 295, 111 Atl. 305.

Missouri.—*Nichols v. Nichols* (1898) 147 Mo. 387, 48 S. W. 947; *Leavell v. Leavell* (1905) 114 Mo. App. 24, 89 S. W. 55.

North Carolina.—*Johnson v. Allen* (1888) 100 N. C. 131, 5 S. E. 666.

Vermont.—*Miller v. Pearce* (1918) 86 Vt. 322, 43 L.R.A.(N.S.) 332, 85 Atl. 620.

Wisconsin.—*White v. White* (1909) 140 Wis. 538, 133 Am. St. Rep. 1100, 122 S. W. 1051.

The court in *Leavell v. Leavell* (Mo.) supra, said: "Exemplary or punitive damages are allowed to the injured party above and beyond what is allowed him as compensation. The object of the law is to punish the defendant, in addition to compelling him to compensate the plaintiff. As the extent of a man's means enters largely into one's judgment in fixing upon a sum which would punish him, his wealth may be shown that the jury may consider what sum would be a punishment to him, it being readily seen that \$1,000 would not be any more punishment to some than \$100 would be to others of less financial worth. So, therefore, in such actions as slander, libel, assault and battery, seduction, and other aggravated torts, the plaintiff may show the defendant's wealth in aid of the measurement of his punishment."

And in actions for criminal conversation, where exemplary or punitive damages are allowed, the financial ability of the defendant is a proper element to be considered on the question of damages. *Browning v. Jones* (1894) 52 Ill. App. 597; *Silvernail v. Westerman* (1882) 11 Luzerne Leg. Reg. (Pa.) 5.

And in *Matheis v. Mazet* (1894) 164

Pa. 580, 30 Atl. 434, where recovery was sought for crim. con., it was held that in fixing punitive damages the jury should not impose the same amount in the case of a poor man as of a rich one, since there is a difference in a penalty as between a rich and a poor man, as what would not amount to anything by way of penalty to the former might be absolutely ruinous to the latter.

And in *Peters v. Lake* (1872) 66 Ill. 206, 16 Am. Rep. 593, an action for crim. con., the pecuniary ability of the defendant was held a proper subject of inquiry with a view to the question of exemplary damages, and evidence of the pecuniary circumstances of the parties was also held admissible; but, where the case was tried some years after the injury, evidence that the plaintiff was a bankrupt at the time of the trial was held to be inadmissible.

And in *White v. White* (1909) 140 Wis. 538, 133 Am. St. Rep. 1100, 122 S. W. 1051, an action against the parents of plaintiff's husband for alienation of his affections, punitive damages were held properly allowed, although one of the defendants was without property and the other was possessed of considerable means.

But it has been held in an action for alienation of a husband's affections, where there are two defendants, that evidence of the wealth of one of them is not admissible for the purpose of measuring punitive damages, since the judgment must be in solido. *Leavell v. Leavell* (1905) 114 Mo. App. 24, 89 S. W. 55.

In some cases punitive damages, in actions for alienation of a husband's affections, are not allowed, and where this is true evidence of the defendant's wealth cannot be taken into consideration on fixing damages. *Phillips v. Thomas* (1912) 70 Wash. 533, 42 L.R.A. (N.S.) 582, 127 Pac. 97, Ann. Cas. 1914B, 800.

And in *Keyes v. Keyes* (1886) L. R. 11 Prob. Div. (Eng.) 100, 55 L. J. Prob. N. S. 54, 34 Week. Rep. 791, it was held that in an action against a corespondent all that the law permits the jury to do is to give compensation for the loss which the husband has sustained, and that they cannot give damages to punish the defendant, and that the latter's means are not, therefore, to be considered in fixing the damages.

And in *Bikker v. Bikker* (1892) 67 L. T. N. S. (Eng.) 721, 1 Reports, 496, it was held that in fixing damages against a corespondent, charged with adultery with petitioner's wife, the position or wealth of the defendant was not to be considered, but that the real question to consider was the injury done to the petitioner.

It is held that, although the amount of compensation cannot depend on the wealth or poverty of the corespondent, yet the way in which he has used his wealth in gaining his end is relevant. *Butterworth v. Butterworth*, L. R. [1920] Prob. (Eng.) 126, 89 L. J. Prob. N. S. 151, 122 L. T. N. S. 804, 36 Times L. R. 265; *Cowing v. Cowing* (1863) 33 L. J. Prob. N. S. (Eng.) 149; *James v. Biddington* (1834) 6 Car. & P. (Eng.) 589. J. T. W.

A. WENTWORTH ERICKSON, Respt.,

v.

SILVANUS J. MACY, Appt.

New York Court of Appeals — April 19, 1921.

(231 N. Y. 86, 131 N. E. 744.)

Writ — publication of summons — statutory authority — effect of Federal statute.

1. A statutory provision, authorizing publication of summons where an attempt to commence action before the expiration of the limitation

period failed and the limitation period would have expired within sixty days next preceding application for leave to proceed by publication if the attempt to commence the action had not been made, does not apply where the defendant is in the military service of the United States, and the Federal statute provides that the period of such service shall not be included in computing the limitation period.

[See note on this question beginning on page 1327.]

— provisions for substituted service — strict construction.

2. Statutory provisions for substituted service of process must be strictly construed and fully carried out to confer jurisdiction upon the court.

[See 21 R. C. L. 1280.]

Limitation of actions — suspension of statute — power of Congress.

3. Congress had authority to suspend the running of the Statute of Limitations in favor of persons in military service during the period of the war.

[See note in 9 A.L.R. 81.]

Conflict of laws — state and Federal — amendment of statute of limitations.

4. A state statute limiting the time within which action may be brought on promissory notes was modified and amended by the Federal statute, providing that the term of military service of a defendant should not be included in computing the period limited for bringing action, as though it had been enacted by the state legislature.

[See note in 9 A.L.R. 16.]

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, Fourth Department, so far as it affirmed an order of a Special Term for Monroe County, denying a motion to vacate and set aside service of summons by publication upon defendant. *Reversed.*

Statement by Chase, J.:

The defendant is, and at all times herein mentioned was, a resident of the county of Livingston in this state. On the 29th day of June, 1912, he made and delivered to the plaintiff his promissory note, dated that day, for \$22,704.04, payable with interest on demand. The note has not been paid. On the 1st day of June, 1918, the defendant entered the military service of the United States, and departed from and remained out of this state until subsequent to his discharge from military service on July 10, 1919. After the defendant left this state, and in June, 1918, the plaintiff delivered a summons and complaint in the supreme court on said note, to the sheriff of Livingston county for service. It was returned unserved, because, as certified by said sheriff, he was unable to find the defendant in said county. On July 16, 1918, an order was granted, directing the service of the summons by publication. The order was based upon pa-

pers, including an affidavit in which it was stated that "there has not been, to the best of deponent's knowledge and belief, any exception suspending the running of the Statute of Limitations on said cause of action or enlarging the time; and that the limitation for the time for bringing this action, as prescribed by chapter 4 of the Code of Civil Procedure, would, as deponent is advised and believes, have expired within sixty days next preceding this application if such attempt to commence the action, as aforesaid, had not been made."

The summons was thereafter published in accordance with the terms of the order. A motion was made to set aside the service of the summons, which motion was denied. An appeal was taken from that order to the appellate division. The appellate division modified the order of the special term so far as it related to the judgment that had been entered upon the alleged default of the defendant after the publication

of the summons, but unanimously affirmed the order so far as it denied the motion to set aside the order of publication. *Erickson v. Macy*, 194 App. Div. 950, 185 N. Y. Supp. 926.

The appellate division thereafter granted leave to appeal to this court (185 N. Y. Supp. 927), and in the order certified that, in its opinion, four questions of law ought to be reviewed by this court, viz.:

"(1) Did the Act of Congress of March 8, 1918, known as Soldiers' and Sailors' Relief Act, extend the New York state statutes limiting the periods of time to enforce a civil remedy against persons engaged in military service of the United States for the period of such service?"

"(2) Did the justice of the supreme court, by whom the order of July 16, 1918, in this action, was made, directing service of the summons herein upon the defendant by publication, have authority and jurisdiction under subdivision 6 of § 438 of the Code of Civil Procedure of the state of New York, in view of the said Act of Congress of March 8, 1918, to grant the said order of publication?"

"(3) Had the limitation of time in which to commence the action expired at the time the said order was applied for and granted, except for the plaintiff's attempt to commence the action by the delivery of the summons to the sheriff?"

"(4) Would such limitation of time have expired within sixty days next preceding the application for such order, if the time had not been extended by the attempt to commence the action?"

John Van Voorhis' Sons, for appellant:

The Act of Congress of March 8, 1918, extended the New York state Statute of Limitations to persons engaged in military service for the period of such service.

Stewart v. Kahn (*Stewart v. Bloom*) 11 Wall. 493, 20 L. ed. 176; *Mayfield v. Richards*, 115 U. S. 137, 29 L. ed. 334, 5 Sup. Ct. Rep. 1187; *Hoffman v. Charlestown Five Cents Sav. Bank*, 231 Mass. 324, 121 N. E. 15; *Konkel v. State*, 168 Wis. 335, 170 N. W. 715:

The justice was without jurisdiction to grant the order directing service of summons upon the defendant by publication, because the limitation of time to commence the action had not expired at the time the order was applied for and granted.

Taylor v. Fenn, 162 App. Div. 930, 147 N. Y. Supp. 1145; *Clarkson v. Butler*, 173 App. Div. 143, 159 N. Y. Supp. 343.

The provisions of chapter 4 of the Code of Civil Procedure, excepting those which refer to periods of time within which various classes of actions specified therein must be commenced, apply to all other limitations specially prescribed by law, as provided in subd. 1 of § 414 of the Code.

Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638; *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228; *Hamilton v. Royal Ins. Co.* 156 N. Y. 327, 42 L.R.A. 485, 50 N. E. 863; *Conolly v. Hyams*, 176 N. Y. 403, 68 N. E. 662; *McKnight v. New York*, 186 N. Y. 35, 78 N. E. 576; *Sharrow v. Inland Lines*, 214 N. Y. 101, L.R.A.1915E, 1192, 108 N. E. 217, Ann. Cas. 1916D, 1236.

Statutes providing for substituted service must be complied with in every detail to confer jurisdiction to grant orders for such service, and the direction thereof must be strictly pursued.

Korn v. Lipman, 201 N. Y. 404, 94 N. E. 861; *Kennedy v. Lamb*, 182 N. Y. 228, 108 Am. St. Rep. 800, 74 N. E. 834; *Gay v. Ulrichs*, 136 App. Div. 809, 121 N. Y. Supp. 726; *Murphy v. Franklin Sav. Bank*, 131 App. Div. 759, 116 N. Y. Supp. 228; *McLaughlin v. McCann*, 123 App. Div. 67, 107 N. Y. Supp. 762; *Empire City Sav. Bank v. Silleck*, 98 App. Div. 139, 90 N. Y. Supp. 561, affirmed in 180 N. Y. 541, 73 N. E. 1123; *Haight v. Husted*, 4 Abb. Pr. 348; *Wortman v. Wortman*, 17 Abb. Pr. 66; *Kendall v. Washburn*, 14 How. Pr. 380; *Hallett v. Righters*, 13 How. Pr. 43; *Peck v. Cook*, 41 Barb. 549; *Whiton v. Morning Journal Asso.* 23 Misc. 299, 50 N. Y. Supp. 899; *Waters v. Waters*, 7 Misc. 519, 27 N. Y. Supp. 1004; *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397.

Mr. Edward Harris for respondent.

Chase, J., delivered the opinion of the court:

Whenever it is necessary to determine whether jurisdiction has been obtained over a defendant in an ac-

tion by service of the summons in some way other than by personal service thereof, it must be remembered that the general rule in regard to the service of process, established by centuries of precedent, is that process must be served personally, within the jurisdiction of the court, upon the person to be affected thereby. Substituted service, when provided by statute, is in derogation of such general rule, and consequently the directions thereof must be strictly construed and fully carried out to confer any jurisdiction upon the court. Korn v. Lipman, 201 N. Y. 404, 94 N. E. 861.

Writ—provisions for substituted service—strict construction.

By the Code of Civil Procedure it is provided that an action upon a contract obligation or liability, express or implied, must be commenced within six years after the cause of action has accrued. Section 382.

By an act of Congress passed March 8, 1918, known as the "Soldiers' and Sailors' Civil Relief Act," it is provided that "the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service." 40 Stat. at L. 443, chap. 20, Comp. Stat. § 3078½, Fed. Stat. Anno. Supp. 1918, p. 816.

The enactment of that section by Congress was within its power.

Limitation of actions—suspension of statute—power of Congress.

Stewart v. Kahn (Stewart v. Bloom) 11 Wall. 493, 20 L. ed. 176; Mayfield v. Richards, 115 U. S. 137, 29 L. ed. 334, 5 Sup. Ct. Rep. 1187; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct.

Rep. 169, 1 N. C. C. A. 875; Hoffman v. Charlestown Five Cents Sav. Bank, 231 Mass. 324, 121 N. E. 15; Grand Trunk Western R. Co. v. Thrift Trust Co. 68 Ind. App. 198, 115 N. E. 685; Konkel v. State, 168 Wis. 335, 170 N. W. 715; Pierrard v. Hoch, 97 Or. 71, 184 Pac. 494, 191 Pac. 328.

The laws of the United States, constitutionally enacted, are the laws of the individual states and of all the people of the United States. It was said by Chief Justice Marshall, in M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, that the nation, on those subjects on which it can act, must necessarily bind its component parts.

The United States Constitution, article 6, subdivision 2, declares: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

By said Civil Relief Act it is further expressly provided: "The provisions of this act shall apply to the United States, the several states and territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed." Comp. Stat. § 3078½aaa, Fed. Stat. Anno. Supp. 1918, p. 813.

The Code provision of this state prescribing the time within which an action can be brought on a promissory note after the cause of action accrues was, by said Civil Relief Act, modified and

Conflict of laws—state and Federal—amendment of statute of limitations.

amended as if the Federal statute had been enacted by the legislature of this state and included as an amendment in our Code of Civil Procedure.

The Federal statutes quoted do not affect the jurisdiction of the courts of this state, or in any way prescribe or stay proceedings therein. They simply extend the time in which an action can be commenced against a person in military service, by enacting that the period of military service "shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against" such person. The plaintiff was mistaken in stating to the court, on the application for the order of publication, that there had not been any exception extending the running of the Statute of Limitations on his cause of action, or enlarging the time. The time for the commencement of an action on the note had been extended and enlarged by the period of military service of the defendant. The order was granted upon the theory that under § 382 of the Code of Civil Procedure the time for the commencement of an action on the note would expire on the 29th day of June, 1918, and that an order directing the service of the summons upon the defendant by publication could be made pursuant to § 438, subdivision 6, of the Code of Civil Procedure. That subdivision of said section provides that "where the defendant is a resident of the state or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable thereto as fixed in that chapter; and the limitation would have expired, within sixty days next preceding the application, if time had not been extended by the attempt to commence the action."

That subdivision of said section

did not authorize the making of the order in this case, because the limitation of the time to commence the action had not and could not expire until some time after the order was made.

Writ—publication of summons—statutory authority—effect of Federal statute.

The plaintiff urges that the Federal statutes should be construed to permit the publication of the summons in accordance with the order granted, because, if the time that a defendant is in military service is not included in computing the period of limitation prescribed by the Code, it will lead to great confusion and uncertainty in regard to the time when the Statute of Limitations in a given case will expire.

In many cases,—among others, absence for a time of a debtor from the state,—it was possible to encounter uncertainty and confusion of fact in computing the time when the Statute of Limitations in a given case would expire, under the Code of Civil Procedure as it existed prior to the enactment of the Federal statute.

It should also be suggested that a holder of a cause of action is not necessarily confined in his remedy thereon to the particular subdivision of the Code of Civil Procedure mentioned, nor to enforcing his remedy in this state.

The provisions of the Code of Civil Procedure and of the Federal statute lead inevitably to the conclusion that the order of publication in this case was improperly granted. The provisions thereof are too plain to permit of a different construction.

The order should be reversed, and motion to set aside the service of the summons by publication should be granted, with costs in all courts, and the questions certified should be answered as follows: The first in the affirmative, and the second, third, and fourth in the negative.

Hiscock, Ch. J., and Cardozo, Pound, McLaughlin, Crane, and Andrews, JJ., concur.

ANNOTATION.

Validity and construction of war enactments in United States suspending operation of statute of limitations.**I. Introductory, 1327.****II. Federal enactments:**

a. *Soldiers' and Sailors' Civil Relief Act, 1327.*

b. *Transportation Act of 1920, 1329.*

c. *Federal Stay Act of 1864, 1330.*

III. State enactments:

a. *Particular jurisdictions, 1331.*

b. *Validity as to action barred at date of enactment, 1346.*

I. Introductory.

The difficulty of maintaining judicial proceedings during, or at the close of, a period of war, has frequently led to enactments suspending the operation of statutes of limitation. Such enactments were especially common during the Civil War, when in many parts of the southern states the civil administration of the courts had practically ceased. These enactments were usually statutory, but not infrequently, in the Reconstruction Period, were in the form of constitutional ordinances. A statute or state constitutional provision to prevent injustice because of war conditions is considered a war enactment for the purpose of this annotation, irrespective of whether it was passed during an actual period of warfare or at a later date. The suspension clause of the Transportation Act of February 28, 1920, though only indirectly due to war conditions, has been treated as war legislation, since its enactment was made necessary or expedient by legislation designed to promote the prosecution of the recent war.

Enactments which suspend the running of statutes of limitation are, of course, for the relief of creditors. For a discussion of war legislation for the relief of debtors, see the note to *Thress v. Zemple*, 9 A.L.R. 1. For a comprehensive review of the earlier cases discussing the validity and construction of the *Soldiers' and Sailors' Civil Relief Act*, see the note to *Morse v. Stober*, 9 A.L.R. 78.

II. Federal enactments.**a. *Soldiers' and Sailors' Civil Relief Act.***

The *Soldiers' and Sailors' Civil Relief Act* of March 8, 1918, includes the following section (205) with respect to the suspension of statutes of limitation: "The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service." 40 Stat. at L. 443, chap. 20, Comp. Stat. § 30781e, Fed. Stat. Anno. Supp. 1918, p. 816.

Even as applied to a state statute of limitations for an action brought in a state court, § 205 of the *Soldiers' and Sailors' Civil Relief Act* is held, in the reported case (*ERICKSON v. MACY*, ante, 1322), to be a valid exercise of the war powers of Congress.

In most of the cases which have arisen under this section it has been held to be applicable to an action instituted by a soldier or sailor.

Thus, in *Kuehn v. Neugebauer* (1919) — Tex. Civ. App. —, 216 S. W. 259, it was held that, under the section quoted, the time limited by a state statute for the payment of the costs of an appeal and the taking out of a mandate did not run against a soldier during the period of his military service.

In *Halle v. Cavanaugh* (1920) — N. H. —, 111 Atl. 76, it appeared that the plaintiff died while an action instituted by her to recover for personal injuries was pending. Her husband, who was named as her executor in her will, was in the military service of the United States from June 27, 1918, to January 27, 1919. Under the New Hampshire statutes an executor is required to assume the prosecution of a

suit begun by his testator or testatrix, within two terms of court, if at all. The question before the court was whether the time for assuming such an action was extended by virtue of § 205 of the Soldiers' and Sailors' Civil Relief Act. It was held that the act of an executor in assuming the prosecution of a suit instituted by his testatrix was not "the bringing of any action" within the meaning of the Federal statute. The court held, however, that, under the liberal construction given to a statute permitting one interested in an estate to bring an action which the executor declined to prosecute, the husband of the plaintiff was entitled in his own right to maintain an action for the injuries to the plaintiff, and that such right of action was not barred until there had elapsed, after the death of his wife, two full terms, exclusive of the time that he was in the service. On this point the court said: "The husband was interested in this suit. The terms of the will do not appear, but if he takes nothing thereby he has the right to his distributive share of her estate under the statute. Laws 1915, chap. 31, § 3. That he would have the right to appear and prosecute the suit within the statutory period, if the executor declined to do so, is not open to question. The fact that his proceeding might have to be in the name of the executor (*Merrill v. Woodbury* (1881) 61 N. H. 504), does not alter the essential fact. The right to be vindicated is one in which he is interested, and which he can assert if the executor declines to do so. The question here is whether this right to appear and prosecute a pending suit, which would abate but for such appearance, is covered by the Federal statute, which in terms applies to 'the bringing of any action.' There is no other provision in the Federal act which would afford any relief to the person so situated. The general purpose of that statute is declared to be to extend protection to persons in the military service, to prevent prejudice or injury to their civil rights during their term of service. 40 Stat. at L. 440, chap. 20, § 100, Comp. Stat. §

30781a, Fed. Stat. Anno. Supp. 1918, p. 812. In view of this declared object, it is reasonable to conclude that the intent was to include the procedure here involved. It follows that the husband had two full terms of court after the death of his wife, and exclusive of the time he was in the service, in which to appear as an individual and assume the prosecution of this suit. The suggestion is made that, if the husband owns only a part interest in the estate, the result of allowing him to appear and prosecute the suit would be to compel a complex computation to determine his ultimate net interest therein, so that recovery should be limited accordingly. The question does not now arise, except incidentally and as a collateral test for the correctness of the conclusion that he can maintain the action. If the rule suggested is sound, it does not present an insuperable obstacle. In any event, his share would have to be determined before distribution, and if that share is all that can be recovered, and is in fact less than the whole, judgment on the verdict can be postponed until the amount to which he is entitled is determined."

Moreover, in *Steinfeld v. Massachusetts Bonding & Ins. Co.* (1921) — N. H. —, 112 Atl. 806, it was held that under the Soldiers' and Sailors' Civil Relief Act the period of a plaintiff's military service was not to be included in computing a ninety-day period, after the payment of a loss or expense, within which he was required by a stipulation in a policy of indemnity insurance to bring suit for such loss or expense. The court said: "The defendant's argument is that the time for bringing suit was limited by the contract, and not by 'any law,' and that therefore the statute does not apply. The defect in the argument is its assumption that the contract is binding, irrespective of any law. This plainly is not so. The contract is valid because some law so declares it. In the defendant's brief it, of necessity, appeals to the law to sustain its position that the contract stipulation is valid. It is by virtue of the decided cases cited by the defendant that

it is able to demonstrate the correctness of that position. Actions are not limited without law. It was the agreement plus the law that created the legal limitation in this case. It is true, as the defendant argues, that a contract is not a law. It is equally true that an agreement without law is not a contract. The application of the Federal act is not limited to statutory provisions. It applies to all law, and provides in substance that, notwithstanding the state law limits the action as by contract agreed, that law shall not apply while the plaintiff is in the service. It is manifest that the present case is within the spirit and intent of the act. The purpose was to extend the time for bringing actions generally. 40 Stat. at L. 440, chap. 20, § 100, Comp. Stat. § 3078½, Fed. Stat. Anno. Supp. 1918, p. 812. It was not the legislative intent that the remedial purpose of the act should be defeated by a narrow or technical construction of the language used. *Halle v. Cavanaugh* (1920) — N. H. —, 111 Atl. 76."

On the other hand, a statute prescribing a period for the redemption of property after a foreclosure sale, by a lien holder acting under a power, has been held not to be a statute of limitation, and, under the section of the Soldiers' and Sailors' Civil Relief Act excluding the period of military service from the computation of a period limited by law for bringing an action by or against a person in that service, one who had an equity of redemption has been denied the right to exclude the term of his military service from the period prescribed for the redemption of the property. *Wood v. Vogel* (1920) 204 Ala. 692, 87 So. 174.

The reported case (*ERICKSON v. MACY*, ante, 1322) appears to be the first decision by an appellate court with respect to the application of § 205 to a cause of action against a soldier or sailor. In this case—an action on a promissory note against a defendant in the military service of the United States—an order was granted directing the service of summons by publication. The order was based on a provision of the New York

Code of Civil Procedure, permitting a service of summons by publication on a resident of the state or a domestic corporation, where an attempt has been properly made to commence the action against the defendant before the expiration of the period of limitation for bringing the action, and such period would have expired within sixty days next preceding the plaintiff's application if the time had not been extended by the attempt to commence the action. The court of appeals holds that, since the six-year period for bringing the action against the defendant could not have expired under § 205 of the Soldiers' and Sailors' Civil Relief Act until some time after the order was made, the order of service by publication was not authorized by the Code of Civil Procedure, and an order denying the defendant's motion to vacate a service by publication pursuant to the earlier order was therefore reversed.

b. Transportation Act of 1920.

In a few recent cases Federal district courts have given effect to § 206(f) of the Transportation Act of February 28, 1920, which provides that "the period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the commission for causes of action arising prior to Federal control." 41 Stat. at L. 462, chap. 91, Fed. Stat. Anno. Supp. 1920, p. 79.

The section quoted has been held to apply to actions to which the bar of a statute of limitations had attached before the section was enacted, and, thus construed, has been held to be a valid exercise of the war power of Congress.

In *Standley v. United States R. Administration* (1920) 271 Fed. 794, it was held that, by virtue of § 206 (f), the period of Federal control was to be excluded in computing the time for the bringing of an action for personal injuries, under an Ohio statute requiring the action to be brought within four years after the cause thereof first accrued.

In *Wenatchee Produce Co. v. Great*

Northern R. Co. (1921) 271 Fed. 784, the court held that the section of the Transportation Act quoted, as applied to a statute of limitation in the usual form, was not invalid because it would be unconstitutional if applied to statutes such as the Federal Employers' Liability Act and Lord Campbell's Act, wherein the time prescribed for bringing an action is made a condition of liability, and not merely of remedy.

In *Lazarus v. New York C. R. Co.* (1921) 271 Fed. 93, the court construed the same section of the Transportation Act in an action wherein it appeared that the defendant had filed a schedule with the Interstate Commerce Commission, limiting its liability in point of time to two years and one day, and that such filing was in conformity with a Federal statute permitting a carrier thus to limit its liability to a period of not less than two years. The court held that "the periods of limitation" referred to in the statute included the period established by the filing of the schedule, in conformity with the statute permitting a limitation of the period of a carrier's liability. It was remarked, however, that in the case before the court there was no evidence that a bill of lading was signed by the shipper or accepted by him, and the court intimated that a period of limitation depending on a contract between the carrier and the shipper would not be within the meaning of "the periods of limitation," as used in the statute.

c. Federal Stay Act of 1864.

A Federal statute was enacted June 11, 1864, suspending the operation of statutes of limitation in cases where the defendant could not be served with process on account of the Civil War. Separate provisions were made for causes of action arising after the passage of the act and for those arising before its passage. With respect to the latter, it was enacted that the time during which the defendant should be beyond the reach of legal process by reason of the resistance of the laws or the interruption of judicial proceedings should not be deemed a part of the time limited by law for

the commencement of an action. See *Stewart v. Kahn* (*Stewart v. Bloom*) (1871) 11 Wall. (U. S.) 493, 20 L. ed. 176.

The statute was held to be a valid exercise of the war powers of Congress. *Stewart v. Kahn* (U. S.) supra; *United States v. Wiley* (1871) 11 Wall. (U. S.) 508, 20 L. ed. 211; *Mayfield v. Richards* (1885) 115 U. S. 137, 29 L. ed. 334, 5 Sup. Ct. Rep. 1187.

The section extending the period of limitation of actions where the cause of action arose prior to the date of the statute was held to extend the period of limitation during the time that the defendant could not be served with process before the passage of the act, as well as during a similar time subsequent to its passage. *Stewart v. Kahn* (U. S.) supra; *United States v. Wiley* (1871) 11 Wall. (U. S.) 508, 20 L. ed. 211; *Mayfield v. Richards* (1885) 115 U. S. 137, 29 L. ed. 334, 5 Sup. Ct. Rep. 1187. In *Harrison v. Adger* (1872) 24 La. Ann. 565, however, the court held that the period elapsing between the time a cause of action accrued and the date of passage of the act was not to be deducted, in view of the language of the act, which, strictly construed, could not apply retrospectively.

In *United States v. Wiley* (1871) 11 Wall. (U. S.) 508, 20 L. ed. 211, it was held that even if the clause relating to the time to be deducted referred only to a period after the passage of the act, the statute would not change the rule of the common law that the existence of civil war suspended the running of the statutes of limitations as to actions between residents of different sections in armed hostility to one another, or between a sovereign government and a subject residing in territory where the rights of the government were not recognized and its power temporarily rendered ineffective.

In *United States v. Muhlenbrink* (1873) 1 Woods, 569, Fed. Cas. No. 15,831, it was held that, by virtue of the Act of 1864, the period to be deducted from the period of limitation in an action in a Federal district court did not extend to the date of the first

term of the Federal district court if the service of process in the case was possible before that time.

The Act of 1864 was held to apply to actions in state courts as well as to actions in Federal courts. *Stewart v. Kahn* (1871) (*Stewart v. Bloom*) 11 Wall. (U. S.) 493, 20 L. ed. 176; *Mayfield v. Richards* (1885) 115 U. S. 137, 29 L. ed. 334, 5 Sup. Ct. Rep. 1187; *Auchincloss v. Frois* (1872) 24 La. Ann. 31; *Miltenerberger v. Witherow* (1872) 24 La. Ann. 183; *Harrison v. Adger* (1872) 24 La. Ann. 565.

In *Graydon v. Sweet* (1871) 1 Woods, 418, Fed. Cas. No. 5,733, the court held, however, that the Act of 1864 did not render invalid or inapplicable, in the Federal courts of Texas, the following clause of the Texas Constitution: "The statutes of limitation of civil suits were suspended by the so-called Act of Secession of the 28th of January, 1861, and shall be considered as suspended within this state, until the acceptance of this Constitution by the United States Congress." With respect to the nature and effect of the Federal statute the court said: "This act does not specify any time within which an action shall be brought. In this respect it lacks an essential feature belonging to a statute of limitations. At the time of its passage, the Civil War was going on, and it simply declared that, during the existence of the Rebellion, the time during which the ordinary course of judicial proceedings was interrupted should not be deemed or taken as any part of the time limited by law for the commencement of an action. It did not provide that when such interruption ceased, or process could be severed, the limitation provided by law should begin to run. Had it done so, I presume there could be little doubt that the present action should be held to be barred. But the act does not so provide, and it is only by inference or implication that such a construction can be given to it. Inasmuch as no bar is expressly created by this statute, and I am unwilling to give it a construction at variance with the rule established by the Constitution of the state, I must

hold that, in this case at least, the state constitutional limitation should govern."

In *Lockhart v. Horn* (1871) 1 Woods, 628, Fed. Cas. No. 8,445, it was held that the Act of 1864 did not apply as between citizens of Confederate states, where the proceedings of the courts were not interrupted, except for brief periods of time, so as to prevent the prosecution of suits between citizens of any of the Confederate states.

The Act of 1864 was also held to be inapplicable to a cause of action arising in a district within a Confederate state which was within the control of the United States during the whole interval sought to be deducted in computing the period of limitation. *Harrison v. Myer* (1876) 92 U. S. 111, 23 L. ed. 606; *Britton v. Butler* (1873) 11 Blatchf. 350, Fed. Cas. No. 1,904.

III. State enactments.

a. Particular jurisdictions.

Alabama.

In *Coleman v. Holmes* (1870) 44 Ala. 124, 4 Am. Rep. 121, it appeared that an Alabama constitutional convention, in 1865, ordained that in computing the time necessary to constitute a bar to an action under a statute of limitations, the time elapsing between January 11, 1861, and the passage of the ordinance, should not be included. An act of the legislature in 1868, however, purported to repeal the ordinance. The court, in deciding that the running of a Statute of Limitations was suspended so as to prevent its being a bar to the action before the court, held that it was unnecessary to consider the validity of the legislation and constitutional provision mentioned, since the commotion of civil war and the lack of legal civil courts were sufficient reasons for holding that the Statute of Limitations was suspended. See to the same effect, *Fox v. Lawson* (1870) 44 Ala. 319.

In *Harrison v. Heflin* (1875) 54 Ala. 552, the ordinance of the Alabama constitutional convention of 1865, suspending the operation of statutes of limitation, was held not to affect the rule that, in an action in equity to

enforce liability on a bond, there is a presumption of payment, where an action is not instituted to enforce the liability within twenty years from the date on which the liability was incurred. See to the same effect, with respect to similar enactments in other states, *Shubrick v. Adams* (1883) 20 S. C. 49; *Kilpatrick v. Brashear* (1873) 10 Heisk. (Tenn.) 372. And compare *Penrose v. King* (1794) 1 Yeates (Pa.) 344, wherein the opposite conclusion was reached. These cases are discussed under their respective jurisdictions in this subdivision.

Florida.

A Florida statute approved December 13, 1861, provided that the Statutes of Limitation then in force in that state, "in relation to civil actions" of every description, should be suspended, and should have no operation or effect so long as the suspending statute should continue in force and unrepealed. It was held that the statute was not repealed by a constitutional provision adopted in 1868, prohibiting the pleading of the Statute of Limitations on any claim so as to include the period between January 10, 1861, and October 25, 1865. *Hart v. Bostwick* (1872) 14 Fla. 162. See to the same effect, *McDonald v. Bogue* (1874) 14 Fla. 363.

In *Bradford v. Shine* (1870) 13 Fla. 393, 7 Am. Rep. 239, an action to enforce a claim against an estate, it was held that the foregoing Statute of December 13, 1861, applied only to a statute relating to ordinary civil actions, and did not affect a statute providing that a claim against an estate was "barred" if not presented within two years after the notice prescribed by statute had been given to creditors. The court also held that, if the act was intended to apply to such a statute so as to revive a cause of action which had become barred, it was not constitutional. See *infra*, III. b.

Georgia.

With respect to Georgia statutes and constitutional provisions relating to the suspension of the operation of statutes of limitation during the Civil War, the court said in *Brian v. Banks*

(1868) 38 Ga. 300: "It is the judgment of a majority of this court that inasmuch as the Statute of 1860 suspended the running of the Statute of Limitations for one year, and the Act of 1861 suspended the running of the statute during the war, and the ordinance of the convention, on the 1st day of November, 1865, having declared the Statute of Limitations to be, and to have been, suspended from the 19th of January, 1861, and that, inasmuch as the 3d paragraph of the 11th article of the Constitution of 1868 declares of force all acts passed by any legislative body sitting in this state as such since the 19th day of January, 1861' (including Irwin's Code), and that inasmuch as the 5th paragraph of the 11th article of the Constitution of 1868 declares that 'all rights, privileges, and immunities, which may have vested in, or accrued' to, any person or persons, or corporation, in his, her, or their own right, or in any fiduciary capacity, under any act of any legislative body, sitting in this state as such, since the 19th day of January, 1861, shall be held inviolate by all the courts of this state, unless attacked for fraud, or unless otherwise declared invalid by this Constitution,' that the plaintiff's right to recover upon the notes sued on is not barred by the Statute of Limitations; that the Act of 1861, as well as the Ordinance of 1865, suspending the running of the statute, are recognized and made valid by the express provisions of the Constitution of 1868; that 'all rights, privileges, and immunities, which may have vested in, or accrued to any person, in his, her, or their own right,' as specified in the 5th paragraph of the 11th article of the Constitution of 1868, includes the rights of the plaintiff as well as the rights of the defendant, whatever the same may be, and not the rights of the defendant exclusively." See to the same effect, *Walker v. Mercer* (1870) 41 Ga. 44, and *Satterfield v. Shwab* (1872) 46 Ga. 119.

In *Battle v. Shivers* (1869) 39 Ga. 405, it was held that various acts of the Georgia legislature from November, 1860, to November, 1865, suspend-

ing the Statute of Limitations, did not apply to certain acts providing that, under certain circumstances, judgments should become dormant. That legislation, however, was held to apply to the Statute of Limitations applicable to bills of review. *Renew v. Darley* (1873) 49 Ga. 332.

In *Ragland v. Barringer* (1870) 41 Ga. 114, an action on a promissory note, the court gave effect to a Georgia Statute of December 18, 1861, suspending the operation of the Statute of Limitations on any debt during the time of the suspension of specie payment by the banks of Savannah, Augusta, and Atlanta, as announced by the proclamation of the governor.

In *Davie v. Hatcher* (1866) 1 Woods, 456, Fed. Cas. No. 3,610, under a Georgia statute suspending the running of the Statutes of Limitation during the existence of the war, and under a later constitutional provision to the same effect, it was held that the period of the war should be deducted in determining whether a five-year statutory limitation barred an action on a promissory note.

Iowa.

In *Edward v. McCaddon* (1866) 20 Iowa, 520, it appeared that by the provisions of the Iowa Statute of April 7, 1862, the property of Iowa volunteers was exempted from levy or sale on execution, trust deed, mortgage decree, or judgment, during their service in the Civil War and for four months after the termination thereof. By a later act it was provided that the Statute of Limitations, or the provisions of law limiting the time within which actions could be commenced, should cease to run in favor of any soldier and his surety during the time his property was exempt from attachment, levy, sale, or lien by virtue of the Statute of April 7, 1862. In upholding the validity of, and applying, the act suspending the operation of the Statute of Limitations, the court said: "It is insisted that this act extending the time for bringing such suit is in violation of the Constitution, for that it impairs the obligations of the contract. In this view we cannot concur. Statutes of limitation pertain

to the remedy, and not to the contract. Sedgwick Const. Law, 658, 659, and authorities there cited. extending the time for bringing suits is valid, and, by its and the facts shown in this suit was commenced in proper time. See to the same effect, *Granton* (1872) 35 Iowa, 508, where the court gave effect to an amendment to the original act, extending the suspension to every soldier from the military service of the United States, whether he was a volunteer or not.

In *Hulbert v. Hopkins* Iowa, 122, it was held that in suspending the running of the Statute of Limitations had no effect where the defendant was in military service, even though the plaintiff was himself a soldier.

Kentucky.

In *Trimble v. Vaughn* Bush, 544, the court gave effect to a Kentucky statute, enacted in 1861, which provided that from 1861, until the courts should be opened, no statute of limitation should run against any cause in certain counties wherein the courts had been closed by the Civil War, holding that the Act of 1861 repealed by a later act providing for a shorter period of suspension and applying to the whole State. The court said: "It seems to us there is no incompatibility between the two enactments. The first only to the citizens of certain counties; the other to the entire State, extending the suspension where it did not previously apply. But, the reason of the two is altogether different. The operation of certain courts was the sole object of the first; the suspension of the writ of *habeas corpus* was the only motive for the other. And, so long as the courts continued closed, the legislative suspension of limitation, for the exclusive reason that remedy was suspended, also continued the Act. There cannot, therefore, be a destructive repeal of the Act

which consequently rules this case." See also the memorandum opinion in *Webb v. Vermillion* (1891) 13 Ky. L. Rep. 367, which appears to be to the same effect.

Maryland.

In *Ringgold v. Cannell* (1790) 2 Harr. & McH. 408, an action of debt on a bond of an administrator, the court said, with respect to the Maryland Stay Laws of the period of the American Revolution: "From the 26th of July, 1775, to the 1st of July, 1777, limitation does not run in any case. From the 1st of July, 1777, to the 17th of October, 1780, it does not run to bar any debt. From the 17th of October, 1780, to the 17th of October, 1782, being two years, the Act of Limitations is suspended in cases of debts contracted before the 1st of September, 1776, and since that time, and before the 12th of June, 1780, with the proviso not to affect suits against executors, etc. And from the 25th of April, 1782, to the 1st of January, 1784, by the aforesaid act, the Act of Limitations is suspended in the cases prohibited from being brought by that act, although the words, 'shall not be taken as part of the time limited by law for prosecuting suits,' are general." See to the same effect, *Johns v. Lane* (1795) 3 Harr. & McH. 398.

In *Kirkland v. Krebs* (1871) 34 Md. 93, the court stated that in the Stay Laws of Maryland, enacted during the Civil War, there was no express provision suspending the running of the Statute of Limitations on an action of scire facias to revive a judgment, and held that the mere fact that a stay of execution and sale were provided for did not have that effect. On the question of implied suspension of the Statute of Limitations, the court said: "But it was insisted that the operation of these laws deprived the plaintiff of the effectual prosecution of his remedy by scire facias, and that the suspension of the statute followed as a necessary consequence upon this suspension of the remedy. Now it is true the term 'cause of action' implies the right of action, and hence certain exceptions have been ingrafted upon the statute, not perhaps within its letter;

as, for instance, where there is no person capable of suing or being sued, or when a temporary incapacity to sue grows out of some particular provision of a statute. *Trecothick v. Austin* (1825) 4 Mason, 16, Fed. Cas. No. 14,164; *Dowell v. Webber* (1844) 2 Smedes & M. (Miss.) 452; *Tarver v. Cowart* (1848) 5 Ga. 66; *Murray v. East India Co.* (1821) 5 Barn. & Ald. 204, 106 Eng. Reprint, 1167, 24 Revised Rep. 325. To permit the statute to run in such cases, where no laches can be imputed to the parties, and where it is impossible, by suit or otherwise, to prevent its operation, would not only be extremely unjust, but, in the language of the authorities, contrary to the conclusions of reason that the framers of the statute so intended. The exceptions, therefore, in such cases, are put upon the express ground that the parties are deprived of all remedy whereby the cause of action may be kept alive. Now if the Stay Laws, in addition to the stay of execution and sale, had provided that no action, by scire facias or otherwise, should be brought upon the judgment during the stay, it might be contended that the time during which such temporary disability continued should be excluded from the computation. But we are at a loss to understand why a stay of execution is to be considered as denying the plaintiff the right to bring an action upon the judgment, either by debt or scire facias. To the latter the defendant has the right to plead; and, although generally termed a judicial writ, it is classed and recognized by all the authorities as an action. 2 Tidd, Pr. 1090; Evans, Pr. The object of a scire facias, we admit, is to obtain a judgment capable of being enforced, but subject, nevertheless, to such restraints and dealings as the law itself may impose. It was never supposed that the Stay Laws of 1861 and 1862 interfered with the right of action. Suits were brought as before, although the judgment, when rendered, was subject to the stay therein prescribed, and it would be unreasonable to suppose the legislature intended to put a specialty creditor upon an inferior footing to that en-

joyed by a simple contract creditor. If, then, the plaintiffs had the right to keep their judgment alive by scire facias during the stay of execution, there is no reason why it should be exempted from the operation of the statutory law of twelve years."

Mississippi.

In *Griffing v. Mills* (1866) 40 Miss. 611, the court, in construing the Mississippi Statute of December 31, 1862, providing for the suspension of the Statute of Limitations "until twelve months after the close of the present war, or until otherwise provided by law," held that the date of the close of the war was determined by a proclamation of the President of the United States, and that the question was not one to be settled by the executive department of the state government. See to the same effect, *McCutchen v. Dougherty* (1870) 44 Miss. 419; *Wiggle v. Owen* (1871) 45 Miss. 691.

The validity of the statute was upheld in *Buchanan v. Smith* (1870) 43 Miss. 90, and *Mister v. McLean* (1870) 43 Miss. 268. In the former case the court said: "In the case of *Texas v. White* (1869) 7 Wall. (U. S.) 723, 19 L. ed. 236, the court, speaking of the legislation had in Texas, says in substance: When the government of that state, in all its departments, was established in hostility to the United States, whilst such government had full control of the state, and was its only actual government, although such political organization was unlawful and revolutionary as to the United States, yet, for the safety of communities, and to prevent the utter confusion and disorganization into which society, in all its interests and relations, would be thrown, within certain limits and for certain purposes limited by the exigencies and necessities, 'the acts of such government must be accepted as valid.' Enumerating some such acts, and without attempting to prescribe precise limits, the court says: 'Acts necessary to peace and good order among citizens—such, for example, as sanctioning and protecting marriage and domestic relations, governing course of descents, regulating the

conveyance and transfer of property, providing remedies for injuries to person and estate, and other similar acts which would be valid if emanating from a lawful government,—must be regarded in general as valid, when proceeding from an actual, though unlawful, government. And that acts in furtherance and support of rebellion, and against the just rights of citizens, must in general be regarded as invalid.' Within the principle and reasoning here laid down, it is quite clear that the Acts of 1862, suspending the Statute of Limitations, have the validity of law."

In *Hill v. Boyland* (1866) 40 Miss. 618, it was contended that the Mississippi Statute of 1862, providing for the suspension, for a limited time, of the Statute of Limitations with respect to certain actions, did not apply to actions in equity. It was held, however, that even though the word "action," as used in the statute, should be construed to refer to an action at law only, the period of suspension designated in the statute as applicable to an action should, by analogy, be deducted in determining whether a suit in equity was begun too late.

New York.

By a New York statute enacted March 21, 1783, it was provided that no part of the time from October 14, 1775, to the day of the passing of the act, was to be deemed a part of a period of limitation. In *Sleght v. Kane* (1783) 1 Johns. Cas. 76, wherein it appeared that a cause of action on a promissory note arose during that period of suspension, it was held that the Statute of Limitations on such action did not begin to run before March 21, 1783. It was also held that if the defendant, on the date last mentioned, was within the British lines in the southern part of the state, he was outside the state within the meaning of a statute providing that, where a debtor was outside the state at the time a cause of action accrued, the period of limitation should not begin to run until he returned to the state. The decision on the latter point was based on the ground that one who was beyond the reach of the

writs of the state, and thus outside its jurisdiction, was not intended by the state legislature to be within the protection of the statute.

North Carolina.

In *Ridley v. Thorpe* (1805) 3 N. C. (2 Hayw.) 343, it was held that an action against the heir of an obligor was barred by virtue of an Act of 1715, requiring a creditor of any deceased person to present his claim within seven years after the death of the debtor. The court admitted that by an Act of 1783 the operation of all acts of limitation was suspended during the war, but found that more than seven years had elapsed after the period of suspension, before the action was brought.

In *Neely v. Craige* (1867) 61 N. C. (Phill. L.) 187, it was held that an act passed on February, 1863, providing that in the computation of time for the purpose of applying any statute limiting any action or suit, or any right or rights, the time which elapsed after May 20, 1861, should not be counted, and a similar act of 1866, did not apply to a statute limiting the time within which a writ of execution might be issued on a judgment to a year and a day from the date of the judgment, or, in any case of a stay of execution, from the expiration of such stay. It was also held that if a writ of execution on a judgment was issued after that interval from the date of the judgment, and after the passage of the Constitutional Ordinance of June 23, 1866, it was invalid by virtue of that ordinance. The ordinance, among other things, provided that nothing contained therein, or in the acts which were thereby repealed, should be construed so as to prevent a judgment from becoming dormant.

The Statute of February 10, 1863, suspending the operation of any statute limiting any action or suit, or any right or rights, or for the purpose of raising any presumption of any release, payment, or satisfaction, or any grant or conveyance, from May 20, 1861, to the end of the then-existing war, was held to apply to a claim of title by virtue of a possession for twenty-one years under color of title.

Howell v. Buie (1870) 64 N. C. 446. In that case it was held that the defendant's claim of title based on such possession was not established, since a part of the twenty-one-year period relied on to perfect his title fell within the period between May 20, 1861, and the close of the war. In *Chancey v. Powell* (1889) 103 N. C. 159, 9 S. E. 298, the court excluded the interval from May 1, 1861, to January 1, 1870, in computing the period of adverse possession which would establish a title to real property, but found that the period of adverse possession by the defendants and their predecessors in interest exceeded twenty-one years, without counting that interval of time.

In *Pearsall v. Kenan* (1878) 79 N. C. 472, 28 Am. Rep. 336, the Act of 1863 was likewise held to be applicable to a statute raising a presumption of payment from a failure to enforce a claim within a prescribed time. See to the same effect, *Thompson v. Nationa* (1893) 112 N. C. 508, 17 S. E. 432, wherein, however, it was found that, exclusive of the period during which the operation of the Statute of Presumptions was suspended, a sufficient time had elapsed, after the cause of action accrued, to raise a presumption of settlement or abandonment.

In *Morris v. Avery* (1867) 61 N. C. (Phill. L.) 238, it was held that by virtue of the Constitutional Ordinance of June 23, 1866, a suit of ejectment had not abated, though an application to prevent the abatement had not been made within the period ordinarily applicable, i. e., two terms of the court after the death of the defendant. The ordinance on which the decision was based provided as follows: "All acts and parts of acts suspending the Statutes of Limitation in the Revised Code are hereby repealed, except as herein provided: Provided, that the time elapsed since 1st Sept., 1861, barring actions or suits, or presuming the abandonment or satisfaction of rights, shall not be counted."

In *Hinton v. Hinton* (1868) 61 N. C. (Phill. L.) 410, the court explained as follows the effect of the Suspension

Acts of the Civil War period on a statute requiring a widow to file a dissent within six months after the probate of a will, in order to be entitled to her common-law dower: "We are inclined to the opinion, from the general wording of these two acts [the Statute of 1863 and the Ordinance of 1866], and the obvious policy of legislation during the war, and the troubled state of things which succeeded it, that the statute limiting the time in which widows were required to enter a dissent comes within their operation, and that time should not be counted from 20th May, 1861, up to 1st January, 1867, in respect to widows who seek to set up a right of dower at common law. See *Morris v. Avery* (1867) 61 N. C. (Phill. L.) 238, as to the abatement of suits; *Neely v. Craige* (1867) 61 N. C. (Phill. L.) 187, as to dormant judgments—by which it is settled that such ordinances and statutes, during the war and since, 'confer no new rights, but preserve existing ones.' We are, however, relieved from the necessity of declaring an opinion upon that question of construction, for the legislature, in February, 1866, out of abundance of caution, passed an act by which, in express words, widows are allowed further time to dissent, and which embraces our case; and in June, 1866, the convention by an ordinance gives further time for a widow to dissent, notwithstanding she may have qualified and acted as the executrix of her husband, thus by a plain and necessary implication recognizing and ratifying the Act of February, 1866; for if a widow who has qualified and acted as executrix has a right to enter her dissent, and further time is given to her, a fortiori, such further time is given to widows who have not that objection to encounter."

The legislation and constitutional provisions of North Carolina suspending the operation of Statutes of Limitation from May 20, 1861, to January 1, 1870, were given effect in *Johnson v. Winslow* (1869) 63 N. C. 552, wherein a statute limiting the period for bringing an action on a promissory note to three years was held not to bar an action brought in May, 1869, on a

promissory note due in January, 1860. That case was cited and followed in *Plott v. Western N. C. R. Co.* (1871) 65 N. C. 74, wherein an action commenced in 1869 against the defendant railroad company, for taking and using the plaintiff's land for its road, was held not to be barred by a statute limiting the period for commencing such actions to three years, although the cause of action accrued in the summer or fall of 1858.

In *State ex rel. Taylor v. Galbraith* (1871) 65 N. C. 409, the North Carolina acts suspending the operation of Statutes of Limitation from May 20, 1861, to January 1, 1870, were held to be applicable to a statute limiting an action on an official bond to six years from the date of the bond. And in *Williams v. Williams* (1874) 70 N. C. 189, it was held that the interval from May 20, 1861, to January 1, 1870, should be deducted in computing the period of limitation prescribed for bringing an action for work and labor. In *Edwards v. Jarvis* (1876) 74 N. C. 315, the same interval, it was held, should be deducted, in computing the period of limitation prescribed for an action to recover the possession of land. In that case, however, the court said, obiter: "The general proposition that the time elapsed from the 20th day of May, 1861, until the 1st day of January, 1870, shall not be counted so as to bar actions or suits, or to presume satisfaction or abandonment of rights, we may assume to be true. This general proposition, however, is subject to the exception that actions of debt, covenant, assumpsit, or account, upon any contract, demand, or penalty incurred since the 1st day of May, 1865, and the remedies thereon, shall be in all respects the same as they were in the year 1860. This exception opened the door for suits and causes of action founded on contract or obligation entered into since the 1st day of May, 1865, but did not affect the general rule already stated in respect to torts, or other causes of action, save those, in contract, embraced in the exception just mentioned."

In two cases it has been held that,

where the plaintiff was under the disability of infancy when the period began during which the North Carolina Statutes of Limitation were suspended by stay laws, and was under the disability of coverture at the close of that period, the Statute of Limitations did not run against her before or during the period of coverture. *State ex rel. Lippard v. Troutman* (1875) 72 N. C. 551; *Davis v. Perry* (1883) 89 N. C. 420. In the latter case the court made the following explanation: "If the question were an open one, we should be disposed to concur in the ruling of the court that the Statute of Limitations—not extinct, but slumbering until the 1st of January, 1870—then awakened into life and activity and operated against the feme relator, though under coverture, as it would have done on her arriving at full age, but for the suspension; and that the effect of the suspension was to eliminate from the count of time so much as was covered by it. But we do not feel at liberty to depart from the express adjudication of the point in the case of *State ex rel. Lippard v. Troutman*, *supra*, the facts of which are substantially the same as the present. There the court says (Settle, J., delivering the opinion) 'that, as the feme plaintiff did not become of age until 1866, the suspension of the Statute of Limitations saved her rights until the 1st day of January, 1870. But before that time, to wit, in 1869, she went under the disability of coverture'—and upon this ground the statute was held not to obstruct the recovery." The view which the court in the later case suggested as the one better supported by legal principle has been adopted in Texas. See *Ragsdale v. Barnes* (1887) 68 Tex. 504, 5 S. W. 68, the holding of which is stated *infra*, this subdivision.

Pennsylvania.

In *Penrose v. King* (1794) 1 Yeates, 344, an action of debt on a bond, the defendant relied on a presumption of payment from lapse of time. It appeared that the Pennsylvania legislature had suspended the operation of the Statutes of Limitation from January 1, 1776, to June 21, 1784. Although

no period was prescribed in either the Pennsylvania or English statutes for bringing an action on a bond, it was held that the interval during which the operation of the Statutes of Limitation was suspended by the legislature should not be counted as a part of the period which would raise a presumption of the payment of a bond. The court said: "Our legislature, for wise reasons, has determined that the operation of the Limitation Act should be suspended between the 1st January, 1776, and the 21st June, 1784. And we think we tread in the steps of the English judges exactly when we declare our opinion that, during this period, the presumption of payment of a bond arising from length of time should also be suspended. This will necessarily throw out of the calculation eight years, five months, and twenty-one days. The length of time then, of itself, is no positive bar in this case; but the circumstances offered, being matters of fact, are proper evidence to be left to the jury to decide on the presumption. The impression which the evidence has made on their minds, after a calm and dispassionate consideration of all the circumstances, must determine their verdict." The opposite view as to the effect of similar enactments has been taken in other states. See *Harrison v. Heflin* (1875) 54 Ala. 552; *Shublick v. Adams* (1883) 20 S. C. 49; *Kilpatrick v. Brashear* (1873) 10 Heisk. (Tenn.) 372, which are discussed under their respective jurisdictions in this subdivision.

In *Hudson v. Carey* (1824) 11 Serg. & R. 10, it appeared that the defendant obtained a certificate of discharge under an act of the Pennsylvania legislature of March 13, 1812, for the relief of insolvent debtors and their creditors. The plaintiff, who was seeking to recover on a promissory note executed by the defendant, contended that the Statute of Limitation should not be considered as running against his cause of action, from the date on which the act under which the defendant received his discharge was held to be constitutional and valid by the supreme court of Pennsyl-

vania, until it was declared to be unconstitutional by the Supreme Court of the United States. See *Farmers' & M. Bank v. Smith* (1817) 3 Serg. & R. 63. During that interval, the plaintiff urged, it would have been useless for him to bring an action against the defendant, since it was clear that a judgment would have been rendered against him by the state court. The court, in holding that the operation of the statute was not suspended, said: "It is unnecessary to say how the case would have stood if the courts had been shut so that no action could be brought. It is to be observed, however, that, the courts having been shut for a short period in the beginning of the War of the Revolution, this state, and I believe all the other states, thought proper to pass acts for the purpose of declaring that the Statute of Limitations should not run during that period. But the courts were never shut one moment against the plaintiff; it was known that the judgment of this court, in the case of *Farmers' & M. Bank v. Smith*, was carried to the Supreme Court of the United States by writ of error, so that the constitutionality of the Insolvent Act was not finally decided; the plaintiff might have pursued the same course, if judgment had been given against him, or, in order to avoid that expense, he might have issued a writ against the defendant without having it served, and continued the process in that way from time to time until the Supreme Court of the United States had decided."

South Carolina.

In *Hicks v. Pouncey* (1802) 3 S. C. L. (1 Brev.) 115, an action of assumpsit, the court said, with respect to the South Carolina acts suspending the operation of the Statutes of Limitation during the War of Independence and the period immediately following: "The 26th of March, 1784, was fixed by act of assembly for the commencement of the operation of the Act of Limitations. This act began to run against the plaintiff's right of action from that day until the 29th of February, 1788, when its operation was suspended until the 28th of

March, 1791, by an Act of February, 1788; and in February, 1791, an act passed which further suspended its operation until the 25th day of March, 1798; then its operation revived, and it ran on to complete the time necessary to bar the plaintiff's right of action, before the writ was sued out. I conceive that the true sense and sound construction of the acts of assembly relative to this subject require that the time which passed prior to the first, and subsequent to the last, act, suspending the operation of the Limitation Act, must be reckoned in computing the time the Limitation Act has run against the plaintiff's right of action, before he commenced his suit; and that the suspending acts operated only to interrupt and stay the course of the Act of Limitations for the times respectively mentioned by them, and did not establish any other period than was before established for the commencement of its operation."

In *Wardlaw v. Buzzard* (1867) 49 S. C. L. (15 Rich.) 158, 94 Am. Dec. 148, the court gave effect to a provision of the Act of December, 1861, suspending the operation of the Statute of Limitations during the period in which the act was in force, so far as the Statute of Limitations was applicable to causes of action coming within the meaning of the act. It was held that, by virtue of the act, the operation of the statute limiting the period for bringing an action on a promissory note was suspended from December, 1861, to December, 1866.

In *Pegues v. Warley* (1880) 14 S. C. 180, the defendant contended that, by virtue of the Statute of Limitations and the adverse possession of herself and predecessors in interest, her title to certain real estate was valid as against the lien of a judgment. The court, however, affirmed a judgment for the plaintiff, on the ground that the operation of the statute was suspended for one year by an act passed in 1865, which declared that during the continuance of the act the Statute of Limitations should be suspended "against the claims of all persons in possession of property of debtors on

final process, and on which such process may have a lien."

In *Shubrick v. Adams* (1883) 20 S. C. 49, it was contended that the period of time which raised a presumption of the payment of a bond was suspended during the period provided by the Stay Acts, which purported to postpone the enforcement of creditors' rights. It appeared that the provision of the Stay Acts postponing the enforcement of the rights of creditors had been held to be unconstitutional, but that the provision of those acts suspending the running of the Statute of Limitations had been held to be valid. The court decided that the latter provision did not affect the presumption of payment, and that there could be no constructive suspension of the period which would create a presumption of payment, based on a disability of the creditor, since the provisions of the Stay Acts purporting to postpone the enforcement of the rights of a creditor were null and void. The mere fact that the plaintiff acquiesced in the requirements of the Stay Acts was held to be insufficient to suspend or lengthen the period which would create a presumption of payment.

The same view has been taken as to the effect of similar enactments on the presumption of payment in *Harrison v. Heflin* (1875) 54 Ala. 552, and *Kilpatrick v. Brashear* (1873) 10 Heisk. (Tenn.) 372; but the opposite view was adopted in *Penrose v. King* (1794) 1 Yeates (Pa.) 344. The decisions in these cases on this point are stated under their respective jurisdictions in this subdivision.

In *Shand v. Gage* (1877) 9 S. C. 187, an action on a promissory note, it was held that the statute limiting the time for bringing an action on a demand of that character was not suspended by an order of a military commander of the United States, issued after the cessation of hostilities, to the effect that no suit or process should be instituted in certain causes of action until the civil government of the state should be established in accordance with the laws of the United States. The court said: "The question then

presents itself whether an act of interference of this nature, that prevents a citizen from prosecuting his claims within the time prescribed by law for that purpose, operates to extend such time in contravention of the terms of the statute. It is very clear that only the legislative authority that could create the statute can repeal it, in whole or in part, or create new exceptions or conditions to it. When, therefore, the sovereign who makes the law does an act the effect of which is to impede the right of the citizen to his remedy, it may well be considered whether or not a repeal or modification of the restrictive part of the statute was ~~not~~ implied in such act of interference. The case just stated is probably the ~~strongest~~ that could be put for introducing constructive exceptions to the Statute of Limitations, and yet, even as it regards that case, the authorities are in great conflict and uncertainty. The present case is clearly distinguishable from that just stated, inasmuch as the interference with the plaintiff's remedy did not occur through the act of a source of authority competent to enact or modify any state statute, but from a source as independent of the law-making power of the state as if it had been produced by the forces of nature. We can find no precedent or principle that warrants any interference with the Statute of Limitations on any such ground. We have not been able to discover any authority in any case or text-writer that would warrant the interpolation in the statute of such an exception as that implied in the plaintiff's claim, in his argument in this case."

Tennessee.

In *Vaughn v. Smith* (1871) 2 Heisk. 649, the plaintiff sought to prove an account of his testator by swearing according to the Book Account Law, which provided for proof of that nature of a "sale and delivery of articles not exceeding \$75 in value which were delivered within two years before the action brought." In holding that the plaintiff was entitled to prove the account in that manner,

though the articles stated in the account were sold in 1860 and 1861, and the action was not brought until May, 1867, the court said: "By the Act of 1865, chap. 10, § 1, it is provided that 'no statute of limitations shall be held to operate from and after the 6th of May, 1861, to the 1st day of January, 1867; and from the latter date the Statutes of Limitations shall commence their operation, according to existing laws.' Then follows this additional provision: 'And the time between the 6th day of May, 1861, and the 1st day of January, 1867, shall not be computed; nor shall any writ of error be refused or barred in any suit decided since the 6th day of May, 1861, or within one year immediately prior to that date, by reason of lapse of time.' The suspension of the operation of all Statutes of Limitations from the 6th of May, 1861, to the 1st of January, 1867, is clearly and unequivocally expressed in the 1st clause of the section. Language could not make the intention of the legislature more distinct and apparent than that used; yet this clause is followed by another, which either means to express identically the same intention, or was intended to add to the breadth of the first clause: 'And the time between the 6th day of May, 1861, and the 1st day of January, 1867, shall not be computed.' How, shall not be computed? In fixing the operation of the Statutes of Limitations? The previous clause had fixed the operation of the Statutes of Limitations between the two periods named, as clearly as language could do it. Then why repeat exactly the same idea in other language, unless it was intended to include by the broader language the purpose of preventing the computation of the time, between the two periods named, in other statutes as well as the Statutes of Limitation?"

In *Gwyn v. Porter* (1871) 5 Heisk. 253, an instruction was held to be proper which excluded the interval from May 6, 1861, to January 1, 1867, in computing the sixteen-year period which created a presumption of payment. The court said: "In *Carter v. Wolfe* (1870) 1 Heisk. 701, this court

said 'that the full period years did not elapse in fore the commencement Civil War, and that per excluded from computation amended Constitution, as ute of Limitations, should be excluded in ascertain sumption of payment.' being now presented for mination, we hold that charge was correct, both ple and the authority o King (1794) 1 Yeates (F also *Bailey v. Jackson Johns*. (N. Y.) 210, 8 A Jackson ex dem. Peop (1813) 10 Johns. (N. Y. ton v. Cannon (1795) 1 Bay) 482; *Quince v. R N. C.* (2 Hayw.) 180, an 2, p. 97 (1 Taylor, 155 Hill's Phillips, Ev. 5th. It is shown by the proof that no court was held county from February, tober, 1865; and indepen Act of 1865, we hold that is made as to the suspe courts in which suits brought, the time durin courts were not open, in War, should be excluded tation, as well in determi the presumption of pay tached, as in fixing the Statute of Limitations." observed that the court cision chiefly on the cl courts during the Civil it also approved the sug in *Carter v. Wolfe* (18 694, that the period of su vided for by the consti vention should perhaps in calculating the lapse o would create a presump ment. The latter questi carefully considered in Brashear (1873) 10 Hei that case the court deci constitutional amendmen the operation of Statute tion did not have the effe ing the period of time w presumption of payment, closing of the courts did

fect. Since the time during which the courts were closed was shorter than the period of suspension provided by the amendment for the operation of Statutes of Limitation, it was held that the whole of the latter period should not be deducted in computing the sixteen-year lapse of time which would create a presumption of payment.

Similar enactments in other states have also been held not to affect the presumption of payment. *Harrison v. Heflin* (1875) 54 Ala. 552; *Shubrick v. Adams* (1883) 20 S. C. 49. But the opposite conclusion was reached in *Penrose v. King* (Pa.) *supra*. The decisions in these cases on this point are stated under their respective jurisdictions in this subdivision.

In *Jones v. Reynolds* (1875) 5 Baxt. 644, under a statute allowing infants, persons of unsound mind, and married women one year after the removal of their respective disabilities within which to bring actions against personal representatives, it was held that the complainant, who was an infant from 1858, when his cause of action accrued, until August 7, 1865, was entitled to one year from January 1, 1867, within which to bring his action against a personal representative, since the amendment to the state Constitution suspended the running of the one-year period until the date last mentioned.

In *Hall v. Gossum* (1921) — Tenn. —, 228 S. W. 1039, it was held that the enactments suspending the operation of the Statutes of Limitation during the Civil War period had no application to a statute providing that, where a power of attorney was registered for twenty years, it should be deemed to be valid, since the latter statute was not a statute of limitation.

Texas.

In *Walters v. Walters* (1870) 33 Tex. 50, wherein the plaintiff recovered a sum of money advanced by his intestate to a niece of the defendant, at his request, the court gave effect to a Texas Ordinance of 1866, suspending the operation of the Texas Act of Limitation from March 2, 1861, to September 2, 1866. In *Porterfield v.*

Taylor (1883) 60 Tex. 264, it appeared that certain notes given for the purchase price of land matured in 1863, and remained unpaid. It also appeared that the deed given by the vendor to the vendee recited that notes were given in payment. In an action by the vendor against a remote grantee of a portion of the land, to subject it to the payment of the amount due on the notes, it was held that no statute of limitations began to run against the vendor's cause of action until March 30, 1870, when the new Constitution took effect.

In holding that the appellee did not acquire a title to real estate by virtue of his adverse possession under a statute of limitation, the court said in *Moseley v. Lee* (1872) 37 Tex. 479: "Suits for title or possession of real estate are, beyond controversy, civil suits, and it was clearly the intention of the convention which adopted the Constitution to include real as well as personal actions. If there were any doubt in regard to this construction of the 43d section of the Constitution, that doubt would be removed by a consideration of the object and purpose of the convention in adopting it, which unquestionably was to secure, unimpaired, the rights of those who, by reason of absence from the state or otherwise, had been deprived of the right of action in the courts, and by a reference to the statutes passed and enforced during the late war. The act passed 26th of February, 1863, most definitely points out the statutes which were suspended, and which the Constitution declares shall remain suspended. The 1st section of that act provides that 'all statutes of limitation, on all civil rights of action of every kind, whether real or personal, are hereby suspended until one year after the close of the war,' etc. This act certainly suspended the Acts of Limitation of three, five, and ten years, on suits for the recovery of land, and the Constitution declares that they shall remain suspended. That the convention had the power or authority to declare the suspension of the Statutes of Limitation we think there can be no doubt. *Bender v.*

Crawford (1870) 38 Tex. 750, 7 Am. Rep. 270. Admitting that the statute commenced to run in favor of appellee on the issuance of title to appellant's vendor, it ceased to run on the breaking out of the war, and was not put into operation again until the adoption of the present Constitution. And thus we find that the Statute of Limitation did not run in favor of appellee and against the appellant, in all, to exceed one year, and not a sufficient time to give appellee any right whatever under his plea of limitation." See to the same effect, *Bentinck v. Franklin* (1873) 38 Tex. 458.

In *League v. Rogan* (1883) 59 Tex. 427, it appeared that a Texas statute with respect to the period of limitation for the recovery of real property provided as follows: "If forcible occupation of the premises, or county containing them, by a public enemy, prevent entry, the time of such disability shall not be computed." The court, in holding that the statute did not apply to raids by Indians, said: "This could not have been intended to apply to such temporary forays as were frequently made upon parts of the frontier of this state, in former years, by hostile Indians; but to secure such occupation by an armed force from some foreign government, with which this country might be at war, as would interfere with the regular operation of the government in the part of the country so occupied. *Bouvier's Dict. 'Public Enemy.'* The record shows that, in the county in which the lands are situated, the courts have at all times been regularly held since the occupation through which the appellee's claim began, and their possession might have been interrupted by suit at any time. Under such circumstances it could not be held that limitation did not run, even if Indians were, within the meaning of the law, 'public enemies.'"

In *Ragsdale v. Barnes* (1887) 68 Tex. 504, 5 S. W. 68, it appeared that one of the plaintiffs was an infant at the time a cause of action accrued to her for the recovery of real property, and was under the disability of infancy until her marriage in 1868. She

contended that since the Statute of Limitations was suspended at the time of her marriage, the disability of coverture attached at the close of the period of the suspension of the statute, and protected her against the bar of the statute during coverture. The court, in holding that the rule under the Texas statute, which does not permit the tacking of the disabilities of minority and coverture, was not changed by the fact that at the time of her marriage the operation of the Statute of Limitations was suspended, said: "It is clear that, if there had been no suspension of the operation of the Statute of Limitation, it would have commenced to run against her upon her marriage in 1868, and she would have been barred long before the institution of this suit. But it is contended that because the Constitution of 1869 provided that the statute should be suspended from the 28th of January, 1861, until the acceptance of that Constitution by Congress, therefore there was no law of limitation in force at the time of appellant's marriage, and hence that, when the suspension ceased, the disability of coverture also attached and protected her against the bar of the statute. But in this view we do not concur. In the first place, it is to be borne in mind that during the year 1868 the Laws of Limitation were in full force (§ 6 of Ordinance 11 of 1866, *Sayles's Const.* 343), and that upon appellant's marriage the statute began to run against her (*White v. Latimer* (1854) 12 Tex. 62). The object of the provision of the Constitution of 1869 was merely to prevent the suspended period from being taken into account in the computation of the time required by the statute to bar an action, and was not to restore a disability that had already been removed. There is nothing in the language to indicate this latter intention, nor does the spirit of the provision support such a construction. But, in the second place, if there be any doubt about the correctness of this conclusion, we think it set at rest by the Revised Statutes. Omitting so much of article 3201 as is not applicable to this case,

it reads as follows: 'If any person entitled to commence suit for the recovery of real property . . . be at the time . . . the adverse possession commence under the age of twenty-one years or a married woman . . . the time during which such disability shall continue shall not be deemed any portion of the time limited for the commencement of such suit.' Appellant's disability of minority, which existed when the cause of action first accrued, had been removed by her marriage. She cannot set up her coverture, because, by the terms of the statute, that disability pertains only to such women as were covert at the time the adverse possession commenced. If the revisers of the statutes had had the question now before us distinctly in view when they framed the article quoted, and had desired to remove all doubt upon it, we do not think they could, by general terms, have expressed that intention more clearly. Of the right to enact this article, although appellant may have been under disability at the time, we think there can be no question. The legislature has power, should it see fit, to repeal altogether the provision relieving *femes covert* from the operation of the statutes, provided a reasonable time be allowed such as are under disability at the time of the repeal within which to bring their suits. Hence, if existing laws had permitted the tacking of disabilities during the period the statute was suspended by the Constitution of 1869, it was competent for the legislature to modify these laws, and provide that one disability should not supervene upon another, as the article we have considered does, in effect, enact. But, we think, neither under the Revised Statutes nor the previous laws can appellant set up her coverture against the operation of the Statute of Limitations in this case. We are of opinion, therefore, that the court below did not err in holding the appellant barred by the Statute of Limitations." See to the same effect, *Harvey v. Carroll* (1893) 5 Tex. Civ. App. 824, 23 S. W. 713.

The opposite conclusion has been

reached in North Carolina cases, though not without doubt being cast on its correctness. See *State ex rel. Lippard v. Troutman* (1875) 72 N. C. 551, and *Davis v. Perry* (1883) 89 N. C. 420, which are set out ante, this subdivision.

In *Sickels v. Epps* (1888) — Tex. —, 8 S. W. 124, the court, in holding that an action in equity for the possession of a tract of land was not barred as a stale demand, said: "Under the circumstances of this case, stale demand, if it can be applied to this character of title at all, about which we withhold any opinion, would not bar the action of plaintiff. This suit was brought in a very short time after the lapse of ten years from the time patent issued to Bullion. The patent issued during the war, March 6, 1863. Statutes of limitation were suspended from that time to the 30th of March, 1870, as an act of justice to parties holding legal claims, from the fact that the courts were practically closed from the commencement of the war to that time. Courts, in applying the doctrine of stale demand, cannot ignore the existence of that state of affairs in the history of the country that called for the suspension of limitation laws. It would be illiberal and unjust. Stale demand in equitable proceedings is analogous to limitation in law. It is nothing but lapse of time in both cases,—one to bar an equitable right, and the other a legal right. We think it might safely be held that stale demand should not run during the time limitation was suspended, but it is not necessary to lay down such a rule in this case. Without further discussion of the matter, we are satisfied we should hold that, during the time of actual war after Bullion's patent issued, stale demand should not apply, and that the defense of stale demand cannot be sustained in this case, if it were applicable to the case."

Vermont.

In *Cardell v. Carpenter* (1870) 43 Vt. 84, it was held that, where a cause of action had not previously been barred by the Statute of Limitations, the following statute was valid as ap-

plied to such cause of action: "In all cases where an inhabitant of this state has volunteered or enlisted, or shall volunteer or enlist under the laws of this state, or of the United States, or shall be drafted into the service of the United States, for the purpose of executing the laws of the Union, suppressing insurrections, or to repel invasions, who had, or shall have, at the time of volunteering or enlisting, any cause of action against any other person; or if such other person had or shall have any cause of action against him (that is, against such soldier), the time of his absence in such service shall not be taken as any part of the time limited for the commencement of his action, or the action of such other person founded on such cause of action."

Virginia.

In *Johnston v. Gill* (1876) 27 Gratt. 587, the court construed the Virginia Statute of March 3, 1866, which postponed the enforcement of certain causes of action (but excepted causes of action against fraudulent donors and purchasers), and which contained the following clause with respect to the suspension of statutes or laws of limitation: "The period during which this act shall remain in force shall be excluded from the computation of the time within which, by operation of any statute or rule of law, it may be necessary to preserve the loss of any right or remedy." The court held that, although the statute did not prevent the bringing of an action against a fraudulent vendor or purchaser, the policy of the legislation was to discourage litigation during the period provided for, and that the suspension of statutes or laws of limitation applied to an action against a fraudulent vendor or purchaser.

In *Spratley v. Mutual Ben. L. Ins. Co.* (1875) 11 Bush (Ky.) 449, it was held that an insurance corporation organized under the laws of another state was a foreign debtor, and as such expressly excluded from the provisions of certain statutes of Virginia, suspending the running of statutes of limitation. On this point the court said: "It may be that the laws of Vir-

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ginia gave to foreign insurance companies doing business in that state before the war 'a sort of local existence,' as was held by a bare majority of the Virginia court of appeals, in the case of *Manhattan L. Ins. Co. v. Warwick* (1871) 20 Gratt. 614, 3 Am. Rep. 218. But if this be true it is equally true that the course pursued by Virginia in the war between the states effectually uprooted and destroyed the 'sort of local existence' this appellee had in that state. Its domicile was within a state adhering to the Federal government, and from the time hostilities commenced between Virginia and the Federal government, this appellee could not comply with the laws of Virginia; and therefore, without fault upon its part, it lost its quasi local habitation in that state, and as matter of necessity assumed toward Virginia and her laws its original character of a foreign corporation. It was therefore, so far as this record shows, a foreign debtor in March, 1866, and in no wise affected by the provisions of the act of the 2d of that month."

In *Danville Bank v. Waddill* (1876) 27 Gratt. 448, it was held to be error to refuse to give an instruction in an action of assumpsit, to the effect that in passing on the issue raised by the Statute of Limitations the jury should exclude from the period of limitation the interval from March 2, 1866, to January 1, 1869. See to the same effect, with respect to the period of limitation applicable to an action to recover on life insurance policies, *Connecticut Mut. L. Ins. Co. v. Duereson* (1877) 28 Gratt. 630.

With respect to a Statute of Limitation of twenty years, applicable to an action on a bond, the court said in *Brewis v. Lawson* (1881) 76 Va. 36: "In making the computation, the period of the late war is to be deducted, for it is conceded that during that period the creditor resided in territory under the dominion of one of the belligerent powers, and the debtor in the territory of the other. In such case, under the rules of international law which have been applied by the courts, state and Federal, to the late

war between the states, these parties are to be considered as in the attitude of alien enemies in their relation to each other during hostilities, and the pendency of war not only interdicted all intercourse between them, but suspended all remedies for the enforcement of their contract with each other, and consequently the operation of the Act of Limitations. *Small v. Lumpkin* (1877) 28 Gratt. 834, and cases there cited; *Hanger v. Abbott* (1868) 6 Wall. (U. S.) 532, 18 L. ed. 939; *Brown v. Hiatt* (1873) 15 Wall. (U. S.) 177, 184, 21 L. ed. 128, 130. After the close of the war, the Stay Law continued in force until the 1st day of January, 1869. The suit at law against the administrator was instituted in August, and the suit in equity against the heirs in November, 1873. Making the proper deduction of time, the Act of Limitations had run less than sixteen years before the institution of either of the suits. So that it is clear that the debt was not barred by the act." See also *Updike v. Lane* (1883) 78 Va. 132; *Cole v. Ballard* (1883) 78 Va. 139. And see to the same effect, with respect to a twenty-year period provided for the enforcement of judgments, *McAllister v. Bodkin* (1882) 76 Va. 809. The interval from April 17, 1861, to January 1, 1869, it has also been held, should not be included in computing the period limited for bringing an action for partition. *Davis v. Tebbs* (1886) 81 Va. 600. Similarly, in *Morrison v. Householder* (1884) 79 Va. 627, it was held that the interval from April 17, 1861, to January 1, 1869, was to be excluded in computing the ten-year period limited for bringing an action on a guardian's obligation.

West Virginia.

In *Caperton v. Martin* (1870) 4 W. Va. 138, 6 Am. Rep. 270, an act of the West Virginia legislature of February 27, 1866, to the effect that in certain counties the period from April 17, 1861, to the date of the act, should not be counted in computing the time limited for bringing an action of trespass or case, was applied in an action for false imprisonment.

That act, however, was held to ap-

ply only to actions *ex delicto*, and not to actions *ex contractu*, even though actions *ex contractu* are technically actions on the case. *Gore v. McLaughlin* (1869) 3 W. Va. 489.

In *Baltimore & O. R. Co. v. Faulkner* (1870) 4 W. Va. 180, it was held that the period excluded by statute in computing the running of the Statute of Limitations against an action of assumpsit was from April 17, 1861, to March 1, 1865. And the statute excluding in certain counties the interval from April 17, 1861, to March 1, 1865, in computing the period of limitation for certain actions, including actions of ejectment, was held to apply by analogy to an action to foreclose a mortgage or to sell land under a deed of trust. *Pitzer v. Burns* (1873) 7 W. Va. 63.

The legislature of West Virginia, by a statute passed February 6, 1873, suspended the running of Statutes of Limitation as against persons who had been prevented from prosecuting suits by the Act of February 11, 1865, requiring a plaintiff, as a condition of his prosecuting an action or suing out process, to make an affidavit that he had not aided in the rebellion against the United States government. The Statute of February 6, 1873, provided as follows: "In computing the time within which any civil suit, motion to recover money, proceeding, or appeal shall be brought, instituted, or taken, or petition filed to have proceeding reheard by persons who could not truly make the affidavit prescribed in § 27, chap. 106, W. Va. Code, the period from the 28th day of February, 1865, to the passage of this act shall be excluded from such computation." See *Sturm v. Fleming* (1888) 31 W. Va. 701, 8 S. E. 263, wherein the court applied the Statute of 1873 in an action to set aside certain judgments, and held that the statute was not repealed by a re-enactment in 1882 of the general Statute of Limitations, without mention of or reference to the Act of 1873.

b. Validity as to action barred at date of enactment.

In a number of decisions on the

validity of war legislation it has been held that a state may, without violating the Federal Constitution, suspend by statute or constitutional provision the running of a statutory period of limitation, even with respect to a demand which has become barred, provided a change of title to real or personal property is not thereby effected. *Campbell v. Holt* (1885) 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209 (holding a Texas enactment valid); *Bender v. Crawford* (1870) 33 Tex. 745, 7 Am. Rep. 270; *Lewis v. Davidson* (1879) 51 Tex. 251; *Landa v. Obert* (1890) 78 Tex. 33, 14 S. W. 297; *Caperton v. Martin* (1870) 4 W. Va. 138, 6 Am. Rep. 270; *Caperton v. Bower* (1870) 4 W. Va. 176, writ of error dismissed for lack of jurisdiction in (1872) 14 Wall. (U. S.) 216, 20 L. ed. 882; *Huffman v. Alderson* (1876) 9 W. Va. 616; *Keller v. McHuffman* (1879) 15 W. Va. 64.

There are other decisions on the validity of war legislation to the effect that after a statute of limitation has become a bar to a demand, even though title to property is not involved, it is not within the power of a state legislature or a state constitutional convention to suspend the running of the statute, and thus authorize an action on the demand. *Girdner v. Stephens* (1870) 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700; *Mynatt v. Hubbs* (1871) 6 Heisk. (Tenn.) 320. See also *Bradford v. Shine* (1870) 13 Fla. 393, 7 Am. Rep. 239; *Calhoun v. Kellogg* (1870) 41 Ga. 231; *Yancy v. Yancy* (1871) 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5; *Harrison v. Henderson* (1872) 7 Heisk. (Tenn.) 315. Compare *East Tennessee Iron Mfg. Co. v. Gaskell* (1879) 2 Lea (Tenn.) 742.

It appears to be well settled that an attempt by a state legislature or a state constitutional convention to suspend, even during a war or reconstruction period, the operation of a Statute of Limitation retroactively, so as to effect a change of title to property based on a complete running of the statute, is a taking of property without due process of law, and invalid. *Lockhart v. Horn* (1871) 1 Woods, 628, Fed. Cas. No. 8,445 (decision as to validity of Alabama con-

stitutional provision); *Tennessee Coal, I. & R. Co. v. McDowell* (1898) 100 Tenn. 565, 47 S. W. 153; *Breckenridge Cannel Coal Co. v. Scott* (1908) 121 Tenn. 88, 114 S. W. 930; *Hall v. Webb* (1883) 21 W. Va. 318. See also *Grigsby v. Peak* (1882) 57 Tex. 142.

In *Campbell v. Holt* (1885) 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209, it appeared that the legislature of Texas had enacted several statutes suspending the operation of the Statutes of Limitation during the Civil War, and that in 1866 another statute was enacted in that state, providing that the Statutes of Limitation should again be operative on and after September 2 of that year. In 1869 a new Constitution was adopted in which it was provided that the Statutes of Limitation, the operation of which had been suspended by the Act of Secession, should be considered as suspended in that state until the acceptance of the Constitution by the United States Congress. The plaintiff's action was for money received by the defendant's intestate from the sale of estate property, and converted to his own use, and for the hire and profits of slaves belonging to the estate. The right of action, by virtue of the Act of 1866, had become barred at the time of the adoption of the Constitution of 1869. The question, before the court was whether the constitutional provision again suspending the operation of Statutes of Limitation was valid, as applied to the plaintiff's cause of action. The defendant contended that, thus applied, the provision violated the 14th Amendment to the Federal Constitution, declaring that no state shall "deprive any person of life, liberty, or property without due process of law." In upholding the constitutionality of the provision, the court said: "It may . . . very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the Statute of Limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is that, by the

law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law. But we are of the opinion that to remove the bar which the Statute of Limitations enables a debtor to interpose, to prevent the payment of his debt, stands on a very different ground. . . . The implied obligation of defendant's intestate to pay his child for the use of her property remains. It was a valid contract, implied by the law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defense to a suit on it. But this defense, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended. It is much insisted that this right to defense is a vested right, and a right of property which is protected by the provisions of the 14th Amendment. It is to be observed that the words 'vested right' are nowhere used in the Constitution, neither in the original instrument nor in any of the Amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution. We certainly do not understand that a right to defeat a just debt by the Statute of Limitations is a vested right, so as to be beyond legislative power in a proper case. The Statutes of Limitation, as often asserted, and especially by this court, are founded in public needs and public policy,—are arbitrary enactments by the lawmaking power. *Tioga R. Co. v. Blossburg & C. R. Co.* (1874) 20 Wall. (U. S.) 137, 150, 22 L. ed. 331, 337. And other statutes shortening the period, or making it longer, which is necessary to its

operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost." See to the same effect, *Landa v. Obert* (1890) 78 Tex. 33, 14 S. W. 297.

A similar Alabama constitutional provision has been held to be invalid, in so far as it purported to extend the period of limitation for an action to set aside a will after the period of limitation had expired. *Lockhart v. Horn* (1871) 1 Woods, 628, Fed. Cas. No. 8,445. It is to be noted, however, that an action to set aside a will ordinarily affects the title to property, and that therefore the decision is not in conflict with *Campbell v. Holt* (U. S.) supra.

In *Huffman v. Alderson* (1876) 9 W. Va. 616, the court carefully considered the validity of the Act of February 6, 1873, suspending the operation of Statutes of Limitation as to certain persons, during the time when they were unable to take an oath prescribed by statute as a condition of maintaining an action. As applied to an action which had previously become barred by a Statute of Limitation, the court, in an able opinion, held that the Act of 1873 was valid and enforceable, provided its enforcement would not effect a change of title to real or personal property. After dissenting, on the one hand, from the view that such a statute effects a forfeiture of a vested right in the nature of a property right, and, on the other, from the view that such a statute alters only the remedy, and not a substantive right, the court stated: "The true view, as I conceive, is that when the time prescribed by the Statute of Limitations expires, the plaintiff is by operation

of law, and not by contract, divested of all right of action. Can the legislature subsequently confer on the plaintiff, by statute, a right of action which he has not when the statute is passed? Certainly, as a general rule, the legislature can possess no such power. It cannot, generally, confer on anyone a right of action which he has not, because, obviously, the party against whom the legislature gives such action is thereby deprived of his property, and the Constitution of the United States, § 1 of the 14th Amendment, provides that no one shall be so deprived of his property, but that he shall only be deprived thereof by due process of law. But while this is the general rule, there are acknowledged exceptions to it. Thus, it has often been held that a legislative act is constitutional, whose object and effect are to give a remedy on an express contract, according to the real intention of the parties, and thus to promote justice, though the act be retroactive, and, when passed, no action could have been brought on such contract, either because of informalities in entering into it, arising out of mistake, or because of personal disability to make such contract, or from some ingredient in the contract forbidden by law at the time it was made; so acts of the legislature have been held constitutional which take from a party a mere legal right to avoid an express contract into which he has entered, it having been held that such a mere legal right to avoid an express contract as the party could not justly insist upon was not protected by the Constitution. . . . To apply these principles to the present case: Here the contract was evidently binding, both legally and equitably, but the remedy thereon was lost, partly, at least, by obstructions to, or difficulties in, its enforcement, arising out of a war, or out of unjust and unconstitutional legislation, the effect of such war; under such circumstances, the moral obligation to fulfil the contract remains, and, without departing from well-established principles, the legislature has provided by law a remedy to enforce such express

contract according to the real intention of the parties. The providing such remedy impairs the obligation of no contract, and the defendant can have no vested right to avoid his express contract bond upon lapse of time under such circumstances. It is true that the legislature, in the Acts of 1872-73 under consideration, has gone further, and attempted to give an action, not only where there was an express contract, but even in actions of detinue and ejectment. In this, they may have transcended their constitutional power, for the legislature has not a constitutional right to confer on a party a right of action, except under particular circumstances, though it may think that it is morally right that such right of action should be conferred. To admit such a general right would be to subject the right of the citizen to hold any property to the caprice of the legislature. The citizen would be deprived of his property by legislative action, and without due process of law. But if the power of the legislature is restricted in the manner we have indicated, though it might possibly be abused, yet, the Constitutions of the United States and of this state not having restrained the legislature from exercising such power, the court cannot pronounce such acts unconstitutional. It is true that the power to pass retrospective acts is always dangerous, and is always liable to great abuse. Some of the states have by their constitutions, in view of these abuses, expressly prohibited the legislature from passing any retrospective law. But our state Constitution contains no such prohibition. The exercise of such power, however, is sometimes eminently just and conservative, and unless its exercise either impairs the obligation of contracts or deprives a party of his life, liberty, or property without due process of law, our courts cannot pronounce it unconstitutional." See to the same effect, *Keller v. McHuffman* (1879) 15 W. Va. 64.

In *Hall v. Webb* (1883) 21 W. Va. 318, the court, following a dictum in *Huffman v. Alderson* (1876) 9 W. Va. 616, held that the Act of February 6,

1873, suspending the operation of the Statute of Limitations, was not valid as applied to an action of ejectment which had become barred by a Statute of Limitation at the time of the passage of the Act of 1873.

In *Caperton v. Martin* (1870) 4 W. Va. 138, 6 Am. Rep. 270, an act of the West Virginia legislature of February 27, 1866, providing that in certain counties the period from April 17, 1861, to the date of the act, should not be counted in computing the time limited by statute for bringing an action of trespass or case, was held to be valid even as applied to a cause of action arising previous to the date of the act by a longer time than the period of limitation prescribed by statute. The decision was based, however, chiefly on the ground that the Statute of Limitations did not run against the cause of action, because the courts were not open to the plaintiff. The court said: "This act, however, is assailed as repugnant to the Constitution, both of the state and of the United States, as retrospective and divesting vested rights; that is, it is claimed that, after one year from the trespass, the defendant could not be sued for it, and he acquired a vested right to be never sued for it. It is true the act is retrospective, for it says so, and there is nothing prohibiting the legislature from passing it on that ground, in either the state or Federal Constitution. *Calder v. Bull* (1796) 3 Dall. (U. S.) 386, 1 L. ed. 648; *Wyatt v. Morris* (1868) 2 W. Va. 575. But is it true that it divests any vested right of the defendant? The right so claimed to be vested is immunity from a just liability, by virtue of the Statute of Limitations, the effect and operation of which were suspended in the county of Monroe, where the parties resided and the liability accrued, during the whole period of limitation, and more. It was so suspended, too, by reason of the insurrection and rebellion there existing, in which the defendant was a participant, and in aid of which he committed the trespass complained of. What right or immunity could possibly be acquired under a suspended law,

and that suspension the result of an unlawful combination of persons in resistance to the execution and enforcement of the laws by the lawfully constituted authority that enacted them originally? Surely no legal right could be acquired in such case, nor by such means. The lawful government could not recognize such claim to immunity, and, if it did, it is perfectly competent to it to divest it while the relation of enemy exists, as the defendant claims the Act of February 27, 1866, to have done in this case." See to the same effect, *Caperton v. Bower* (1870) 4 W. Va. 176, writ of error dismissed for lack of jurisdiction in (1872) 14 Wall. (U. S.) 216, 20 L. ed. 882.

In *Bender v. Crawford* (1870) 33 Tex. 745, 7 Am. Rep. 270, the plaintiff sought to recover on two promissory notes, one due January 22, 1859, and the other ninety days after September 7, 1859. The action was brought July 26, 1869, and the Statute of Limitations was relied on as a defense. The question before the court was whether the plaintiff's right to maintain his action was saved by the following Texas constitutional provision, adopted in 1869: "The Statutes of Limitation of civil suits were suspended by the so-called Act of Secession of the 28th of January, 1861, and shall be considered as suspended within this state until the acceptance of this Constitution by the United States Congress." The court held that since the Act of Limitation related to the remedy, the constitutional provision did not impair the obligation of a contract within the meaning of the Federal Constitution, and was valid even as applied to a cause of action barred by the Act of Limitation at the time the constitutional provision was adopted. See to the same effect, *Lewis v. Davidson* (1879) 51 Tex. 251.

In *Grigsby v. Peak* (1882) 57 Tex. 142, it was admitted that after a Statute of Limitations had run so as to vest title to real property in a person holding it adversely, a statute or state constitutional provision which purported to suspend retroactively the

running of the statute would, as applied to such a title to real estate, be a taking of property without due process of law, and within the prohibition of the 14th Amendment to the Federal Constitution. Since, however, in the case before the court, it appeared that the Statute of Limitations had not vested a title in the appellant before the first statute was enacted on February 26, 1863, suspending the Statute of Limitations as to actions for real property, and that, before the period of suspension provided for therein had expired, a state constitutional amendment provided for a further suspension of the statute, it was held that both the Statute of 1863 and the constitutional amendment, as applied to that case, were valid.

In *Girdner v. Stephens* (1870) 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700, an action for assault and battery committed in September, 1861, it was held that, after the period of one year limited for instituting such an action had expired, it was beyond the power of a state legislature or a state constitutional convention to suspend retroactively the running of the statute, so as to permit the action to be maintained. In that case the court said: "We hold, both on authority and principle, when a cause of action is barred by a statute of limitation, in force at the time the right to sue arose and until the time of limitation expired, that the right to rely upon the statute as a defense is a vested right that cannot be disturbed by subsequent legislation. Judge Cooley, in his work on Constitutional Limitations, 369, says: 'As to the circumstances under which a man may be said to have a vested right to a defense, it is somewhat difficult to lay down a comprehensive rule. He who has satisfied a demand cannot have it revived against him; and he who has become released from a demand by the operation of the Statute of Limitations is equally protected. In both cases, the right is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation.'" See also

Mynatt v. Hubbs (1871) 6 Heisk. (Tenn.) 320. And see to the same effect, with respect to a Statute of Limitation affecting the title to real estate, *Tennessee Coal, I. & R. Co. v. McDowell* (1898) 100 Tenn. 565, 47 S. W. 153; *Breckenridge Cannel Coal Co. v. Scott* (1908) 121 Tenn. 88, 114 S. W. 930.

In *Yancy v. Yancy* (1871) 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5, the court approved of the principle relied on in *Girdner v. Stephens* (Tenn.) supra, but held that, by reason of the presumption that the courts were closed in a county occupied by the Federal Armies, the Statute of Limitations had been suspended so that the plaintiff's right of action had not become barred when the amendment was adopted. Likewise, in *Harrison v. Henderson* (1872) 7 Heisk. (Tenn.) 315, the court admitted that a statute or ordinance could not revive or make enforceable a cause of action which had previously become barred by the Statute of Limitations, but held that, where the courts were closed before the statute became a bar to a cause of action, a legislature or convention, during the time the courts were closed, had the power to provide for the suspension of the Statute of Limitations. An Amendment to the state Constitution, suspending the operation of Statutes of Limitation from May 6, 1861, until such time as the legislature might prescribe, was held to be applicable and valid as applied to the plaintiff's cause of action, since the courts were closed before the cause of action had become barred, and before they were opened the Amendment was enacted.

However, in *East Tennessee Iron Mfg. Co. v. Gaskell* (1879) 2 Lea (Tenn.) 742, the court doubted whether the rule as to the invalidity of a statute suspending the operation of a Statute of Limitation after it had become a bar to an action had any application, unless the statute vested title or extinguished a demand. The court said: "The power of the legislature to suspend the statute before the completion of the bar has never been doubted. It is only when the bar was completed before the suspension of

the statute that the right acquired has been considered as vested, so as to be beyond the legislative control. And even then the rule ought, perhaps, to be limited to cases where the statute operates to vest title or extinguish the demand."

In *Bradford v. Shine* (1870) 13 Fla. 393, 7 Am. Rep. 239, the court held to be invalid an ordinance enacted by a Florida constitutional convention in 1865, to the effect that no law of the state barring claims against the estates of decedents if not presented within two years should be considered as in force in the state of Florida between January 10, 1861, and October 25, 1865. The invalidity of the ordinance was based on the ground that it was in the nature of legislation, and that the people had not conferred on their representatives at the convention the authority to enact legislative provisions. Although the court appears to have relied on the lack of authority of the convention to exercise ordinary legislative functions, as the ground for holding the ordinance to be invalid, it also expressed a doubt as to the power of a properly constituted legislative body to revive a claim against an estate after it had become barred under a statute expressly stating that at the expiration of the time limited the claim was "barred."

In *Calhoun v. Kellogg* (1870) 41 Ga. 231, the court held to be valid, and gave effect to, the following Georgia statute, enacted March 16, 1869: "That much confusion has grown out of the distracted condition of affairs during the late war, and that doubts are entertained relative to the Law of Limitation of Actions in this state, which should be put to rest. . . . That all acts of the legislature of this state, and all ordinances of the con-

ventions of 1865 and 1868, which have the force and effect of law, which are retroactive in their character, relative to the Statute of Limitations, shall be held by the courts of this state to be null and void, in all cases in which the statute had fully run before the passage of said retroactive legislation." The court explained: "I am aware that the Chief Justice of the Supreme Court of the United States, in delivering the opinion of the court in the *Texas Bond Case*, has given an opinion that certain acts of the legislatures of the seceded states, passed during the war, when not in aid of the rebellion, are to be held valid. It was not, however, necessary to the decision of the case before the court to lay down any rule on that subject. And I do not deem it important to inquire whether or not the suspension of the Statute of Limitations in this state, which was authorized for one year immediately prior to the secession of the state, and in contemplation of that event, and the subsequent acts continuing it during the war, in connection with the Stay Law and the law suspending specie payment by the banks, were intended to aid the Confederate cause, by satisfying all who consented to enlist in the armies, or to aid with their money, that their rights would not suffer during its continuance. As it cannot be denied that the legislative power of the state, since the war, has admitted that this legislation was illegal without confirmation, I feel it my duty as a judge, till the decision of the political department of the state is reversed or changed by that power itself, so to treat it, and to administer as well the exception to the confirmatory acts as the acts themselves." W. S. R.

MOBILE & OHIO RAILROAD COMPANY, Appt.,
v.

SAMUEL ZIMMERN.

Alabama Supreme Court—May 12, 1921.

(— Ala. —, 89 So. 475.)

Injunction — against confiscation of coal by railroad.

1. Injunction will lie to prevent a railroad company from confiscating

nessee, Kentucky, and Illinois which are dependent upon it for transportation facilities, and for which it does an enormous business; that it needs great quantities of coal to operate its trains; that it had outstanding contracts for sufficient coal, but that strikes and labor troubles had made it necessary to the movement of its trains that it should make use of some parts of coal shipments over its road, without which it would have been impossible to transport freight, including coal shipped to complainant; that it has used a few carloads of complainant's coal, but it has fairly distributed its exactions among all shippers of coal; that it has offered to pay complainant for his coal its invoice price at the mines, plus 10 per cent; that it has not greatly interfered with complainant's business, and that it will not be necessary to appropriate any more of complainant's coal for some months to come, "though, of course, this respondent cannot know what conditions the future may bring forth, and on account of strikes and other causes entirely beyond the control of this respondent an emergency may again arise where it will be absolutely necessary for this respondent to appropriate some of the coal consigned to complainant to keep its trains running, and in order to enable respondent to deliver to complainant the other coal consigned to complainant and shipped over the railroad line operated by this respondent; that, for this reason, an injunction such as is prayed for by complainant might result in this defendant being unable to operate entire trains for days at a time, and thus result in untold damage and suffering, not only to the general public, but to the complainant himself, who would, in such an emergency, be deprived of receiving a great part of the coal consigned to him and shipped over the line of respondent; that at no time in the past has it been, and in all probability at no time in the future will it be, necessary for this respondent,

even in the greatest emergency, to appropriate for use in operating its trains more than a very small fraction of the coal consigned to complainant;" that its practice in respect to the appropriation of coal shipped over its line is one that has been indulged by all railroads in this country for fifty years or more, "and is a practice which, from the very nature of the case, will necessarily have to be indulged from time to time in the future, as occasion arises." This statement will suffice, we believe, to disclose the nature of the controversy between the parties to this cause.

The parties offered affidavits tending to sustain their respective contentions, and upon a hearing the court denied defendant's motion to dissolve the temporary injunction. The court's ruling on the motion to dissolve is now assigned for error.

Defendant says in its brief that it is "not asking the court to condone, authorize, license, or recognize as valid the taking of complainant's coal in the manner and under the circumstances complained of," but only that the court will not enjoin such taking on the facts presented by the record. We will notice as briefly as may be several considerations advanced in support of defendant's position.

In the first place, defendant contends that the court of equity will not enjoin mere trespasses to personality, unless in case of insolvency, for the reason that there is a plain, adequate, and complete remedy at law. On the question thus presented and on the allied question that arises where a single defendant by repeated acts of trespass, makes it necessary for the plaintiff to pursue his legal remedy by a succession of actions, we quoted at some length the language of Pomeroy's Equity Jurisprudence in the case of *Tidwell v. H. H. Hitt Lumber Co.* 198 Ala. 236, L.R.A.1917C, 232, 73 So. 486. That language, which we need not repeat, tended to support the equity of complainant's bill in this cause, and shifted somewhat the

previous attitude of this court, bringing it more into line with the current of modern opinion. But we have of old no authority denying the power of equity in a case such as is here disclosed; for defendant, abusing the law which conferred upon it corporate life and functions, has not only trespassed against complainant's property rights, but, assuming to exercise a power which resides only in the sovereign state, has taken complainant's property, at the same time avowing its purpose to repeat the process if occasion arises, leaving complainant to such compensation as it may recover by negotiation or repeated actions at law. We do not affirm that there may not be conditions, arising without the fault of the carrier, in which it may refuse to accept goods for transportation, but in general the court may compel the carrier, in the exercise of its public duty, to accept goods tendered to it for shipment, and thus impose upon it the absolute duty to deliver them at their designated destination. If, then, the court may not, to quote again defendant's answer and brief, condone, authorize, license, or recognize as valid defendant's taking of property consigned to it, in the circumstances shown by the record, and yet is powerless to interfere despite defendant's announced intention, in effect, to do the like

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again on what it
may deem proper
occasion, its juris-
diction would hard-

ly seem to deserve the name of equity. The conclusion thus reached will be aided incidentally, as we proceed in our statement of the other points involved.

Complainant is insisting upon a right acquired by contract and protected by the policy of the law, and the court is not free to consider the relative conveniences of the parties.

—balancing of
conveniences.

No balancing of the
conveniences of pri-
vate parties will be

indulged when the act complained of is tortious in itself as well as in

its incidents, and the preservation of a clear legal right is involved. *White v. Harrison*, 202 Ala. 623, 81 So. 565; 14 R. C. L. p. 359, § 61.

It is said that, where the damage to the complainant from the refusal of an injunction will be trifling, and public interests will suffer by its issuance, injunction will be refused. *American Smelting & Ref. Co. v. Godfrey*, 89 C. C. A. 139, 158 Fed. 225, 14 Ann. Cas. note p. 20. And 22 Cyc. 784, 785, is cited. We have examined quite a number of the cases cited to the text above without finding sufficient reason to disturb the conclusion to be presently stated. It will be found that most of them were affected by considerations not here appearing, as that complainant had no legal right, or his right was doubtful, or had been forfeited by laches, or for some other reason complainant was estopped, or the injunction was merely ancillary, or preliminary and interlocutory. It is conceded, of course, that, in a case where preliminary injunction is sought for the preservation of the status quo pending a determination of the right in suit, consideration of the balance of injury is proper; but this is not really such a case, for here the facts are admitted and complainant's legal right is clear—is not denied. Notwithstanding this clear status of legal right, defendant avers that the public interest requires that in times of emergency its appropriation of coal belonging to shippers, without which, as it avers, its railroad cannot be operated, be not interfered with by the court. We think this contention cannot be sustained in principle or fact. At this point we can do no better than quote Mr. Pomeroy: "A further element is sometimes introduced into the case by the fact that the defendant is engaged in a business which serves public convenience, and thus can plead not only the injury to himself, but also to the public, as a reason for not granting the injunction. It should be pre-

—convenience of
public—effect.

mised in the beginning that the question cannot arise except in a case in which some sufficient reason for equity jurisdiction, such as irreparable injury or the prevention of a multiplicity of suits, exists."

The present case goes even further: "In other cases the injunction will be refused on the simple ground that the legal remedy is adequate. It is believed, too, that the question of the convenience of the public should be treated as immaterial, though it must be said that courts have sometimes allowed their decision to be influenced by this consideration."

The learned author then quotes from an English case, in which the court, answering the suggestion that the convenience of the public should be taken account of in determining the propriety of an injunction, and that Parliament might disregard complainant's right, said: "Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private interests and public interests than this court can take."

And Mr. Pomeroy resumes: "In other words, so far as the utility to the public is made the basis of an argument, it would seem to be simply urging the propriety of taking private property for public use without the requisite condemnation proceedings,—the unwise policy of which cannot be doubted, . . . and it can safely be said that the argument based on the balance of injury to the defendant will be availing only in a limited class of cases." Pom. Eq. Jur. 4th ed. § 1922.

Section 23 of the Constitution provides that "private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner."

This court, in common with oth-

ers, holds that equity will exert its power by way of injunction to keep corporations within the line of their authority, and to compel obedience to the Constitution without regard to the fact that they may be trespassers or the injuries they inflict may be irreparable. *East & West R. Co. v. East Tennessee, V. & G. R. Co.* 75 Ala. 275.

But defendant does not intend to say that the few carloads of coal, the property of complainant, which it has appropriated from time to time and expects to appropriate in the future as occasion arises, are essential to the operation of its road. Notwithstanding the concession to which we have referred, the real meaning of defendant's contention is that the court, by its decree in the pending cause, should set a precedent by which defendant will be informed that the court will not interfere with its practice in general—in effect, a license to appropriate the coal of shippers whenever that may be necessary in its judgment, leaving shippers, as we have already suggested, to recover the value of their coal by negotiation or actions at law, and imposing upon complainant in this proceeding the burdensome, if not impossible, task of refuting defendant's assertion that, measured by the situation as it was at the moment, the appropriation of complainant's coal was the result of a public necessity. But the fact is that, when the privileges with which carriers are clothed are considered, it must in any case be hard for the carrier to show a necessity affecting the public,—and we think defendant failed in this case,—for, since railroads must have fuel, "they are entitled, and indeed required by law, to take all proper and just measures to assure the regularity and certainty of their fuel supply," and "the carrier must be free to contract for the total output of a mine, if it so desires; or it may contract for any part of a mine's output less than the whole,

—to prevent
abuse of pow-
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poration.

and it is entitled to get its fuel coal first, for without fuel it cannot haul even commercial coal to its destination, to say nothing of complying with its obligations to the public at large." *Springfield Light, Heat & P. Co. v. Norfolk & W. R. Co.* (D. C.) 260 Fed. 254. But if property is accepted for shipment as the property of the consignee, it must be delivered at its destination (case last above); nor have the public, in our opinion and speaking more broadly, any interest to be served by the maintenance of a proposition so subversive of property rights in general as that advanced on behalf of defendant. The public interest rather is that property rights, as guaranteed by constitutional and statutory law, be preserved against the inroads of private persons, natural or artificial, though they pretend to act in the public interest.

We have seen no case that supports defendant's objection to complainant's bill. *Springfield Light, Heat & P. Co. v. Norfolk & W. R. Co.* supra, is cited, not indeed as directly in point, but as containing an interesting discussion with a tendency to bring defendant's position into favorable consideration. But that was an action at law, and the question directly in issue was whether the railroad company should pay plaintiff for coal which it had appropriated to its own use. The court, speaking of six carloads delivered by the colliery to the defendant and received by defendant for delivery to plaintiff, said: "Assuming, but not deciding, that defendant's necessity morally justified its taking the six cars in order to keep its railroad running, the court can see no reason why the defendant should not pay the plaintiff for them."

As for the rest of the coal in dispute in that case, the railway company, having an unfulfilled contract with the colliery for coal, refused to accept it as plaintiff's coal, but appropriated it to the satisfaction of its own contract. Upon this branch of the case the court observed: "This particular coal, as between defendant and plaintiff, belonged to defendant, and it owed the plaintiff no duty with respect thereto."

These conclusions do not help the defendant in this case in the least. But, if the Federal district court, going further, may appear to have recognized, arguendo, the right of common carriers, in cases of necessity in the performance of contractual obligations, to appropriate coal received by them for transportation, we think it will suffice, in the way of rebuttal, to refer to what has already been said, and perhaps it will not be inappropriate to add the comment of the *Harvard Law Review* (February, 1920, pp. 605, 606) as follows: "The virtual recognition by the court of a right of angary in public utilities, it is submitted, is without precedent, and should not be followed. Its implications involve all the dangers of self-help. Even the power of eminent domain is no defense to a taking of property by self-help, which is certainly not due process,"—citing *Clinton v. Franklin*, 119 Ky. 143, 83 S. W. 140.

Without prolonging the discussion, we state our conclusion that the trial court committed no error in overruling the defendant's motion to dissolve the temporary injunction.

Affirmed.

All the Justices concur, Gardner, J., concurring in the conclusion.

ANNOTATION.

Appropriation by carrier for its own use of coal or other commodity shipped over its line.

Comparatively few cases have involved the question of the right of a carrier to appropriate for its own use coal or other commodities shipped over its lines.

The authorities are agreed that where a carrier accepts coal for transportation to the consignee, it cannot thereafter appropriate such coal to its own use without becoming liable to the owner for damages, even though the coal was necessary for the actual operation of the railroad. The following cases so hold: *Springfield Light, Heat & P. Co. v. Norfolk & W. R. Co.* (1919) 260 Fed. 254 (see this case as set out and discussed in *MOBILE & O. R. Co. v. ZIMMERN* (reported herewith) ante, 1352; *Blackmer v. Cleveland, C. C. & St. L. R. Co.* (1903) 101 Mo. App. 557, 73 S. W. 913; *Frazier v. Atchison, T. & S. F. R. Co.* (1904) 104 Mo. App. 355, 78 S. W. 679; *Roth Coal Co. v. Louisville & N. R. Co.* (1919) 142 Tenn. 52, 215 S. W. 404. And that an action for conversion will lie against a common carrier for an appropriation to its own use of property held by it for transportation, see dictum in *Central R. & Bkg. Co. v. Lampley* (1884) 76 Ala. 357, 52 Am. Rep. 334. In *Roth Coal Co. v. Louisville & N. R. Co.* (Tenn.) supra, where a railroad company accepted coal for transportation to a private customer of the consignor, but during a strike, and while the coal was in transit, used such coal in firing its locomotives, confiscation being necessary in order to keep its trains in operation, it was held that the motive which controlled the railroad company in the conversion of the coal did not constitute a defense, although it might be shown in a case where exemplary damages were claimed.

And in *Blackmer v. Cleveland, C. C. & St. L. R. Co.* (1903) 101 Mo. App. 557, 73 S. W. 913, where it appeared that a coal company had contracted to ship plaintiffs a certain portion of

its output of coal, and the carrier had agreed to furnish the necessary cars to transport the same; that the carrier notified the coal company that none of its own cars should be loaded with coal for any other customer than itself; that the coal company nevertheless loaded cars pursuant to its contract and notified the carrier to bill the same to plaintiffs, but that instead it billed the coal to itself and appropriated it to its own use in reliance upon its previous notification, as well as on the fact of an urgent need for coal to operate its trains,—it was held that the jury was justified in finding that the coal was put on the cars in such a way as to amount to a delivery to the plaintiffs so as to entitle them to recover for the conversion of the coal by the carrier. In discussing the effect of the carrier's urgency, the court said: "The defendant's urgency may have been great, but so was the plaintiffs.' If the defendant had to have coal to run its trains, plaintiffs likewise had to have coal to supply their customers in fulfillment of plaintiffs' contracts, and so that the customers could run their factories; and an emergency such as the defendant may have found itself in affords no excuse for appropriating the property of another. The evidence does not show that the defendant was bound to use this coal or stop running its trains; and if that was shown it would be no justification for forcing plaintiffs and others into a like dire strait, though it might excuse the defendant from punitive damages."

And in *St. Louis & S. F. R. Co. v. Stone* (1908) 78 Kan. 505, 97 Pac. 471, rehearing denied in (1908) 78 Kan. 510, 104 Pac. 1067, where a consignor had contracted to sell cars of coal to be delivered and paid for at the place of destination, and loaded the coal on the carrier's cars, and delivered bills of lading naming the consignee and destination, but the carrier's agent

erased the consignee's name and inserted that of the carrier, and the road, claiming ownership, appropriated the coal to its own use and delivered none to the proper consignee, it was held that the carrier was liable at the suit of the consignor as for wrongful conversion of the coal. And see *Luhrig Coal Co. v. Jones & A. Co.* (1905) 72 C. C. A. 311, 141 Fed. 617, wherein it was held that coal loaded and billed to a purchaser in compliance with a contract, but which, after refusal to ship, was appropriated by the carrier to its own use under plea of necessity, was to be considered, as between the consignor and the consignee, as having been delivered to the purchaser in fulfilment of the contract of sale.

But a distinction has been made between cases where the carrier accepted the commodity for transportation to the designated consignee, and a case where the carrier refused to accept it for transportation, but appropriated it to its own use in the operation of its road. Thus, in *Springfield Light, Heat & P. Co. v. Norfolk & W. R. Co.* (1919) 260 Fed. 254, where the carrier and consignee both had contracts with a coal company for a supply of coal, and the coal company, becoming delinquent in its supply to the carrier, was notified by the latter that it would not accept coal for transportation for commercial uses until its own needs were supplied, and actually did appropriate to its own use, under claim of necessity, coal which had been tagged by the consignor to plaintiff as consignee, but which, before being moved, was re-tagged by the carrier to itself, it was held that the carrier was not liable in conversion. In upholding this right of self-help by the carrier in case of necessity and in aid of its own contract with the consignor, the court said: "The Collieries Company [consignor] had, it is true, after filling cars with coal at the mines, tagged them for transportation to the plaintiff at Springfield; but the cars were not moved in pursuance of that designation, but the defendant removed the tags and tagged the cars to itself as

consignee, indicating its intention thereby not to receive the coal for shipment to plaintiff, and having theretofore notified the Collieries Company that it had appropriated the six cars, under its fuel contract, to supply its fuel needs. Plaintiff's claim is that the Collieries Company actually did deliver to defendant, for shipment to plaintiff, and title passed to plaintiff; that, the coal being tendered for carriage to the plaintiff, the defendant 'was bound to receive it and carry it for that purpose, or to reject it altogether and take such legal consequences as might follow the rejection. . . .' But defendant, while admitting that as a general rule a common carrier is bound to accept goods tendered to it for shipment, avers that under the circumstances of this case it was not bound to accept shipment. An analysis of its position would seem to indicate that there are two reasons which excused it, both involving the fact that the coal was necessary for the actual operation of its railroad. One reason is that the coal was, in substantial effect, as against the plaintiff, its own coal, which the Collieries Company had agreed to deliver, but was delinquent, and that, being necessary fuel coal, it took precedence over the plaintiff as contractee for commercial coal. The other reason is that the tender by the Collieries Company to it was of the Collieries Company's own wrongdoing, after notice of defendant's insistence on the receipt of its fuel coal, under the contract, and that plaintiff cannot take advantage of the wrongdoing of the Collieries Company, and thereby force on defendant the relation of common carrier, and thus give it, as purchaser of commercial coal, an advantage over the defendant as purchaser of the very fuel coal necessary in its operations. On the case as it stands, if the coal were plaintiff's coal, and the defendant bound to transport it, it could not do so, because it would not have the coal necessary to fire its engines, and the plaintiff's coal would remain at the mines, of no benefit either to the plaintiff or to the defendant or to the Collieries Company.

. . . The appropriation of this coal by defendant would not be the exercise of any paramount right by which the property of the plaintiff was taken without compensation. It merely amounts to postponing plaintiff's delivery until defendant may have the coal to operate its railroad, and then serve plaintiff. It would seem that, in the nature of things, the mine owner having contracts to deliver commercial coal, and having contracts with the railroad company, operating to and from its mine, for the railroad company's necessary fuel coal, that it is the duty of the mine owner to supply the fuel coal before supplying the commercial coal. Indeed, one would think that the contractor for commercial coal would be bound by the implication that the mine owner with whom he had contracted would, if the mine owner had also a contemporaneous contract with a railroad company for fuel coal, necessarily fill its contract with the railroad company first, at least to the extent of sufficient coal to enable it to carry commercial coal to the end of its line. . . . In the nature of things, the carrier, in order to carry from a mine any commercial coal at all, must have that mine owner fulfil its fuel contract with the railroad. When, therefore, this coal was placed on the defendant's cars, and the defendant, without moving it, and after notice, asserted the right of precedence which necessity gave it, the plaintiff had no right to complain of mere postponement of delivery to it under its contract with the Collieries Company. The rule that a common carrier is bound to receive goods tendered for carriage is not hard and fast. There are reported cases showing exceptions. In *The Idaho* (1877) 93 U. S. 575, 23 L. ed. 978, it was held that a common carrier may show, as an excuse for nondelivery pursuant to his bill of lading, that he has delivered the goods upon the demand of the true owner. In *Valentine v. Long Island R. Co.* (1907) 187 N. Y. 121, 79 N. E. 849, it appearing that the railroad company, having received certain rails for shipment over its lines without knowledge that the

rails were its property, and afterwards discovered that they were, had the right to appropriate the rails. In both of these cases the tender, the acceptance, the delivery, were without question. In the case here the railroad company notified the Collieries Company that it would not accept for shipment the commercial coal, and laid claim to the coal as its own. The Collieries Company could not force it into the relation of a common carrier, when it, without fault on its part, was unable to perform what would ordinarily be the duty of a common carrier, when it had given notice of its inability to perform the service due and demanded of it as a common carrier. The Supreme Court of the United States says so in *Eastern R. Co. v. Littlefield* (1915) 237 U. S. 145, 59 L. ed. 883, 35 Sup. Ct. Rep. 491, in so many words: 'But where, without fault on its part, a carrier is unable to perform a service due and demanded, it must promptly notify the shipper of its inability; otherwise, the reception of goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse for refusing to accept the goods, or for delay in shipment after they had been received.' That case also had to do with car shortage, which made it impossible for a carrier to furnish a reasonable number of cars for an accepted shipment; and it was held that the carrier, though not responsible for the car shortage, could not avoid liability, since it had given no notice to the shipper. Plaintiff's counsel say that the statement quoted is a dictum only. If it is, it has, nevertheless, coming as it does from the Supreme Court, a very persuasive influence. The case here is stronger than that, for shipment was not accepted, and the notice said it would not be accepted. The wrongdoing of the Collieries Company in tagging the cars for the plaintiff contrary to the notice could not, as heretofore said, compel the defendant into a relation it expressly declined, for justifiable reasons, to assume. This particular coal, as between defendant and plaintiff, be-

longed to defendant, and it owed the plaintiff no duty with respect thereto."

And in *Phoenix Coal Co. v. Pennsylvania R. Co.* (1920) 190 App. Div. 665, 180 N. Y. Supp. 283, where the rules of a carrier, required and approved by the Interstate Commerce Commission, obligated coal companies to specify the cars required for the following day, specifying separately those required for "fuel purposes" for the defendant carrier under a contract to furnish it coal, and those required for "commercial purposes," and the coal company, by specifying cars for "fuel purposes," obtained a greater proportion of cars than it otherwise would have been entitled to, and loaded some of such cars, and filled out the manifest card showing that the coal was for private consignees, some of which manifests were changed by the carrier's agents, before moving the cars, so as to give the carrier its proportionate number of cars of coal, it was held that the railroad company had a right to use coal put in cars which were, or should have been, requisitioned for it, so that it could not be held for conversion of such coal, notwithstanding the original manifest cards showed that the coal was for private consumers.

In *Frazier v. Atchison, T. & S. F. R. Co.* (1904) 104 Mo. App. 355, 78 S. W. 679, it was held that the fact that the conversion, by a carrier, of a car of coal belonging to a consignee, was the result of an honest mistake, did not relieve the carrier from liability to the consignee for the wrongful conversion.

The reported case (*MOBILE & O. R. Co. v. ZIMMERN*, ante, 1353) goes a step further than any of the other cases in holding that, to prevent a multiplicity of suits, equity will enjoin a carrier from carrying out its announced purpose to continue to appropriate coal accepted for shipment, where its use is necessary to the continued operation of the road, notwithstanding the carrier's offer to pay for the coal and the right of plaintiff to pursue his legal remedy by a succession of actions, and notwithstanding the fact that the interests of the public might be better served by the appropriation of the coal for use in operating trains. In the latter connection, it will be recalled, the court was of the opinion that there could be no balancing of the conveniences, since the appropriation was tortious and the preservation of a clear legal right was involved. G. J. C.

HINTON LAUNDRY COMPANY, Appt.,

v.

FLORENCE DELOZIER.

Tennessee Supreme Court — October 25, 1920.

(143 Tenn. 399, 225 S. W. 1037.)

Workmen's compensation — injury after hours — liability.

Injury to an employee of a laundry while engaged in pressing a skirt for a fellow employee after working hours does not arise out of the employment within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 1364.]

APPEAL by defendant from a judgment of the Circuit Court for Knox County (Huffaker, J.) in favor of claimant in a proceeding by her under the Workmen's Compensation Act to recover compensation for personal injuries alleged to have been sustained while in defendant's employ. *Reversed.*

The facts are stated in the opinion of the court.

16 A.L.R.—86.

Messrs. Frantz, McConnell, & Seymour, for appellant:

Claimant's injury did not arise out of and in the course of employment.

Linnane v. Aetna Brewing Co. L.R.A. 1917D, 117, 118, notes 7, 8; Mueller Constr. Co. v. Industrial Bd. L.R.A. 1918F, p. 905; Griffiths v. Robins, 10 B. W. C. C. 90; Rayner v. Sligh Furniture Co. L.R.A. 1916A, pp. 40, 232.

Messrs. R. A. Cawood and W. S. Roberts for appellee.

Hall, J., delivered the opinion of the court:

Florence DeLozier brought this suit in the circuit court of Knox county by petition filed on January 7, 1920, seeking to recover compensation provided for injured employees under the terms of chapter 123 of the Act of 1919, known as the "Workmen's Compensation Act," the petitioner claiming to have been injured while in the employ of the defendant at its laundry operated by it in the city of Knoxville.

The case was heard before the circuit judge without the intervention of a jury, and a judgment was rendered against the defendant for the sum of \$5 per week, continuing for a period of seventy-five weeks.

From this judgment defendant appealed to this court, after its motion for a new trial had been overruled, and has assigned errors.

The petition alleges that plaintiff was employed by the defendant to do general laundry work in its steam laundry at a salary of \$7 per week, and as a part of the terms of the employment she was given the privilege of having her individual laundry done at its plant free of charge, the defendant agreeing to furnish her all the necessary ingredients, machinery, and other apparatus for doing such laundry while petitioner was in its employ; that while so employed, on or about the 8th day of August, 1919, her hand was in some way caught in a pressing machine, whereby her fingers were so injured that their use was destroyed.

The petitioner prayed for a judgment

for compensation, as provided by the Workmen's Compensation Statute above referred to.

The defendant answered the petition admitting that petitioner was employed by it on August 8, 1919, and had been so employed off and on for a period of several years, to do general work around its plant in the starch department and other departments of the plant, and that at the time of the injury complained of she was earning an average wage of \$7 per week.

The answer denied, however, that in addition to the weekly wage paid to petitioner there was included as a part of her compensation the privilege of having her individual laundry done free of charge, and that she was to be furnished any ingredients, machinery, and other apparatus in connection with the doing of her individual laundry.

The answer further averred that, at the time of the accident which resulted in injury to the petitioner, she was engaged in pressing a skirt belonging to one of the other female employees in the plant of defendant, and was using for this purpose a steam pressing machine used by respondent in its business; that the act that petitioner was performing at the time was in no wise connected with the business of respondent, and had no connection whatever with the duties which petitioner had been employed to perform, and did not arise under and in the course of the employment of petitioner, but that petitioner was engaged in performing a personal act, wholly disconnected with her employment, and wholly as a matter of accommodation to a third person.

The answer further averred that there was no mutuality between respondent and petitioner with respect to the act which she was performing when injured, and that her hours of service had ceased, and that she was not authorized or directed by any agent or officer of respondent to perform this service.

The question presented for de-

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termination by the court is whether the service that was being performed by the petitioner was one contemplated by the employment, and one in which the employer had an interest, or whether it was simply a voluntary service being performed by petitioner as a matter of accommodation to one of her fellow employees, and therefore was not in the course of her employment.

Subsection D of § 2 of the Workmen's Compensation Act aforesaid provides that "injury" and "personal injury" shall mean only injury by accident arising out of and in the course of employment, and shall not include a disease in any form except as it shall naturally result from the injury."

The proof shows that petitioner was earning \$6.50 per week, and a bonus of 50 cents, provided she appeared promptly for her work each day during the week. This wage she received from the defendant whether she did her individual laundry at the defendant's plant or not.

The proof shows that, under a rule of the defendant, petitioner and other employees engaged in the defendant's plant were given the privilege of doing their individual laundry at the plant on Monday of each week; that day not being a busy day with the plant in doing the work of its patrons. The employees did not have the right to do their individual laundry on any other day of the week under the rule referred to.

The petitioner was injured on Friday while pressing a skirt for Margaret Bowling, a fellow employee, in violation of the rule of the defendant. She was pressing this skirt after her regular work hours had ceased, and at a time when she owed no duty to the defendant. Her act of pressing the skirt for Margaret Bowling was purely a voluntary one, and was being done by the petitioner as a matter of accommodation to her fellow employee. The evidence is uncon-

tradicted that the defendant had an interest whatever in the service which was being performed by the petitioner at the time of her injury.

The question presented by the case is discussed in 1917D, 117, 118, and in 8. It is there said: "Compensation is not recoverable when an employee is injured while performing a duty solely for his own benefit. This rule has been applied in cases where an employee has been on shore for some time of his own, and is injured while on the dock on his way back to the vessel. So, too, there can be no recovery where an employee, at the time of his injury, was working for a third person, and was injured at a time when he was not required to perform his duties to perform for the employer, and was not required, expected, to be on the premises."

In *Bayer v. Bayer*, 143 Mich. 423, 158 N. W. 2d, it was held that an insurance policy which had insured against injuries while a contractor in constructions, cannot be held liable for injuries to an employee who was engaged with his employer in carting material for the employer's brother, who was not employed with the employer in business, and who paid one half of the cost of feeding the horse upon which he might have the horse at certain times.

In another case it was held that a jobbing grinder, who was paid so much per week for a fixed condition that he do all the work of the cutler, for which he was paid a regular price, and, with the acquiescence of the employer, does work for others when he has no work for himself, while working for a third person, is not an employee of the cutler so as to make him liable for compensation for an injury received while so employed. *Oates v. Turner & Co.* [1917] 115 L. T. Rep. 335.

32 Times L. R. 659, 86 L. J. K. B. N. S. 24, 9 B. W. C. C. 447, 60 Sol. Jo. 639.

It has also been held that the death of a boy employed as a stable boy cannot be said to have arisen out of the employment, where it was caused by the kick of a horse as he was entering the stable with a halter in his hand, at a time when he had no duty to perform in the stable. *Joy v. Phillips M. & Co.* [1916] 1 K. B. 849, 85 L. J. K. B. N. S. 774, [1916] W. C. & Ins. Rep. 67, 114 L. T. N. S. 577, [1916] W. N. 142, 9 B. W. C. C. 242.

It has also been held that where a servant girl was engaged in mending her own dress when the bell rang and she arose to answer it, and in some manner drove the needle into her knee, no compensation was recoverable, since the accident did not arise out of the em-

ployment. *Griffiths v. Robins* (1916) 10 B. W. C. C. 90.

The petitioner being injured in the manner and circumstances herein stated, she cannot recover of the defendant, because her injury did not arise out of her employment, or while performing any service for the defendant, or in any service in which it was interested. Upon the other hand, the uncontradicted proof shows that the service which petitioner undertook to perform, and which resulted in her injury, was purely voluntary, and was being performed for the accommodation of a fellow employee.

**Workmen's compensation—
injury after
hours—liability.**

We do not think the Workmen's Compensation Act covers such injury. It results that the judgment of the court below will be reversed, and the suit dismissed, with costs.

ANNOTATION.

Workmen's compensation: injury to employee while using an instrumentality of the employer for benefit of himself or third person.

This annotation does not cover cases where the employee was riding for his convenience on an elevator or other conveyance of the employer, contrary to orders; neither does it include cases where the employee was performing the work of another employee at the latter's request, but for the employer's benefit.

As to right to compensation where injury results from doing a prohibited act, see annotation to *Fournier's Case*, — A.L.R. —.

As to injury while riding to or from work in employer's conveyance as arising out of or in course of employment, see annotation in 10 A.L.R. 169.

For injury to employee who is resting during working hours as arising out of and in the course of his employment, see annotation in 10 A.L.R. 1488.

As to compensation for injuries during lunch hour on employer's premises, see annotation in 6 A.L.R. 1151.

It will be observed that in the re-

ported case (*HINTON LAUNDRY CO. v. DELOZIER*, ante, 1361), it was held that an injury to an employee of a laundry, while using a pressing machine in pressing a skirt for a fellow employee after working hours, did not arise out of the employment within the meaning of the Workmen's Compensation Act, since she was not performing any service for the employer, but was doing an act purely voluntary for a fellow employee.

And in *Daly v. Bates & Roberts* (1918) 224 N. Y. 126, 120 N. E. 118, where a laundress was employed in a hotel, and, in addition to a money consideration, was given the privilege, after regular working hours, of using the plant of the employer to do her laundry work, it was held that an injury to her while doing her laundry after working hours did not arise from or in the course of her employment. The court said: "In *Heitz v. Ruppert* (1916) 218 N. Y. 151, L.R.A.1917A, 344, 112 N. E. 750, we sought to establish

general principles applicable to a construction of subd. 7 of § 3 of the Workmen's Compensation Law, a recitation of which will bear repetition here. "The statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words "arising out of and in the course of employment," are conjunctive, and relief can be had under the act only when the accident arose both "out of" and "in the course of" the employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work.' Applying the principles stated to the case at bar, we are led to the conclusion that the injury to claimant did not arise from or in the course of her employment. She was employed to perform the laundry work of her employer. Such employment was to be performed within established hours. On the day in question claimant had completed her labors for her employer some few hours before the happening of the accident. Her duty to her employer did not require her presence in the laundry again until the following morning. The accident occurred in the evening while she was engaged in doing work personal to herself. At that time she was not engaged in the performance of any duty she was employed to perform, or directly connected with or incidental to the work of the employer, but her labor there was entirely disassociated with the work of her employer. The fact that she was permitted to use the laundry for her personal benefit did not change the relation of the parties. . . . Had the claimant remained in her room in the hotel and engaged her time in mending her clothing, and while so engaged met with an accident by reason of using a scissors, it could scarcely be held that such injury would arise out of and in the course of her employment, or was incidental thereto."

And in *Radtke Bros. v. Industrial*

Commission (1921) — Wis. —, 183 N. W. 168, where a boy fourteen years old, employed as an errand boy in a printing plant, who had been instructed to keep away from all machines, was injured while using a machine, when unobserved by anyone in authority, to make a tablet for himself for use at home, it was held that the accident did not happen while he was performing services growing out of and incidental to his employment within the meaning of the Compensation Act. The court stated that they had found no case where an employee had been awarded compensation for an injury received while he was doing work entirely different from that assigned to him, against orders, and for his own benefit, and further said: "It is strongly urged upon us that boys of this age from natural curiosity are apt to intermeddle with machinery, and that there should be the most careful supervision to prevent accidents where they are engaged to render service wherever machinery is used. It does not appear in this case that the claimant was led by curiosity to operate the machine, but that after full warning of the danger he undertook to use it to do work for his own benefit. Although, as already indicated, the statute should be liberally construed, it should not be so interpreted as to make employers absolute insurers against all accidents happening to employees, even though they are minors. It is the legislative policy that minors over fourteen years of age may be employed in industrial work under the very careful restrictions imposed by the statute. It may fairly be inferred that this policy was adopted because it was deemed better, under the conditions imposed, for boys over fourteen, not interested in higher education or not able to attend school, to do moderate work, than to live in the idleness which leads to immorality and pauperism. We do not conceive it to be our duty to construe the statute so broadly that no employer would feel safe in employing minors over fourteen years of age. Such a course would be detrimental both to

employers and to the working class, for whose benefit the statute was in large degree enacted."

And an injury to the foreman of a knitting room in a mill, sustained when his hand came in contact with a revolving fan in a pipe conveying heated air into the dry room, as he attempted to place luncheon to heat in the pipe through an aperture left for the care of the fan, does not arise out of and in the course of his employment within the meaning of the Compensation Act, although the employer has impliedly assented to the heating of such materials by employees by placing them in the mouth of the pipe. *Mann v. Glastonbury Knitting Co.* (1916) 90 Conn. 116, L.R.A.1916D, 86, 96 Atl. 368, 12 N. C. C. A. 891.

And in *Gibbs v. Almstrom* (1920) 145 Minn. 35, 11 A.L.R. 227, 176 N. W. 173, it was held that the injury did not arise in the course of the employment where it appeared that plaintiff was a salesman and supplied with an automobile by his employer, and that he was injured while taking another automobile, which the company had furnished to a salesman in another territory, from the station to a garage to accommodate the other salesman.

And where the defendant, who was in the automobile business, and about to move, had employed the plaintiff to move some material, and gave him and his coworkers some junk to sell, and loaned them a truck to use in disposing of it, and the plaintiff was injured in a collision while they were using the truck in selling the junk, it was held that the accident did not arise in the course of the employment, but happened while plaintiff was prosecuting his own private business. *Sizzirri v. Krouse* (1920) 73 Pa. Super. Ct. 476.

And in *Dennis v. Taylor* (1919) 89 L. J. K. B. N. S. (Eng.) 296, 121 L. T. N. S. 296, 12 B. W. C. C. 172, 54 Sol.

Jo. 243, where the driver of a taxicab, when she was supposed to have completed her work and have returned the taxicab to the garage, in defiance of her employer's orders, hired the cab to take passengers to a place outside the limit she was supposed to go, and was injured while so driving, it was held that the injury did not arise out of and in the course of her employment.

And in *Whitfield v. Lambert* (1915) 8 B. W. C. C. (Eng.) 91, 84 L. J. K. B. N. S. 1378, 112 L. T. N. S. 803, where a farm laborer, according to his agreement of hiring, after dinner was allowed to take a horse and cart to go to the station for his box, and on the way was injured through the horse becoming frightened by a motor, it was held that the accident did not arise out of his employment, since he was going to the station for his own purposes.

And an insurance company, which had insured an employer against injuries while acting as a contractor in constructing buildings, cannot be held liable for injuries to an employee while he was engaged with his employer's horse in carting material for the employer's brother, who was not connected with the employer in business, but paid half the expenses of feeding the horse upon the condition that he might have the use of it at certain times. *Bayer v. Bayer* (1916) 191 Mich. 423, 158 N. W. 109.

In *Caleveras Copper Co. v. Indiana Acci. Commission* (1920) — Cal. App. —, 187 Pac. 129, the evidence was held sufficient to warrant the finding that the truckman of a copper company was acting within the scope of his employment, where there was testimony that he was instructed by one of the officers to haul some wood for one of the members of the company, and injured his fingers while sawing some sides for his truck so that he might put on a larger load. J. T. W.

The decedent's children at the time of his death consisted of two daughters, Nettie A. Shoch, spinster, and Bessie Clair Shoch Neel, the wife of Percy L. Neel, and a son, James R. Shoch.

James R. Shoch died testate January 7, 1918, leaving a widow, Germaine S. Shoch, and one child, James R. Shoch, Jr., who was born on January 9, 1917, subsequent to the date of his father's will, which was made October 30, 1913. After directing payment of debts, James R. Shoch gave his entire estate to his wife, the appellant.

Stephen S. Simon was appointed guardian of the estate of James R. Shoch, Jr., and at the adjudication of the account of the surviving executor of Henry R. Shoch, deceased, he claimed that the birth of his ward subsequent to the date of the will of the latter's father invalidated the father's will so far as the after-born child's interests are concerned. He further contended that James R. Shoch, Jr., was entitled to take the whole portion of the residuary estate of Henry R. Shoch, deceased, from which his father, James R. Shoch, had received the income, as though the latter had made no appointment thereof.

On the other hand, Germaine S. Shoch claimed that James R. Shoch had validly exercised his power of appointment in her favor, and the birth of James R. Shoch, Jr., subsequent to the date of the will of her husband, did not invalidate the latter as an exercise of the power, or, if at all, then only *pro tanto*.

The orphans' court overruled the last-mentioned contentions, and awarded the fund in controversy to

the guardian of the minor child. While the case presents some nice points of law, we think them correctly solved.

Section 21 of the Wills Act of 1917 (P. L. 403, 410; Pa. Stat. 1920, § 8333) provides: "When any person, male or female, shall make a last will and testament, and afterward shall marry, or shall have a

child or children not provided for in such will, and shall die, leaving a surviving spouse and such child or children, or either a surviving spouse or such child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the surviving spouse, or child or children born after the making of the will, shall be deemed and construed to die intestate; and such surviving spouse, child, or children shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if such person had actually died without any will."

Fortunately we have a very recent construction of the legislation just quoted which accords with the view taken by the court below, and furnishes a key to the difficulties involved in this case that might have been used to advantage had the authority in question been called to the attention of the court below. We refer to *Shestack's Estate*, 267 Pa. 115, 110 Atl. 166, where a woman married after making her will, and a surviving husband claimed out of her estate the \$5,000 allowed by the Act of June 7, 1917, *infra*. We there said, speaking of § 21 of the act here involved, that it provides: "Where any person, male or female, shall make a last will and testament, and afterwards shall marry, . . . and shall die, leaving a surviving spouse, . . . so far as shall regard the surviving spouse, . . . [the testator] shall be deemed and construed to die intestate; and such surviving spouse . . . shall be entitled . . . as if such person had actually died without any will"—adding: "By the marriage of the testatrix to the appellee the will as to him was annulled. There was an actual intestacy as to him, in view of the provisions of the Wills Act."

The Intestate Act of June 7, 1917 (P. L. 429), as amended by the Act of July 11, 1917 (P. L. 755; Pa. Stat. 1920, § 8344), § 2, provides that in "cases of actual intestacy" a surviving husband, under the cir-

Power—exercise
by will—effect
of birth of
child.

cumstances detailed in the act, shall be entitled to \$5,000 out of his wife's estate; and in Shestack's Estate the husband was awarded such \$5,000, on the ground that "as to him" his wife's will "was annulled" and she had died intestate. When this principle is applied to the case now before us, it is plain that, as to James R. Shoch, Jr., the minor child born after the making of his father's will, the will of the latter was annulled, and, with respect to such after-born child, the father died intestate.

So far as the individual estate of the minor's deceased father is concerned, of course the child takes only the proportion thereof which belongs to him under the intestate law, as provided in the above-quoted section of the Wills Act; but, with relation to the property of the grandfather, Henry R. Shoch, over which James R. Shoch had power of appointment, when we determine that the latter died intestate as to his son, we must then look at the will of Henry R. Shoch to see what he provides in case of such an intestacy, in order to determine the present interest of the minor child.

In *Young's Appeal*, 39 Pa. 115, 116, 118, 80 Am. Dec. 513, a woman placed an estate in trust, reserving the right of testamentary disposition, and providing that, in default of appointment, the property should go to the settlor's heirs. After she made a will, a child was born to her, who was not provided for. In holding that the will was annulled as to this child, we said: "The will is set aside, wholly or partially, because the law presumes that it does not express the final intention of the testator [testatrix], and this reason of the law takes no notice of whether the power to make the will comes from public law or from private contract."

If we strike from the matter just quoted the phrase "private contract," and substitute therefor the words "a privately conferred power of appointment" (which on principle may be done), we have a ruling that the birth of a child after the

date of a will, which otherwise would operate as the exercise of a power of appointment, annuls such operation. See also *Re McClure*, 105 Misc. 347, 173 N. Y. Supp. 206.

Young's Appeal is likewise authority for the statement made above that, when an intestacy as to the after-born child is found, we must look to the instrument creating the power of appointment, in order to ascertain the interest of such child. It is there said (39 Pa. 119, 120): "We must declare this a case of intestacy so far as relates to the appellant, a son of the testatrix born after the making of the will. Then, looking back at the articles of nuptial settlement, we find they provide that, in case of intestacy, the trustees shall hold the property . . . for her legal heirs. . . . It follows, therefore, and from the fact that she had but one other child, that she is intestate of one half of her estate, and that that half goes . . . for the use of the appellant [the minor child]."

Had the after-born child in *Young's Appeal* been given the whole estate over which the power existed, no doubt the pro tanto intestacy as to the child would have been held, in effect, to extend to the entire estate, as in the present case.

Here, when we look at the will of Henry R. Shoch, deceased, we find it provides that, in case his son James R. Shoch shall die intestate, the fund in question shall go to the latter's children; and, as James R. Shoch did die intestate so far as James R. Shoch, Jr., is concerned, since the latter is the only child surviving his father, it follows that this grandchild takes the entire fund, under the terms of his grandfather's will.

A more elaborate discussion of the testamentary provision in the will of Henry R. Shoch, deceased, providing for the disposition of his residuary estate to his "grandchildren" in the event of his children failing to appoint their respective shares, will be found in another opinion, this day filed, on the appeal

of the Commonwealth Title Insurance & Trust Company, guardian for the Neel minors; and this is why, in the paragraph immediately above, we merely state our conclusion concerning the effect of that part of the will, so far as it relates to grandchildren.

There is nothing in the decision of the court below, or in this opinion, contrary to our ruling in *Huddy's Estate*, 236 Pa. 276, 281, 282, 84 Atl. 909. Here, as there, the person to whom the fund is awarded received the property in question "under and by virtue of the original will creating the power." In *Huddy's Estate* a husband elected to take against the will of his wife, and our decision concerning the property which, under those circumstances, he was entitled to receive, is therein expressly made to rest upon § 1 of the Act of May 4, 1855 (P. L. 430). This statute, in terms, confines its operation to the individual estate of the testator, and we said that the taking against the will is not viewed in law as necessarily rendering the decedent intestate; whereas, as previously shown *Sheslack's Estate*, *supra*, decides that the marriage of a testator (or the birth to him of a child) after the making of his will creates, as to the surviving spouse (or after-born child) an actual intestacy. This is the distinction which must be kept in mind

when considering *Huddy's Estate* in connection with the present case.

In the case at bar one act of assembly, that of June 4, 1879 (P. L. 88), created a presumption of intention on the part of James R. Shoch to execute the power given him by the will of Henry R. Shoch; while, under our statutory doctrine of implied revocation arising from an after-born and unprovided-for child, a counter, conclusive presumption arises that James R. Shoch did not intend to exercise the power so far as concerns the after-born child, James R. Shoch, Jr. Therefore the power has never been exercised, for the Act of 1879 has not changed the last-mentioned statutory doctrine in the least; consequently the appellee takes under the will of his grandfather.

Before closing this opinion, since the will of James R. Shoch contains a direction to pay debts, it may be well to add that the court below states the award was made directly to the guardian of James R. Shoch, Jr., because it was proved that the estate of James R. Shoch "had been settled and all debts paid."

This appeal has been well presented; but, after considering the enlightening arguments of able counsel, we are not convinced of error.

The decree is affirmed, the costs to be paid out of the fund in controversy.

ANNOTATION.

Effect of marriage or subsequent birth of child on exercise of power of appointment.

I. Effect of marriage:

a. Rule at common law, 1370.

b. Rule under statute:

1. In England, 1371.

2. In United States, 1372.

II. Effect of subsequent birth of child, 1374.

I. Effect of marriage.

a. Rule at common law.

At common law, the will of a woman made in the exercise of a power of

appointment was deemed not to be revoked by her subsequent marriage. See *McAnnulty v. McAnnulty* (1887) 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; *Stewart v. Mulholland* (1888) 88 Ky. 38, 21 Am. St. Rep. 320, 10 S. W. 125; *Francis v. Marsh* (1904) 54 W. Va. 545, 46 S. E. 573, 1 Ann. Cas. 665. See also *Rich v. Beaumont* (1727) 6 Bro. P. C. 152, 2 Eng. Reprint, 994.

In *Francis v. Marsh* (1904) 54

of his surviving his wife, made a will while a widower, and thereafter contracted a second marriage. The court held that the will was not revoked by the second marriage, although the same persons would take under the terms of the settlement, in default of appointment, as would have taken in case of intestacy under the Statute of Distributions. See also *Fenwick's Goods* (1867) 36 L. J. Prob. N. S. 54, L. R. 1 Prob. & Div. 319, 16 L. T. N. S. 124.

In *Re Paul* (1921) 2 Ch. 1, the court said: "It appears to me that, on the true construction of the will of Sir J. D. Paul, there was, first of all, a settlement on each daughter of the income of her share during her life, with remainder to her children or the other grandchildren of the testator as the lady should appoint, and that for the moment, as each share was so settled, the trusts, in default of appointment, were not declared, but that, immediately after the settlement of the four separate shares, there was a general clause beginning with the words, 'And I declare that, subject as aforesaid, I leave all my residuary estate that may not hereby or hereunder be effectually disposed of,' which swept in and disposed of anything not appointed in respect of any of those shares, and was a perfectly clear gift in default of appointment applying to each one of the four separate fractions of the estate. That being so, the gift in default of appointment not being within the terms of the words in brackets in § 18 of the Wills Act, — that is to say, the property not, in default of appointment, passing to Mrs. Atherton's (testatrix's) heir, customary heir, executor, administrator, or next of kin under the Statute of Distributions, — it follows, in my judgment, that the will, so far as it exercised this limited or special power of appointment, was not revoked by the marriage."

A will exercising a power of appointment, and also disposing of a testator's property other than that included in the power, is not entirely revoked by subsequent marriage, but that part of it which exercises a power of appointment is within the exception of the

English statute, and must be held good, although the remainder of the will is revoked. *Russell's Goods* (1890) L. R. 15 Prob. Div. 111, 59 L. J. Prob. 80, 62 L. T. N. S. 644.

In *Hodsden v. Lloyd* (1789) 2 Bro. Ch. 564, 29 Eng. Reprint, 293, a will made prior to a marriage, contrary to the terms of an antenuptial agreement providing for the settlement of certain property on the surviving husband or wife for life, with power to the wife to dispose of the property by will made after the marriage, was held to be revoked by the marriage.

2. In United States.

In several American states, statutes exist similar to the English act providing that wills made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to the testator's heirs, personal representatives, or next of kin, shall not be revoked by marriage. *Stewart v. Mulholland* (1888) 88 Ky. 38, 21 Am. St. Rep. 320, 10 S. W. 125; *Ingersoll v. Hopkins* (1898) 170 Mass. 401, 40 L. R. A. 191, 49 N. E. 623; *Paine v. Price* (1904) 184 Mass. 350, 68 N. E. 833; *Winslow v. Copeland* (1852) 44 N. C. (Busbee, L.) 17; *Phaup v. Wooldridge* (1858) 14 Gratt. (Va.) 332; *Francis v. Marsh* (1904) 54 W. Va. 545, 46 S. E. 573, 1 Ann. Cas. 665. See also *Stewart v. Powell* (1890) 90 Ky. 511, 10 L.R.A. 57, 14 S. W. 496. And see Gen. Laws of Rhode Island (1896) chap. 203, § 16.

"The reason for this exception is that the donee of a power, in making an appointment, is acting for the donor in disposing of the donor's property. But where the property in question goes, in default of appointment, to those who would have been entitled to it had it been the property of the donee of the power and he had died intestate, a case arises where the property to be disposed of by the appointment is, for all practical purposes, the property of the donee of the power, and for that reason it is taken out of the exception and left within the operation of the act." *Paine v. Price* (1904) 184 Mass. 350, 68 N. E. 833.

Under the Kentucky statute, it has been held that the will of a woman, made prior to her marriage in execution of a power of appointment conferred on her by an antenuptial agreement entered into orally before the making of the will, but not formally executed in writing until after the making of the will, was not revoked by the marriage. *Stewart v. Mulholland* (Ky.) *supra*.

In *Winslow v. Copeland* (1852) 44 N. C. (Busbee, L.) 17, the court said, with reference to the North Carolina statute: "We . . . cannot doubt that our act, copied, as it is, literally from the English statute, having the same difficult and perplexing distinctions arising from the implied revocation of wills to deal with, intended to accomplish the same purpose by the same means. . . . All wills, with a single exception, whether made by a man or woman, shall be revoked ipso facto by his or her subsequent marriage, in consequence of which the property will devolve upon those to whom the law shall assign it, in case he or she shall die without making a subsequent disposition of it. The exception made by the act is where the will is made in exercise of a power of appointment, when the property thereby appointed would not devolve, in default of appointment, upon those to whom the law would give it; and therefore the statute will not interfere between the objects of the bounty of the grantor of the power, in default of appointment, and those upon whom the will, made under the power, may confer it." The will in that case was held to be inoperative for the reason that the marriage settlement which conferred the power of appointment made no disposition, in default of appointment, of the property.

In other American jurisdictions, where no exception of wills made in the exercise of a power of appointment is made in statutes declaring that the wills of persons subsequently marrying shall be revoked, conflicting results have been reached.

For example, in the case of *Re McClure* (1918) 105 Misc. 347, 173 N. Y. Supp. 206, the will of a single woman,

made in the exercise of a power of appointment conferred by a deed of trust, was held to be revoked by her subsequent marriage, in view of the New York statute (Decedent Estate Law, § 36; 13 McKinney, Consol. Laws, p. 105), providing that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." The court said: "This language is clear and comprehensive. A will executed by an unmarried woman becomes a nullity immediately upon her subsequent marriage. . . . There are no express exceptions in the statute, and there is no room for exceptions by implication. If the legislature had intended to make an exception in favor of that part of the will of an unmarried woman which exercised a power of appointment conferred upon her, there is no reason why it should not have expressly provided for such an exception, as the legislatures of many of our states have done, and as the British Parliament did in the English Wills Act of 1837. Our legislature has not yet seen fit to modify the direct and comprehensive enactment contained in § 36 of the Decedent Estate Law, and until it does this court cannot attempt such modification by judicial interpretation."

But in *McMahon v. Allen* (1855) 4 E. D. Smith (N. Y.) 519, a will and codicil exercising a power of appointment subsequently established by the provisions of a marriage settlement were held not to be affected by the subsequent marriage of the testatrix. The court said: "Although, by the provisions of our statute, a will made by an unmarried female is to be deemed revoked by her subsequent marriage (2 Rev. Stat. 64, § 36), such subsequent marriage does not operate to prevent an instrument executed before the marriage, and established by the marriage settlement, from taking effect upon the property settled according to the very terms of the settlement itself. . . . And . . . the said will and codicil were . . . a valid appointment."

In *Osgood v. Bliss* (1886) 141 Mass. 474, 55 Am. Rep. 488, 6 N. E. 527, it appeared that the parties were mar-

ried in the state of Indiana, having, on the eve of the marriage, made an antenuptial contract by which the intended wife was given full power of disposition of her property, and by which it was also agreed that the marriage should not revoke a will that had been made by the intended wife. The intended husband had never seen the will, and knew nothing of its contents. The statute of Indiana contained no exceptions, but provided that "after the making of a will by an unmarried woman, if she shall marry, such will shall be deemed revoked by such marriage." The wife dying, the husband claimed about \$12,000 in money or choses in action, disposed of by the will, on the ground that the marriage rendered the instrument a nullity. The supreme court of Massachusetts held that the will, so far as it was in execution of the power of appointment contained in the antenuptial agreement, was not revoked by the marriage.

In *Wheeler v. Wheeler* (1850) 1 R. I. 364, wherein it appeared that the testator, in contemplation of marriage, had executed a deed of trust reserving to himself a power of appointment by will, and had thereafter exercised such power, it was held that the marriage did not revoke the will. The statute in that case provided that "no devise, etc., shall be revocable otherwise than by marriage of the testator, subsequent to the date thereof," etc.

II. Effect of subsequent birth of child.

Search has revealed but one case, other than the reported case (*RE SHOCH*, ante, 1367), determining the effect of the subsequent birth of a child on the exercise of the power of appointment.

In *Young's Appeal* (1861) 39 Pa. 115, 80 Am. Dec. 513, a will made by a woman under a special power of appointment contained in a marriage settlement, providing that, in default of appointment, the property should go to the testatrix's heirs, was held to be annulled by the subsequent birth of a child to said testatrix, the court saying: "We have no doubt that this will is to be regarded as made under the special power contained in the articles of marriage settlement, and not under the general power granted by law; but we do not think that it is, on this account, any the less subject to revocation by operation of law, when the circumstances attending it bring it within the reason of the law. In either case the will is a private law of descent and distribution, and if revoked at all by operation of the general law, it is because of some defect in itself, and not because of the authority or power on which it is grounded, but entirely irrespective of this. The will is set aside, wholly or partially, because the law presumes that it does not express the final intention of the testatrix, and this reason of the law takes no notice of whether the power to make the will comes from public law or from private contract."

In the reported case (*RE SHOCH*, ante, 1367), under a statute specifically providing that the birth of a child shall render inoperative a will previously made, it is held that a will, executed in pursuance of a power of appointment prior to the birth of a child, is revoked on the happening of such event, and this is so despite the provisions of another statute, creating a presumption of intention on the part of the testator to execute such power of appointment. L. F. C.

WACHOVIA BANK & TRUST COMPANY, Appt.,
v.
J. W. CRAFTON.

North Carolina Supreme Court — May 25, 1921.

(— N. C. —, 107 S. E. 316.)

Bills and notes — gambling debt — liability of indorser.

A statute rendering void notes given for gambling debts does not prevent a holder in due course for value from holding the indorser liable on his contract of indorsement.

[See note on this question beginning on page 1377.]

APPEAL by plaintiff from a judgment of the Superior Court for Buncombe County (Long, J.) in favor of defendant in an action brought to hold him liable on his contract of indorsement of a certain promissory note. *Reversed.*

Statement by Hoke, J.:

Civil action tried before his Honor, B. F. Long, judge, and a jury, at December term, 1920, of the superior court of Buncombe county.

The action is brought by an indorsee and holder in due course of a promissory note given by one J. M. Carver to J. W. Crafton, defendant, for money won by defendant in a game of cards, and indorsed by the defendant, the payee of the note in due course and for value to plaintiff bank. There was denial of liability, the defendant, the indorser, alleging that the note in question was for an amount won in a gambling transaction. The jury rendered the following verdict:

1. Did the defendant, Crafton, indorse the note declared on for \$700, February 18, 1919, due April 8, 1919, as alleged in the complaint and before its maturity?

Answer: Yes.

2. Did the plaintiff discount and pay \$690 for the note to W. E. Shuford, in regular course, without notice that it was for a gambling debt, and before maturity, as alleged by plaintiff?

Answer: Yes.

3. Was the note executed by J. M. Carver for a gambling debt to J. W. Crafton?

Answer: Yes.

On the verdict, there was judgment that defendant go without day, and plaintiff bank excepted and appealed.

Messrs. Bourne, Parker, & Jones, Theodore F. Davidson, and V. S. Starbuck, for appellant:

The contract of indorsement is a separate and independent contract.

1 Dan. Neg. Inst. § 668; Evans v. Gee, 11 Pet. 80, 9 L. ed. 639.

Defendant's liability on his separate and independent contract of indorsement is in no wise affected by the invalidity of the note itself.

3 R. C. L. 1020; Irwin v. Marquett, 26 Ind. App. 383, 84 Am. St. Rep. 297, 59 N. E. 38; Hannum v. Richardson, 48 Vt. 508, 21 Am. Rep. 152; Morford v. Davis, 28 N. Y. 481; Horowitz v. Wollowitz, 59 Misc. 520, 110 N. Y. Supp. 972; Klar v. Kostiuck, 65 Misc. 199, 119 N. Y. Supp. 683; Moffett v. Bickle, 21 Gratt. 283; Unger v. Boas, 13 Pa. 601; Graham v. Maguire, 39 Ga. 531; Weil's Succession, 24 La. Ann. 139; Edwards v. Dick, 4 Barn. & Ald. 212, 106 Eng. Reprint, 915, 23 Revised Rep. 255; 1 Dan. Neg. Inst. 6th ed. § 673.

Usurious notes are as void in the hands of an innocent holder for value as if in the hands of those who made the usurious contract.

Claffin v. Boorum, 122 N. Y. 385, 25 N. E. 360; Sabine v. Paine, 223 N. Y. 401, 5 A.L.R. 1444, 119 N. E. 849.

Mr. Marcus Erwin for appellee.

Hoke, J., delivered the opinion of the court:

Our statute applicable to the note in question (Consol. Stat. § 2142) renders this and all notes and contracts in like cases void, and it is urged in support of his Honor's ruling that, this being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well-considered authorities elsewhere. *Glenn v. Farmer's Bank*, 70 N. C. 191; *Calvert v. Williams*, 64 N. C. 168; *Sabine v. Paine*, 223 N. Y. 401, 119 N. E. 849, reported also in 5 A.L.R. 1444.

This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent indorsee for value and holder in due course, against the indorser on his contract of indorsement. It is very generally held—uniformly, as far as examined—that this contract of indorsement is a substantive contract, separable and independent of the instrument on which it appears, and, where it has been made without qualification and for value, it guarantees to a holder in due course, among other things, that the instrument, at the time of the indorsement, is a valid and subsisting obligation. It is so expressly provided in our statutes on negotiable instruments (Consol. Stat. chap. 58, § 3047), and the statute in this respect, as in so many of its other features, is but a codification of the general principles of this branch of the mercantile law, as established in the better-considered decisions on the subject. *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152; *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137; *Sinker v. Fletcher*, 61 Ind. 277; 4 Am. & Eng. Enc. 2d ed. p. 477; *Norton, Bills & Notes*, p. 217; 1 *Calvert's Daniel, Neg. Inst.* § 669. In 4 Am. & Eng. Enc., supra, it is stated "that no principle is more fully settled or better understood in

commercial law than that the obligation of the indorser is a new and independent contract."

And in *Norton on Bills & Notes* it is said that "every indorser who indorses without qualification warrants to his indorsee and to all subsequent holders," among other things, "that the bill or note is a valid and subsisting obligation."

In applying these principles, the cases hold that, on breach of the contract of indorsement, a recovery by a holder in due course will be sustained against the indorser, though the instrument is rendered void by the statute law. *Irwin v. Marquett*, 26 Ind. App. 383, 84 Am. St. Rep. 297, 59 N. E. 38; *Morford v. Davis*, 28 N. Y. 481; *Horowitz v. Wollowitz*, 59 Misc. 520, 110 N. Y. Supp. 972; *Moffett v. Bickle*, 21 Gratt. 280; *Graham v. Maguire*, 39 Ga. 531; *Edwards v. Dick*, 4 Barn. & Ald. 212, 106 Eng. Reprint, 915, 23 Revised Rep. 255; 1 *Calvert's Daniel, Neg. Inst.* § 373. In *Irwin v. Marquett*, supra, in denying recovery on the note, the court said: "It is the law that, in a suit by a bona fide holder against an indorser, the latter cannot defend on the ground that the original contract was based on a gaming consideration, for the reason that the indorsement is a separate and independent contract, and the indorser, by his indorsement, warrants the validity of the original contract"—citing many authorities.

In the citation to *Calvert's Daniel on Negotiable Instruments*, § 673. the author says: "The indorser engages that the bill or note is a valid and subsisting obligation, binding all prior parties according to their ostensible relations; and he may be held liable, although the instrument be entirely null and void, as between prior parties themselves; and also as between prior parties, and even bona fide holders, without notice"—and quotes from an English case in which *Lee, Ch. J.*, in denying recovery on a note void for gaming, said: "The plaintiff is not without

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remedy, for he may sue the indorser on his indorsement." The law which renders these contracts void was enacted for the suppression of gambling, but it would tend rather to encourage the vice if a successful gambler could procure the value of such a note on his indorsement, and protect himself from the obligation

so incurred by pleading his own wrongdoing. On both reason and authority, therefore, the defendant should be held liable for breach of his own contract of indorsement, and under the facts established by the verdict, there should be judgment for plaintiff.

Reversed.

ANNOTATION.

Invalidity of note as affecting liability of indorser to indorsee or subsequent holder.

I. Introductory, 1377.

II. In general, 1377.

III. Theory, 1378.

IV. Effect of indorsee's knowledge of the illegality, 1380.

V. Application under the various grounds of invalidity, 1381.

I. Introductory.

This annotation is confined in the main to regular indorsers. The liability of irregular accommodation indorsers of invalid paper has not generally been considered. See *Burke v. Smith* (1909) 111 Md. 624, 75 Atl. 114, as to liability of accommodation indorsers to original payee. See also *Bowman v. Hiller* (1881) 130 Mass. 153, 39 Am. Rep. 442; *Leonard v. Draper* (1905) 187 Mass. 536, 73 N. E. 644; *Fish v. First Nat. Bank* (1879) 42 Mich. 203, 3 N. W. 849.

Cases dealing with forged bills and notes as well as those dealing with forged indorsements have been excluded.

Cases dealing with notes barred by statutes of limitations have been excluded. See *Carroll v. Nodine* (1902) 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51, on this point.

II. In general.

The indorser of a negotiable instrument cannot escape liability on his indorsement to a subsequent indorsee, by reason of the fact that the instrument itself is invalid.

Alabama.—*Birmingham Nat. Bank v. Bradley* (1893) 103 Ala. 109, 49 Am. St. Rep. 17, 15 So. 440.

Arkansas.—*Airy v. Nelson* (1882) 39 Ark. 43 (obiter).

16 A.L.R.—87.

California.—*Bunker v. Osborn* (1901) 132 Cal. 480, 64 Pac. 853.

Connecticut.—*Kilgore v. Bulkley* (1841) 14 Conn. 362.

Georgia.—*McDougald v. Central Bank* (1847) 3 Ga. 185; *Brown, Ch. J.*, in *Graham v. Maguire* (1869) 39 Ga. 532; *Frank v. Longstreet* (1871) 44 Ga. 178.

Indiana.—*Henderson v. Fox* (1854) 5 Ind. 489; *Tam v. Shaw* (1858) 10 Ind. 469.

Kentucky.—*Farmers' & D. Bank v. Unser* (1892) 13 Ky. L. Rep. 965.

Louisiana.—*Weil's Succession* (1872) 24 La. Ann. 139.

Massachusetts.—*Copp v. M'Dugall* (1812) 9 Mass. 1; *Burrill v. Smith* (1828) 7 Pick. 291; *Prescott Nat. Bank v. Butler* (1893) 157 Mass. 548, 32 N. E. 909.

New York.—*First Bank v. Jones* (1913) 156 App. Div. 277, 141 N. Y. Supp. 304; *Archer v. Shea* (1878) 14 Hun. 493; *Shaw v. Outwater* (1894) 77 Hun. 87, 28 N. Y. Supp. 312; *Horowitz v. Wollowitz* (1908) 59 Misc. 520, 110 N. Y. Supp. 972; *Klar v. Kostiuik* (1909) 65 Misc. 199, 119 N. Y. Supp. 683.

Pennsylvania.—*Unger v. Boas* (1850) 13 Pa. 601 (obiter).

South Carolina.—*Payne v. Trezevant* (1796) 2 S. C. L. (2 Bay) 23 (obiter).

Virginia.—*Moffett v. Bickle* (1871) 21 Gratt. 280.

England.—*Haly v. Lane* (1741) 2 Atk. 181, 26 Eng. Reprint, 513; *Ex parte Clarke* (1791) 3 Bro. Ch. 238, 29 Eng. Reprint, 511; *Bowyer v. Bampton* (1741) 2 Strange, 1155, 93 Eng.

Reprint, 1096 (obiter); *Edwards v. Dick* (1821) 4 Barn. & Ald. 212, 106 Eng. Reprint, 915, 23 Revised Rep. 255.

At least, an indorser who has taken usury cannot defeat his liability to an indorsee on the ground of invalidity for such usury. *Morford v. Davis* (1864) 28 N. Y. 481.

The indorser of a town order which was issued without authority, and was therefore of no binding validity, was held liable to his indorsee in an action in assumpsit, in *Furgerson v. Staples* (1889) 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158. This case is approved in *Willis v. French* (1892) 84 Me. 593, 30 Am. St. Rep. 416, 24 Atl. 1010. And in *Merchants' Nat. Bank v. Spates* (1895) 41 W. Va. 27, 56 Am. St. Rep. 628, 23 S. E. 681, one who assigned a non-negotiable county order, which was invalid under a constitutional provision, was held liable to his assignee in a suit to recover the money paid therefor.

It was held in *Florida C. R. Co. v. Schutte* (1881) 103 U. S. 118, 26 L. ed. 327, where a railroad company put on the market and sold bonds of a state, indorsed by the railroad company with its certificate that the state held the first-mortgage bonds of the company for a like amount as security to the holder, that although the state was not liable upon its bonds, because they were unconstitutional, the certificate of the railroad company was equivalent to an engagement by the company that the bonds, so far as the security was concerned, were the valid obligations of the state, the case being held to be within the rule which makes an indorser of commercial paper the guarantor of the genuineness and validity of the instruments he indorses.

In *Martin v. Drake* (1842) 1 Rob. (La.) 218, an action was brought against a husband and wife on a note drawn by the wife to the order of her husband, and indorsed by him. The defendants admitted their signatures, but alleged that the note was given in part payment for a slave who was afflicted with an incurable disease well known to the vendor. The court, after holding the wife not bound, said: "On the merits of the case, so far as the

husband is concerned, he has failed to support his defense below by any evidence. The appeal was clearly taken by him for the purpose of delay." The meaning of this statement is not clear but a judgment for the amount of the note was affirmed as against the husband.

Even under an assignment of a note which states that the assignee takes it at his own risk and exonerates the assignor, it was held in *Prettyman v. Short* (1852) 5 Harr. (Del.) 360, that if the note was assigned in payment of goods purchased, though without recourse, the assignor would still be liable, if he fraudulently induced the assignment by representing it to be a good note when he knew it to have been procured by fraud and deceit.

The court in *Southern Loan Co. v. Morris* (1845) 2 Pa. St. 175, 44 Am. Dec. 188, refused to hold liable the indorser of an instrument in the form of a certificate of deposit issued by a loan company in plain excess of its charter powers. The court says that even if the certificate was a legitimate certificate of deposit, such as the company was authorized by its charter to issue, it would not be a negotiable instrument so as to make the indorser liable on his indorsement.

III. Theory.

The general theory of the foregoing decisions is that an indorsement is a new and independent contract, not affected by the invalidity of the contract evidenced by the note. *Airy v. Nelson* (1882) 39 Ark. 43; *Graham v. Maguire* (1869) 39 Ga. 532, per Brown, Ch. J.; *Frank v. Longstreet* (1871) 44 Ga. 178; *Weil's Succession* (1872) 24 La. Ann. 139; *Furgerson v. Staples* (1889) 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158; *Morford v. Davis* (1864) 28 N. Y. 481; *First Bank v. Jones* (1913) 156 App. Div. 277, 141 N. Y. Supp. 304; *Moffett v. Bickle* (1871) 21 Gratt. (Va.) 280.

According to the court in *Moffett v. Bickle* (Va.) *supra*, the contract of indorsement "is entirely several and independent of the contracts of the maker and of the prior indorsers, and is wholly unaffected by the usury

which taints those contracts. . . . The contract implied by Bickle's indorsement was that the note should be duly paid at maturity, and his liability is none the less when the note has not only not been duly paid, but is infected with usury between him and the prior indorsers and maker, so that an action cannot be maintained against such prior indorsers and maker."

In holding that the indorsee or holder of a promissory note may recover thereon from the indorser, although the note itself was given for a slave consideration, and its enforcement prohibited by a constitutional provision, the court in *Weil's Succession* (1872) 24 La. Ann. 139, says that the indorsement is a new contract which is in no wise affected by the invalidity of the contract evidenced by the note itself.

As shown above, the indorsement is a contract independently of the instrument indorsed; it is sometimes said that in this new contract the indorsee impliedly warrants that the instrument is valid and what it purports to be.

Arkansas.—*Airy v. Nelson* (1882) 39 Ark. 43.

California.—*Bunker v. Osborn* (1901) 132 Cal. 480, 64 Pac. 858.

Colorado.—*Rhodes v. Jenkins* (1892) 18 Colo. 49, 36 Am. St. Rep. 263, 31 Pac. 491.

Connecticut.—*Kilgore v. Bulkley* (1841) 14 Conn. 362.

Indiana.—*Henderson v. Fox* (1854) 5 Ind. 489; *Tam v. Shaw* (1858) 10 Ind. 469; *Alleman v. Wheeler* (1885) 101 Ind. 141.

Maine.—*Furgerson v. Staples* (1889) 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158.

Massachusetts.—*Burrill v. Smith* (1828) 7 Pick. 291; *Prescott Nat. Bank v. Butler* (1893) 157 Mass. 548, 32 N. E. 909.

New York.—*Archer v. Shea* (1878) 14 Hun, 493; *Shaw v. Outwater* (1894) 77 Hun, 87, 28 N. Y. Supp. 312; *Horowitz v. Wollowitz* (1908) 59 Misc. 520, 110 N. Y. Supp. 972.

Virginia.—*Moffett v. Bickle* (1871) 21 Gratt. 280.

The Negotiable Instruments Act provides "that every indorser who indorses without qualification warrants to all subsequent holders in due course . . . that the instrument is at the time of his indorsement valid and subsisting." *Horowitz v. Wollowitz* (N. Y.) *supra*.

It is said in *Farmers' & D. Bank v. Unser* (1892) 13 Ky. L. Rep. 965, in case of a note based on a gambling consideration, that although the note was based on such a consideration "the indorsers are liable, for they engage that the note is a valid and subsisting obligation, binding on all prior parties according to their ostensible relations, and they will be held liable, although the instrument be entirely null and void as between the prior parties themselves, and also as between such prior parties and bona fide holders without notice."

The accommodation indorser of a promissory note who intrusts it to the maker, who was the accommodated party, for negotiation, warrants the subsequent holder that the note is what it purports to be on its face. In this case the warranty was held to preclude the accommodation indorser from showing that the date of the note had been altered. *Meyer v. Foster* (1905) 147 Cal. 166, 81 Pac. 402.

The court in *Copp v. M'Dugall* (1812) 9 Mass. 1, after stating that, upon the failure to recover against the maker, the indorsee became entitled, at least, to the money he had paid his indorser upon a bargain and consideration which had failed on his part, and the transfer of a note which was not what it purported to be,—a good recoverable note against the promisor,—continues: "The case is analogous, as I conceive, to that of a bill of exchange where the drawer is proved to have had no funds in the hands of the drawee or acceptor, and to have suffered no prejudice as to the demand or remedy against him. A negotiable promissory note, when indorsed, has, as a mercantile contract, every circumstance of a bill of exchange or draft accepted; the indorser standing in the relation of the drawer, and the promisor being the acceptor. When the

promise or acceptance is void, as it is in a case of usury between the drawer and acceptor, if he will resort to that defense against his promise, the contract becomes, as it respects the indorser, a draft accepted without funds—that is, in the case of a promissory note,—and the indorser has no demand which he can lawfully or effectually assign in the hands of the promisor; and it is at least evident that the indorser suffers no prejudice or loss by any delay of the indorsee in demanding payment of the promisor, or in giving notice to the indorser."

That an indorser cannot, as a witness, impeach the note indorsed by him, is held in an action between the holder and maker in *Walters v. Smith* (1860) 23 Ill. 342. •

This warranty of genuineness has been held to exist, even in the case of an indorsement in form "to be liable in the second instance." *McNeil v. Knott* (1852) 11 Ga. 142.

And in an indorsement without recourse there has been held to be an implied warranty arising from the sale of a note that the note is genuine. *Hannum v. Richardson* (1875) 48 Vt. 508, 21 Am. Rep. 152.

The present annotation does not purport to present an exhaustive review of the decisions upon the nature and extent of the warranty arising from the indorsement of a negotiable instrument, but touches upon that question only as it bears upon the liability of the indorser of an invalid note.

IV. Effect of indorsee's knowledge of the illegality.

If the indorsee has notice of the illegality, it seems that he cannot recover.

In *Ward v. Doane* (1889) 77 Mich. 328, 43 N. W. 980, an action on a note given in a "Bohemian oats" transaction, the court, after holding the note void in its inception, said that, if the plaintiff purchased it of the payee knowing that it was a "Bohemian Oats" note, then public policy required that any contract between the payee and his indorsee, the object and purpose of which was to give life to illegal papers, should be also void upon

the same grounds as those which destroyed its validity at its inception; that no liability can be created upon it, "not even a contract of indorsement between the payee and one acquainted with its fraudulent character."

In *Root v. Wallace* (1845) 4 McLean, 8, Fed. Cas. No. 12,039, in one part of the opinion the action is stated to have been brought on notes, but in another that the plaintiff was seeking to recover on a contract of indorsement. Apparently the latter was the fact, for it was argued on the part of the plaintiff that, whether the notes were void or not, the indorsement was conclusive evidence of the making and legality of the note; that the contract of indorsement under which the plaintiff sought to recover was a new and distinct contract equivalent to the drawing of drafts by the indorser upon the maker of the note in favor of the holders, and by which the indorser promised to pay the money mentioned in the note, if the maker failed and the indorser was notified; and it was further argued that, if the notes were void on the ground of illegality, usury, or forgery, yet the indorsee might recover of the indorser. In answer to this contention the court says: "The question is not whether the indorsee may not recover from the indorser the consideration paid, but whether the indorsements on the notes are evidence of the consideration. An indorser is estopped from setting up an illegality not apparent on the face of the note, against a bona fide holder without notice. By his indorsement he guarantees that the note is what it purports to be." In this case the illegality of the notes was apparent upon their face, having been issued by a corporation in violation of a state law, and it is held that the rule that an indorser cannot show the illegality of the paper does not apply to an indorser with notice. The court says further: "If the illegality of the notes be established, the indorsee cannot recover from the indorser until he shows that he took the note for value. . . . He must not only show that he paid value for the notes, but it must appear that

he had no notice of the fraud. . . . In the case of *Utica Ins. Co. v. Scott* (1821) 19 Johns. (N. Y.) 6, the court said that a note taken for money lent by the company was void, yet that the money loaned might be recovered, but that the action could not be sustained on the note, as that was void. In *Utica Ins. Co. v. Kip* (1827) 8 Cow. (N. Y.) 20, the second count of the declaration was for money lent. The plea admitted the loan by the plaintiffs to the defendants, and the court held that the plaintiff could recover on the admission, but not on the note. The note being void, its contents cannot be received in evidence to support an action upon it." The net result of this decision seems to be that, in a case in which the holder has notice of the illegality, the note itself is incompetent for any purpose, but that this does not preclude the indorser being liable to the indorsee for the money paid for the note.

In *Root v. Godard* (1842) 3 McLean, 102, Fed. Cas. No. 12,037, the parties to the action are not clearly stated. Apparently, however, the action was brought on certain notes by the indorsee against the indorser. The notes were issued by a corporation in violation of a statute, and showed this violation on their face. The plaintiff was therefore held chargeable with notice thereof, and it was further held that the illegality might be shown by the indorser to defeat the action.

V. Application under the various grounds of invalidity.

The broad statement is made in *Shaw v. Outwater* (1894) 77 Hun, 87, 28 N. Y. Supp. 312, that an indorser can have "no defense to the note on the ground of its invalidity for any cause, since by his contract of indorsement he himself guaranteed its validity as well as its payment." In this case the note was claimed to have been invalid because given in a scheme for the sale of grain, similar to the "Bohemian oats swindle." In *Ex parte Clarke* (1791) 3 Bro. Ch. 238, 29 Eng. Reprint, 511, it is said: "The indorsee may come against the indorser, though the bill is a mere

nullity in other respects. It is the indorser's business to see what he can make of the bill, but he, by his indorsement, is certainly liable to the indorsee." In this case the indorser of a bill made payable to a fictitious payee was held liable.

The broad generalization of the foregoing courts is supported in the result of the cases. For of all the grounds of invalidity that have been before the courts, none has been held to invalidate the contract of indorsement except, as hereinbefore noted, where the indorsee has knowledge of the invalidity.

The payee of a note the consideration for which is a slave, and which under the state law is unenforceable, who indorses the note and transfers it for a valid consideration, is liable on his indorsement. *Graham v. Maguire* (1869) 39 Ga. 532, per Brown, Ch. J.; *Weil's Succession* (1872) 24 La. Ann. 139.

The payee of a note which is vitiated for usury, who has subsequently indorsed the note, is liable on his indorsement. *Frank v. Longstreet* (1871) 44 Ga. 178; *Copp v. M'Dugall* (1812) 9 Mass. 1. The purchaser of a note who exacted usury in his purchase, and who thereafter sold and indorsed it, cannot defeat liability on his indorsement by showing the usury. *Moffett v. Bickle* (1871) 21 Gratt. (Va.) 280. In this case, by virtue of a statute, a judgment was rendered against the indorser in a joint action against the maker and other indorsers. That an indorser who has exacted the usury cannot defeat his liability on this ground, is held also in *Morford v. Davis* (1864) 28 N. Y. 481. The owner of a note, invalid, in part, for usury, has been held liable to his indorsee notwithstanding the invalidity, even though he indorsed without recourse. *Challiss v. McCrum* (1879) 22 Kan. 157, 31 Am. Rep. 181. This liability, however, was based upon the defendant's character as vendor, and it is expressly stated that no action would lie on the indorsement.

In *Payne v. Trezevant* (1796) 2 S. C. L. (2 Bay) 23, where an innocent holder was denied the right to recover

on a usurious note against the maker, the court, in charging the jury, said that the plaintiff was not without his remedy, for, although the note was void against the drawer, he had his remedy against the indorser, or person from whom he received it, in an action for money had and received to his use.

That usury between prior parties is no defense to an indorser on his liability to a holder in due course is true under the Negotiable Instruments Act. *Horowitz v. Wollowitz* (1908) 59 Misc. 520, 110 N. Y. Supp. 972; *Klar v. Kostiuk* (1909) 65 Misc. 199, 119 N. Y. Supp. 683.

In denying recovery by an innocent holder of a note given for a gambling consideration, in an action against the maker, the court says, in *Unger v. Boas* (1850) 13 Pa. 601, that the plaintiff is not without his remedy, for he may sue the indorser on his indorsement. The court in *Bowyer v. Bampton* (1741) 2 Strange, 1155, 93 Eng. Reprint, 1096, in holding that an innocent indorsee of a note given for a gambling consideration could not recover of the maker, says that the plaintiff is not without his remedy, for he may sue the indorser on his indorsement.

The indorser of a note, void because executed in the name of the maker by an agent after the death of the maker, is liable on his indorsement. *Burrill v. Smith* (1828) 7 Pick. (Mass.) 291.

The fact that a note may be invalid because of having been executed and delivered on Sunday does not relieve the indorser of liability on his contract of indorsement. *Prescott Nat. Bank v. Butler* (1893) 157 Mass. 548, 32 N. E. 909.

The fact that the maker of the note may not have become legally bound thereon because of being a married woman affords no defense to an action

brought against the indorser. *Archer v. Shea* (1878) 14 Hun (N. Y.) 493; *Haly v. Lane* (1741) 2 Atk. 181, 26 Eng. Rep. 513; *Ross v. Dixie* (1850) 7 U. C. Q. B. 414.

The indorsers of a corporate note, invalid because not properly authorized, are liable to an indorsee on their contract of indorsement. *Bunker v. Osborn* (1901) 132 Cal. 480, 64 Pac. 853. The indorsers of a corporate note cannot set up corporate incapacity to make the contract embraced in the note. *Kilgore v. Bulkley* (1841) 14 Conn. 362; *Merchants Bank v. United Empire Club Co.* (1879) 44 U. C. Q. B. 468. Nor can the indorser set up that the instrument was not executed, as the corporate charter required. *McDougald v. Central Bank* (1847) 3 Ga. 185.

The indorser sued in *McDougald v. Central Bank* (Ga.) *supra*, was the president of the bank, who drew the bill in question. In holding that he could not thus avoid his liability, the court says that the suit is against him "on his indorsement of a bill which he drew as president of said bank in his own favor, and he now seeks to avoid his liability upon the ground that he had no authority under the charter to make such a contract." In answer to this argument, the court said: "I apprehend that he is bound upon his indorsement, whether the bank be or not; and at any rate the objection does not lie in his mouth."

Granting that the note itself was ultra vires the corporation, the new contract evidenced by the indorsement is not dependent upon the validity of the note. *First Bank v. Jones* (1913) 156 App. Div. 277, 141 N. Y. Supp. 304.

But see *Southern Loan Co. v. Morris* (1845) 2 Pa. St. 175, 44 Am. Dec. 188, *supra*, II. See also *Root v. Godard* and *Root v. Wallace* (Fed.) *supra*, IV.

W. A. E.

M. M. JONES, Appt.,
v.
T. L. BLAND et al.

North Carolina Supreme Court — September 21, 1921.

(— N. C. —, 108 S. E. 344.)

Innkeeper — duty to one entering inn for purpose of gambling.

1. An innkeeper owes no duty to a person going to the room of a guest, upon the latter's invitation, for the purpose of gambling, except not wilfully or intentionally to injure him, and therefore is not liable to him for injury caused by his falling into an unguarded elevator well.

[See note on this question beginning on page 1388.]

Appeal — interpretation of instructions.

2. Instructions to the jury must be considered and interpreted in reference to the material facts submitted for decision.

[See 14 R. C. L. 821.]

Evidence — burden of proof — injury to invitee in hotel.

3. An invitee injured by falling down an unguarded elevator well in a hotel is not, in order to hold the innkeeper liable for the injury, bound to show that the gate was left open by the employee in charge of the elevator, or, if by a stranger, that it remained open so long that the innkeeper should have discovered it.

Negligence — injury by falling into elevator well.

4. An innkeeper may be held liable for injury to an invitee in the inn

who falls down an unguarded elevator well intended for passenger use, where the door from the landing was left open when the elevator was not there, and the situation of the elevator, the darkness of the day, and color of the paint were such that ordinary observation would not disclose the opening, or absence of the elevator.

[See 14 R. C. L. 538.]

Evidence — res ipsa loquitur.

5. Where a thing which causes an injury is shown to be under the management of the defendant, and the occurrence is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.

[See 9 R. C. L. 1259.]

APPEAL by plaintiff from a judgment of the Superior Court for Beaufort County (Allen, J.) in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by their negligence. *New trial.*

Statement by Hoke, J.:

The action is to recover damages for the alleged negligence of T. L. Bland, proprietor of the Hotel Louise, and another, in leaving open the elevator shaft leading off the hotel lobby, and into which plaintiff fell, receiving serious, painful, and enduring injuries. There were denial of liability and plea of contributory negligence on part of plaintiff. On the trial there was evidence tending to show that on the afternoon of January 23, 1918, about 3:30 P. M., plaintiff was invited into

said Hotel Louise by W. B. Troy, a boarder at the hotel, and the two were going up to the room of said Troy on the fourth floor of the building; that it was a dark, cloudy day, the elevator, being behind the stairs, shutting off much of the light that existed, and the elevator shaft, from its placing and color of paint, was such that plaintiff was unable to discern whether carriage was in place, and, believing it was, stepped into the open door, falling to cement floor of the basement, a distance of 9 to 11 feet, and causing painful and

permanent injuries, from which he is still suffering and greatly hindered in his ability to work.

It was proved that the carriage of the elevator at the time was at one of the upper floors, where it had been taken by someone, and that the door on the lobby floor was open. It was also shown that Mr. Troy, the inmate of the hotel, had been sick and confined to the house for about a week, and there were facts on evidence permitting the inference that it was the purpose of Troy in calling plaintiff into the building, and of the two in going to Troy's room, to play cards for money at a fine of 10 cents' limit, involving a loss of 25 or 50 cents, etc. There were submitted the three ordinary issues as to the negligence of defendant, contributory negligence of plaintiff, and damages, and, the court having charged the jury, there was verdict for defendant on the first issue. Judgment for defendant, and plaintiff excepted and appealed, assigning errors.

Messrs. Daniel & Carter for appellant.

Messrs. Robert Ruark, Small, MacLean, Bragaw, & Rodman, and William B. Campbell, for appellees:

Where reasonable men might draw different inferences or conclusions from the testimony, such testimony should be submitted to the jury.

Forsyth v. Zebulon Cotton Oil Mill Co. 167 N. C. 179, 83 S. E. 320; *Cotton v. North Carolina R. Co.* 149 N. C. 229, 62 S. E. 1093; *Deppe v. Atlantic Coast Line, R. Co.* 152 N. C. 79, 67 S. E. 262; *Phillips v. Giles*, 175 N. C. 411, 95 S. E. 772.

The only duty owed to plaintiff is not to injure him wilfully or wantonly.

Money v. Travelers Hotel Co. 174 N. C. 508, L.R.A.1918B, 493, 93 S. E. 964; *Quantz v. Southern R. Co.* 137 N. C. 136, 49 S. E. 79; *Muse v. Seaboard Air Line R. Co.* 149 N. C. 448, 19 L.R.A.(N.S.) 453, 63 S. E. 102; *Briscoe v. Henderson Lighting & P. Co.* 148 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 600; *Monroe v. Atlantic Coast Line R. Co.* 151 N. C. 374, 27 L.R.A.(N.S.) 193, 66 S. E. 315; *Stanwood v. Clancey*, 106 Me. 72, 26 L.R.A.(N.S.) 1213, 75 Atl. 293; *Piper v. New York C. & H. R. R. Co.*

156 N. Y. 224, 41 L.R.A. 724, 66 Am. St. Rep. 559, 50 N. E. 851, 4 Am. Neg. Rep. 335.

Hoke, J., delivered the opinion of the court:

It is earnestly urged for error that his Honor charged the jury, in part, on the first issue that, if they should find that Jones and Troy were on the way to Troy's room for the purpose of playing cards for money, they should answer the first issue for defendants; the objection being that such unlawful purpose, even if established, could in no legal sense be considered as the proximate or contributing cause of plaintiff's injury. As an abstract proposition, considered entirely apart from the proprietary rights of the defendant as owner and in the management of the property, the position embodied in this objection should be upheld. In *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534, Chief Justice Dixon, in an opinion of great force and learning, approves and sustains the principle that "the fact that plaintiff, at the time he suffered injuries to his person or property from the negligence of defendant, was doing some unlawful act, will not prevent a recovery, unless the act was of such a character as would naturally tend to produce the injury;" that is, unless the very unlawfulness of the act would have that tendency. And the principle so stated is fully recognized in this state as in accord with the better-considered authorities on the subject. *Ferrell v. Durham Traction Co.* 172 N. C. 682, L.R.A. 1917B, 1291, 90 S. E. 893; *McNeill v. Durham & C. R. Co.* 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765; *Waters v. Richmond & D. R. Co.* 110 N. C. 338, 16 L.R.A. 834, 14 S. E. 802; *Watson, Damages for Personal Injuries*, §§ 230-237.

A judge's charge, however, must be considered and interpreted in reference to the material facts submitted for his decision, and on this record it appears that defendant is the owner and

Appeal—interpretation of instructions.

proprietor of the hotel where the incident occurred, and plaintiff is insisting upon the position that he was there at the time on the invitation of a guest of the hotel, and has been injured in breach of the duty owed to one in that position. In the case suggested, and without more, it is very generally held that such a one, termed an invitee, is entitled to the duty of ordinary care from the proprietor and his employees, but the principle does not extend to a claimant who enters a hotel for an ulterior purpose, and who, going beyond the scope and purpose of the invitation, wanders into some remote portion of the premises not covered by the same, and where there is no reason to expect him to go. Under such circumstances, he loses the position of invitee and the privileges incident to it, and is to be considered trespasser or mere licensee, towards whom no duty is owing except not to wilfully or wantonly injure him. *Money v. Travelers Hotel Co.* 174 N. C. 508, L.R.A. 1918B, 493, 93 S. E. 964; *Monroe v. Atlantic Coast Line R. Co.* 151 N. C. 374, 27 L.R.A. (N.S.) 193, 66 S. E. 315; *Quantz v. Southern R. Co.* 137 N. C. 136, 49 S. E. 79; *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1, 22 L.R.A. (N.S.) 1045, reported also in 17 Ann. Cas. 576; *Ryerson v. Bathgate*, 67 N. J. L. 337, 57 L.R.A. 307, 51 Atl. 708, 11 Am. Neg. Rep. 300; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; *Zoebisch v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660. And the principles as stated should clearly prevail where, under the guise of an invitee, the claimant has entered or remains upon the premises for an unlawful purpose; assuredly so, where the proprietor has no knowledge of such purpose and takes no part therein. *McGhee v. Norfolk & S. R. Co.* 147 N. C. 142, 24 L.R.A. (N.S.) 119, 60 S. E. 912; *Newark Electric Light & P. Co. v. Garden*, 37 L.R.A. 725, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74; 1 Thomp. Neg. § 969.

In this last citation the position is stated as follows: "The distinction is that the person coming on the premises to whom this duty of care is due must not come as a mere trespasser or wrongdoer, but for some purpose lawful in itself and such as the owner or occupier might reasonably expect to bring him there."

As applied to the facts of this record, therefore, his Honor correctly charged the jury that, if claimant was going to the room for the unlawful purpose of gambling, they should answer the issue as to defendant's negligence, "No;" and he gave the right reason for it; "for in such case there would be no duty

innkeeper—duty to one entering inn for purpose of gambling.

owing to him except not to wilfully or wantonly injure him." *Emry v. Roanoke Nav. & Water Power Co.* 111 N. C. 94, 17 L.R.A. 699, 16 S. E. 18. And he was correct also in holding that there were no facts in evidence to justify a finding of that character; there being no claim of wilfulness and wantonness in this connection, being negligence so gross as to manifest a reckless indifference to plaintiff's rights. *Everett v. Richmond & D. R. Co.* 121 N. C. 519, 27 S. E. 991.

The appellant excepts further that the court charged the jury as follows: "The burden is on the plaintiff to satisfy you by the greater weight of the evidence that Shepard, the boy in charge of the elevator, or whoever was in charge of it, left the door open, or that, if opened by someone other than an agent or employee of defendants, that defendants knew it, or that it remained open long enough for them, in the exercise of ordinary care, to have discovered it, and if plaintiff has failed to so satisfy you of these facts, you will answer the first issue, 'No.'"

The court is dealing here with the general question of defendant's negligence as involved in the first issue, and on the assumption that plaintiff was an invitee on the

premises and entitled to the duty of ordinary care. In this aspect of the case he so instructed the jury, and correctly charged them further that the burden of the issue was on the plaintiff, and in effect that he was required to establish a breach of duty towards him, the proximate cause of his injury. Going further and referring to some of the contentions of the parties, he gave the instruction excepted to as a further rule to guide the jury in their deliberations, and in this we think there was error to appellant's prejudice

Evidence—burden of proof—
injury to invitee in hotel.

which entitles him to a new trial. It will be noted that his Honor is here charging the jury as to the burden of proof, telling them in terms that to find the issue for plaintiff the burden is on him to show by greater weight of evidence either that the employee of defendant left the door open, or, if done by a third party, it had remained open so long that defendant should have discovered it.

In this aspect of the case there are facts tending to show, and they are without substantial contradiction, that on January 23, 1918, about 3:30 in the afternoon, plaintiff, an invitee on the hotel premises, walked into an elevator shaft opening on the lobby and fell to the cellar, 11 feet below, receiving permanent and painful injuries, from which he still suffers, and disqualifying him to a great extent from active labor in his calling; that it was a dark afternoon, sleet was falling, and from this cause, and the color of the paint, and intervening obstructions to what light was prevailing on the outside, the place was so dark that ordinary observation did not disclose the opening, or absence of the elevator carriage; that the door leading into lobby where plaintiff was at the time had been left open, or was open, and the elevator carriage was at one of the upper stories. If these facts are accepted by the jury, and, as stated, they are not challenged in the rec-

ord, a prima facie case of negligence is made out which would justify the jury in finding a verdict on the issue against the defendant without further proof. It is the accepted position here and elsewhere "that, where a thing which causes an injury is shown to be under the management of the defendant, and the occurrence is such

Negligence—injury by falling into elevator well.

as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care."

Evidence—res ipsa loquitur.

This was held in the recent case of *Stone v. Texas Co.* 180 N. C. 546-561, 12 A.L.R. 1297, 105 S. E. 425, and the principle has been approved and applied in many of our decisions on the subject. *Fitzgerald v. Southern R. Co.* 141 N. C. 530, 6 L.R.A. (N.S.) 337, 54 S. E. 391; *Stewart v. Van Deventer Carpet Co.* 138 N. C. 60, 50 S. E. 562; *Womble v. Merchants Grocery Co.* 135 N. C. 474, 47 S. E. 493; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 321; *Sweeney v. Erving*, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; *Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St. 379, 78 N. E. 529, 20 Am. Neg. Rep. 186, 6 L.R.A. (N.S.) 800, reported also in 113 Am. St. Rep. 980, with an informing and helpful note on the subject; *Labatt, Mast. & S.* § 834. In the citation to *Labatt*, quoted with approval in *Womble's Case*, it is said: "The rationale of this doctrine (spoken of in the cases as *res ipsa loquitur*) is that in some cases the very nature of the action may of itself, and through the presumption it carries, supply the requisite proof. It is applicable when under the circumstances shown the accident presumably would not have

happened if due care had been exercised. Its essential import is that, on the facts proved, the plaintiff has made out a *prima facie* case, without direct proof of negligence. . . . The doctrine does not dispense with the rule that the party who alleges negligence must prove it. It merely determines the mode of proving it, or what shall be *prima facie* evidence of negligence."

And a clear and accurate statement of the position will be found in the case of *Stewart v. Van Deventer Carpet Co.* 138 N. C. 60, 50 S. E. 562.

In *Fitzgerald's Case* the opinion cites an English decision on the subject as follows: "In *Scott v. London & St. K. Dock Co.* 3 Hurlst. & C. 596, 159 Eng. Reprint, 665, the plaintiff proved that, while conducting his duties as custom officer, he was passing in front of a warehouse in the dockyard and was felled to the ground by six bags of sugar falling upon him; and the principle is declared as follows: 'There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.'"

And again a case from New Jersey is referred to with approval as follows: "In *Sheridan v. Foley*, 58 N. J. L. 230, 33 Atl. 484, it is said: 'It is urged, however, on behalf of the defendant that the plaintiff was bound, in order to entitle him to a verdict, to prove affirmatively that the injury which he received was caused by the negligent act of the defendant or of his servants; that the mere proof that the plaintiff was injured by a brick falling from the hod of one of the defendant's hod carriers, or from a scaffolding upon which some of the employees of the defendant were engaged in laying a wall, does not, standing

alone, raise any presumption of negligence; and that, as there was no evidence offered to show under what circumstances the brick fell, there was nothing in the case to warrant the jury in inferring that the injury complained of was the result of carelessness of the defendant or of his employees. While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern,—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim "*res ipsa loquitur*" is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care.'"

On the record, therefore, in charging the jury that in order to render a verdict for plaintiff on the first issue the burden was on him to show by a preponderance of the evidence either that the boy in charge of the elevator left the door open, or, if opened by some other than an agent of plaintiff, that defendant knew it, or it had been open long enough for them to have found it out in the exercise of proper care, the court, in our opinion, was putting on plaintiff a greater burden than is warranted by the proper application of the principle referred to. It no doubt made the impression upon the jury that, in order to a verdict on first issue, plaintiff was required to offer direct and affirmative proof of the facts suggested, whereas the jury, if they so determined, or in the absence of satisfactory explanation, were well warranted in finding negligence from the objective and attendant facts of the occurrence, without such affirmative proof.

In many cases on the subject these passenger elevators are likened to railroad carriers of passengers, in which there is a presumption of negligence arising from an unexplained injury. *Edwards v.*

Manufacturers' Bldg. Co. 27 R. I. 248, 2 L.R.A. (N.S.) 744, 114 Am. St. Rep. 37, 61 Atl. 646, 8 Ann. Cas. 974, 18 Am. Neg. Rep. 621; *Oberfelder v. Doran*, 26 Neb. 118, 18 Am. St. Rep. 771, 41 N. W. 1094; *Fox v. Philadelphia*, 208 Pa. 127, 65 L.R.A. 214, 57 Atl. 356, 16 Am. Neg. Rep. 228. But in this jurisdiction the objective facts similar to those presented here, as shown in *Stewart's* and *Womble's* decisions, only make out a *prima facie* case of

negligence, justifying a verdict without further or direct and affirmative proof. Having undertaken to lay down the rule as to the burden of proof, it should have been done correctly, and no prayer for instructions was required. *State v. Wolf*, 122 N. C. 1079-1081, 29 S. E. 841; *Bynum v. Bynum*, 33 N. C. (11 Ired. L.) 632.

For the error indicated, plaintiff is entitled to a new trial of the issues, and it is so ordered.

ANNOTATION.

Improper motive or purpose in going to hotel as affecting one's status as guest, or invitee of a guest, for purpose of determining degree of care owed by proprietor.

The present annotation assumes that the relation of guest, or invitee of a guest, would have been established, were it not for the particular purpose or motive involved.

The decision in the reported case (*JONES v. BLAND*, ante, 1383) to the effect that the general rule that an invitee of a guest in a hotel is entitled to have the proprietor and his employees exercise ordinary care for his security does not extend to one who enters the hotel for an ulterior purpose, such as gambling with a guest, and that under such circumstances he loses the position of invitee and the privileges incident to it, and becomes a mere trespasser or licensee, toward whom no duty is owed except not to wilfully or wantonly injure him,—is the only one found which has passed upon the question of the purpose and motive in going to a hotel, as affecting one's status as the invitee of a guest.

But the effect of an improper purpose or motive in going to a hotel, as affecting one's status as a guest and the liability of the hotel keeper to him, has been passed upon.

Thus, in *Curtis v. Murphy* (1885) 63 Wis. 4, 53 Am. Rep. 242, 22 N. W. 825, it was expressly held that the fact that one who goes to a hotel with a prostitute, and engages a room solely for the unlawful purpose of having sexual intercourse with the woman,

does not become a guest in the legal sense, and entitled to protection as such, so as to recover money left with the clerk for safe-keeping, but stolen by him during the night. In reaching this conclusion the court said: "The natural, perhaps necessary, inference, from the plaintiff's own testimony, is that he went to the defendant's hotel at midnight with a prostitute and engaged a room solely for the purpose of having sexual intercourse with the woman. Thus, he says that he went to the hotel as a guest, and asked the clerk if he 'could stay there for bed and breakfast.' But he lived near by, gave no reason why he did not go to his usual lodging place, therefore we feel entirely justified in assuming that he went to the hotel for the unlawful purpose above indicated. This being the case, the question arises whether he was a guest in a legal sense, and entitled to protection as such. The learned counsel for the defendant insists that he cannot and should not be deemed a guest under the circumstances, and entitled to the rights and privileges of one. If the relation of innkeeper and guest did exist between the parties, it is difficult to perceive upon what ground the defendant can escape responsibility for the loss of the money handed to the clerk or person in charge of the office; for the common law, as is well known,

on grounds of public policy, for the protection of travelers, imposes an extraordinary liability on an innkeeper for the goods of his guest, though they may have been lost without his fault," and, after reviewing numerous definitions of the term "guest," continued as follows: "While the definition of guest has been somewhat extended from its original meaning, it does not include everyone who goes to an inn for convenience to accomplish some purpose. If a man and woman go together or meet by concert at an inn or hotel in the town or city where they reside, and take a room for no other purpose than to have illicit intercourse, can it be that the law protects them as guests? Is the extraordinary rule of liability which was originally adopted from considerations of public policy to protect travelers and wayfarers, not merely from the negligence, but the dishonesty, of innkeepers and their servants, to be extended to such persons? If so, then for a like reason it should protect a thief who takes a room at an inn and improves the opportunity thus given to enter the rooms and steal the goods of guests and boarders. We do not think that the relation of innkeeper and guest can or does arise in the cases supposed. One whose status is a guest is a traveler or transient comer who puts up at an inn for a lawful purpose, to receive its customary lodging and entertainment. It is not one who takes a room solely to commit an offense against the laws of the state. So, upon the facts detailed by the plaintiff himself, we have no hesitation in saying that he was not a guest at the hotel within the legal sense of the term. The relation of landlord and guest was never established between them. We feel the more confidence in the correctness of this conclusion when we consider the duties of an innkeeper. An innkeeper is bound to take in all travelers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. Bacon, *Abr.* title 'Inns and Innkeepers, (C);' Story,

Bailments, § 476. Now, if the defendant had been aware of the purpose of the plaintiff in applying for a room, could he not have refused to receive him into his house? Nay, more, if the plaintiff had been received by the clerk and a room had been assigned him, could not the defendant, on learning the purpose for which the room had been taken, have incontinently turned the plaintiff and the woman with him into the street, or have called the police and had them arrested? It seems to us there can be no doubt of the right of the defendant thus to have treated the plaintiff. But if the plaintiff was a guest, and entitled to the rights and privileges of a person having that status at the hotel, he could not have been turned into the street, though his profligate conduct was outraging all decency and ruining the reputation of the hotel." But see the following criticism of this decision by Beale, in § 136 of his work on *Innkeepers & Hotels*: "It is clear in this case, as the court says, that if the innkeeper had been aware of the party's purpose in applying for the room, he might have refused to receive him; and even after the applicant had been received, he could have been ejected upon his purpose becoming known. It does not follow, however, as the court appeared to hold, that therefore he was not a guest. The court says that if he had been a guest 'he could not have been turned into the street, though his profligate conduct was outraging all decency and ruining the reputation of the hotel.' This dictum can hardly be supported; for, as has been seen, (*ante*, § 102), the innkeeper would certainly have a right to turn out a guest under such circumstances. And though the innkeeper would have been justified in refusing to receive the applicant as a guest, it by no means follow that, if he was received, the applicant did not occupy the exact position of a guest. The innkeeper can doubtless waive his right to refuse admittance and accept an applicant as his guest; though it is equally clear that he may, if he choose, accept him on such terms that he will not be a guest, (*ante*, §§ 125, 135). In

this case the applicant was received as a guest. He, however, was guilty of fraud in asking for accommodation for himself and wife; and the decision may probably best be supported on the ground that the guest was precluded from recovery in the case because of his fraud. As Kennedy, J., said in *Orchard v. Bush* (1898) 2 Q. B. (Eng.) 284: 'If a man is in an inn for the purpose of receiving such accommodation as the innkeeper can give him, he is entitled to the protection the law gives to a guest at an inn.'

In *Lucia v. Omel* (1899) 46 App. Div. 200, 61 N. Y. Supp. 659, on subsequent appeal in (1900) 53 App. Div. 641, 66 N. Y. Supp. 1136, it appeared that plaintiff hired a room at defendant's hotel and took a strumpet there for the purpose of consort, who absconded with a part of his money; that he thereupon asked the clerk to keep the balance of his money, which request was refused, and after he had gone back to his room it was stolen from him. It was held that the misconduct and immorality of the plaintiff did not preclude recovery of that portion of his money which was stolen after such conduct had ceased, the court saying that the previous immorality did not affect his subsequent status as a guest in the hotel. And with respect to the money stolen by the strumpet, it was said that the loss was the result of his own negligence and misconduct in associating with her, which would preclude a recovery from the hotel keeper.

And some courts have defined the term "guest" as a traveler or a transient comer who puts up at an inn for

"a lawful purpose," to receive the accommodations of the place. See, for instance, *DeLapp v. VanClosser* (1909) 136 Mo. App. 475, 118 S. W. 120. This would seem to imply that, were the resort to the inn for other than a lawful purpose, the status of guest would not be created.

A somewhat analogous question arose in *Cohen v. Manuel* (1898) 91 Me. 274, 40 L.R.A. 491, 64 Am. St. Rep. 225, 39 Atl. 1080, 4 Am. Neg. Rep. 273, wherein it was held that the liability of an innkeeper for goods stolen from a peddler's cart while in the innkeeper's custody was not avoided by the fact that the peddler had no license to peddle. This, however, was upon the theory that the plaintiff did not lodge at the inn as a peddler, which fact distinguishes it from those cases where the illegal or improper motive was the moving cause for, and was directly connected with, the resorting to the inn. And see *Cox v. Cook* (1867) 14 Allen (Mass.) 165, wherein it was held that the fact that one who put up at a hotel had been illegally traveling on Sunday did not prevent the maintaining of an action to recover for the loss of a robe which he had brought, but which could not be found. The contention in this case was that the claim of the plaintiff could not be supported without showing a violation of the statute for the due observance of Sunday; but the court said that it did not see that any such ground of defense was tenable, since the claim did not necessarily require the plaintiff to show in its support a violation of the Lord's Day.

G. J. C.

ANDREW WEBER, Guardian, etc., of Fred Bodman et al., Minors, Respt.,
v.

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, Appt.

North Dakota Supreme Court — July 22, 1921.

(— N. D. —, 184 N. W. 97.)

Insurance — suicide as accident.

1. Where the insured in an accident insurance policy commits suicide

Headnotes by GRACE, J.

while so insane as not to comprehend the nature of the act nor the physical result which would flow from it, his death is caused by accidental means within the meaning of the policy insuring against bodily injury from external, violent, and accidental means.

[See note on this question beginning on page 1402.]

—burden of establishing defense.

2. The defendant, an accident insurance company, relied on a certain by-law to avoid liability on a certain policy of insurance. It neither pleaded nor proved the by-law nor the substance thereof. It is held that if such by-law, in any circumstances,

might constitute a defense, a prerequisite thereto would require it to be properly pleaded, and its contents established by competent evidence, and, that not having been done, the defense in that regard, if any, is not available.

(Robinson, Ch. J., dissents.)

APPEAL by defendant from a judgment of the District Court for McIntosh County (Allen, J.) in favor of plaintiff, and from an order denying a new trial in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. M. Haines, G. M. Gannon, and A. A. Ludwigs, for appellant:

The provisions of the contract are not void as being against public policy.

Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 44 L. J. Ch. N. S. 705, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696; 1 Page, Contr. p. 503; Interstate Businessmen's Acci. Asso. v. Atkinson, 165 Ky. 537, L.R.A.1915E, 656, 177 S. W. 254; Bigelow v. Berkshire L. Ins. Co. 93 U. S. 284, 23 L. ed. 918.

The provision is of different effect and scope than the provisions against "suicide," "self-destruction," and like acts while insane.

Blunt v. Fidelity & C. Co. 145 Cal. 268, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729; Manhattan L. Ins. Co. v. Beard, 112 Ky. 455, 66 S. W. 35; Interstate Businessmen's Acci. Asso. v. Atkinson, 165 Ky. 532, L.R.A.1915E, 656, 177 S. W. 254; Layton v. Interstate Business Men's Acci. Asso. 158 Iowa, 356, 139 N. W. 463.

The contract sued upon was offered and received in evidence and established the terms of the limitation.

Binder v. National Masonic Acci. Asso. 127 Iowa, 31, 102 N. W. 190.

Messrs. I. A. Mackoff, Curtis & Remington, and E. T. Burke, for respondent:

Self-destruction by one who is insane is not suicide, but accident.

Blackstone v. Standard Life & Acci.

Ins. Co. 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156; Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740; Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433.

Where defendant relies upon rules and by-laws of the association, they must be set out in the answer, and it is not sufficient to allege merely that they have been violated.

1 Cyc. 288; 1 C. J. 494; Gray v. National Ben. Asso. 111 Ind. 531, 11 N. E. 477; Stevens v. Continental Casualty Co. 12 N. D. 463, 97 N. W. 862; United States Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176.

Having stipulated the facts to be thus and so, defendant cannot then introduce evidence to show the facts to be diametrically opposite.

12 Enc. Ev. p. 100; Jones, Ev. p. 324; Greenl. Ev. ¶ 339; 4 Wigmore, Ev. ¶ 2588 & 2592.

The burden was upon the defendant to plead and to prove both the fact that the contract was an Iowa contract, and also the state and existence of any law of the state of Iowa of which it wished to avail itself.

Kephart v. Continental Casualty Co. 17 N. D. 380, 116 N. W. 349.

Grace, J., delivered the opinion of the court:

This appeal is from a judgment in plaintiff's favor for \$5,000, with interest and costs, and from an order denying defendant's motion for a new trial.

The action is brought by plaintiff as guardian of the estate of the minor children of Fred J. Bodman, deceased, to recover on what purports to be a certain accident insurance policy in the sum of \$5,000, issued by the defendant to Fred J. Bodman in his lifetime.

The insurance is against injury or death by violent, external, and accidental means. On December 11, 1913, defendant issued its policy to the insured. It would appear from the testimony, that this policy (exhibit A) may not have been the one in force at the time death occurred. There is some evidence to indicate that it lapsed; that the insured applied for reinstatement, and requested a duplicate of the policy, claiming that he was unable to find the old one.

A discussion of this point is not very material, as will appear from the following stipulation:

"(1) That Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman, and Myron Bodman are the infant children of Fred J. Bodman, deceased, and that Andrew Weber, the plaintiff in this action, is the duly appointed, qualified, and acting guardian of their estates.

"(2) That the defendant, the Interstate Business Men's Accident Association of Des Moines, Iowa, is a corporation engaged in the business of insurance against accident, and that during the lifetime of Fred J. Bodman the defendant issued a policy, in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect on the 12th day of May, 1919.

"(3) That the wards of the plaintiff, hereinbefore named, are the beneficiaries named in the said policy, and are entitled to the full benefit of all of the benefits thereof.

"(4) That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"(5) That no part of the same has been paid to the wards of the plaintiff nor to anyone authorized to receive the same in their behalf."

The plaintiff claims that on the 12th day of May, 1919, insured came to his death by external, violent, and accidental means, to wit, by the wheels of a railroad coach running over his neck.

The complaint states a cause of action for recovery on the policy. In substance, the answer admits the issuance and delivery of the policy, the payment of the premiums, and that the policy was in full force and effect at the time of the death; and, after denying the allegations not admitted, it alleges that the death of Bodman was not caused by external, violent, and accidental means, but was caused by the wilful and premeditated self-destruction of the deceased, with suicidal intent, and was due wholly to his own acts, and not to the acts of any other person or agency.

The only issue presented by the pleadings is whether the death of the insured was due to an act of suicide committed while he was sane. The answer does not allege that he was sane. It states, however, that the act of self-destruction was wilful and premeditated. If it were premeditated, it would tend to denote sanity, and to some degree the word means deliberation. If there is any other issue in the case—and we do not think there is—it arose from the introduction in evidence of what purports to be a portion of the by-laws of the defendant association, which, so far as material here, is as follows: "Limitation of Risk.—The accident department of the association does not assume any liability for accidental injury sustained . . . if the occasion of the accident be disease, bodily or mental infirmity, *insanity*," etc.

The defendant introduced exhibit A in evidence (a synopsis of the by-law being on the back thereof), it would appear, for the sole purpose of establishing proof of this particu-

lar by-law. The defendant did not plead the by-law, and we think, in order to adduce proof of it, it should have been pleaded either in the original pleading or by an amendment thereof, or, in any event, even though improperly received in evidence by reason of not being pleaded, if it were to be given any consideration as evidence, the defendant, at least, should have made a motion to amend the pleadings to correspond with the proof. No amendment nor any such motion was made, and from this it would appear that the by-law should not have been received nor admitted as evidence, and we so determine. It must follow, in these circumstances, that the alleged by-law is no defense, and does not prevent a recovery on the policy. 1 Cyc. 288; 1 C. J. 494; Gray v. National Ben. Asso. 111 Ind. 531, 11 N. E. 477; Stevens v. Continental Casualty Co. 12 N. D. 463, 97 N. W. 862; Ennis v. Retail Merchants' Asso. Mut. F. Ins. Co. 33 N. D. 21, 156 N. W. 234.

On the back of the policy is the following: "The following is a synopsis of the provisions of the articles of incorporation and by-laws now in force and effect: The right of any member to claim benefits or indemnity will be determined by the provisions of the articles of incorporation and the by-laws in force at the time the accident happens, out of which any claim arises."

Assuming for the present that under the laws of this state the by-laws of the defendant could be proved as a part of its contract or policy of insurance—a subject which will be treated later in the opinion—it is clear that the identical by-law or by-laws relied on in force at the time of the happening of the accident out of which the claim arises should be pleaded. To plead a synopsis or abbreviation of it would not be sufficient, for those relying on its terms to limit liability might omit an important part of it, or might omit a part which to them might seem immaterial, and

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yet which might have an important bearing on their liability.

It must also appear by the pleadings that the by-law is the one in effect at the time the accident occurs. The synopsis of the by-law above set forth, and contained in exhibit A, if it were ever a by-law, was perhaps in force on the 11th day of December, 1913, the date of the policy. But the by-laws of the company are subject to change from time to time, and those which are in force at the time of the accident are the ones only which are operative.

It was approximately six years from the date of exhibit A until the accident. The above by-law may have been entirely changed or eliminated, or another of entirely different meaning and phraseology enacted since that time, which in that event would be the one in effect at the time of the accident. In that case the above by-law would be of no force nor effect. So that it would appear that it was incumbent on the defendant, not only to plead the above by-law in full, but, as well, to adduce competent evidence to show that it was in full force and effect at the time of the accident. There was no foundation laid for any such proof, and no competent evidence of the actual, complete by-laws, if any, in force at the time of the accident.

The general rule is that, if the defendant desired to assert nonliability on the policy by reason of the protection afforded it by certain by-laws or provisos or conditions which are claimed to be a part of the policy, or referred to and claimed to be made a part of it, they should be fully pleaded and established by competent evidence.

A pleading of the synopsis is not sufficient, nor are the conclusions of the pleader, as drawn from and based on the by-law, proviso, etc. It would appear that the admission in evidence of the synopsis of the by-law above mentioned was not

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evidence of a by-law in force at the time of the accident.

Furthermore, if the by-law were properly pleaded and proved, it still would not be effective to avoid liability on the policy, as it is contrary to the specific provisions of § 6638, Comp. Laws 1913, which, so far as material here, is as follows:

"No policy of insurance against loss or damage by the sickness, bodily injury, or death by accident of the assured shall be issued or delivered in this state if it contain any of the following provisions."

Subdivision 2: "A provision referring to the constitution, by-laws or rules of the company or association or attempting to make the same a part of the policy."

The other subdivisions of the section need not be here considered.

It is clear from the above section that the by-law could not become a part of the policy. Such a provision, if inserted in it or attached to it, is absolutely void and of no effect. Evidence of it should not have been received, and it could not be pleaded nor in any manner used as a defense. The by-law being prohibited by law from becoming a part of the policy, it is for that reason void, and for the same reason is void as being against public policy.

The legislature, in enacting the above law, intended, no doubt, to prohibit accident insurance companies from adding subsequent provisos or conditions to a policy, through the medium of by-laws the enactment and terms of which were consented to in a way by the insured at the time of the issuance of the policy. No doubt the legislature was aware that this practice had been resorted to, to such a degree that it in effect destroyed the consideration for the payment of the premium. In other words, the legislature, no doubt, was aware of a practice among insurance companies writing the class of insurance specified in the section above mentioned, whereby, subsequent to the date of issue of the policy, it was practically made worthless to

the insured by the incorporation therein of new provisos and conditions through subsequently enacted by-laws made a part of the policy, by which they were largely relieved of liability. In other words, they greatly decreased the risk, and thus made the policy largely worthless to the insured or the beneficiary; or perhaps the legislature acquired knowledge that such insurance companies were making immense profits by these various practices, now prohibited by the law, which, when permitted, assisted the company to avoid a large portion of its risks. Whatever may have been the cause which moved the legislature to enact the law, it has done so, and its act in that regard would seem to be one of wisdom, founded on a sound public policy, and intended to protect the insured against impositions which are prohibited by the law.

Whether the contract is an Iowa contract is not a matter pleaded or proved. That should have been done if defendant desired to avail itself of any benefit or advantage in that regard. Having failed to do so, it waived them. In the absence of pleading and proof to the contrary, it should be deemed a North Dakota contract, and the laws of this state are applicable to it in determining its legal effect.

It is not necessary here to determine what application the above section would have if the contract had been properly asserted and proved to be an Iowa contract. That question is not in this case, and needs no further consideration. It is proper here to consider the only defense interposed, which is to the effect that the insured came to his death by wilful and premeditated self-destruction with suicidal intent. We are clearly of the opinion that this defense must fail for want of proof. The evidence clearly tends to show that the insured took his life while not in the possession of his mental faculties, and when they were disordered, and thus his mind was unsound and not in a condition

to reason; in other words, he was then violently insane.

Further proof of insanity is afforded by the physical facts, for it would appear to a reasonable mind that no person possessed of any reason, or, in other words, unless wholly insane, could terminate his own life in such a cruel, inhuman, and fiendish manner. The testimony shows that the body was found on one side of one of the rails of the railroad, and the head on the other side of it, indicating that, if he committed suicide, he placed his body in such position on the rail that the wheels of one of the trucks of a car, which was part of a moving train, would pass over his neck, and thus sever the head from the body, which was virtually what happened. It may also be noted that the defendant, in attempting to prove the by-law, in effect conceded the insanity.

We are of the opinion that the evidence is in such state as to show that the insured, at the time he destroyed his own life, was so insane as not to comprehend the nature of the act or of the physical result which would flow from it, and for this reason his suicide

—suicide as
accident.

was caused by accidental means within the meaning of this policy, insuring against bodily injuries from external, violent, and accidental means. *Tuttle v. Iowa State Traveling Men's Asso.* 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Blackstone v. Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156; *Grand Lodge, I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59.

Here we will consider another important feature of this case. Dr. C. A. Campbell, a duly licensed and practising physician of Ashley, North Dakota, the village where the accident happened, testified as a witness on behalf of plaintiff. The evidence shows he examined the

dead body of Fred J. Bodman. In addition to other testimony, he stated that the jaw was broken, and that there were several contusions and bruises on one side of the face; that the angle of the right lower jaw was broken.

His further testimony, in the form of questions and answers, is as follows:

Q. From the position that you saw the head, and from its location adjacent to the rail, what would you say caused the fracture of the jaw?

A. I couldn't say, except that the jaw had been hit.

Q. Might not that have happened by the pressing down of the wheel upon the neck and pressing the head and jawbone into the cinders and track?

A. That wouldn't be the easiest way of explaining it.

Q. How would you explain that?

A. I should fancy that he was struck first by some projecting iron or thing.

Q. You mean to say that from the position of that body that he might have been struck by something besides the car wheel?

A. Yes, sir.

Q. There is nothing that I can think of on a car that would hit him there, and at the same time cut off his head and break the jaw. Do you think that that blow to the jaw might have taken place and broken the jaw before the head was cut off?

A. It might have been.

Q. Was that a serious event, that breaking of the jaw?

A. If the person were alive; yes.

Q. From the position of the body you would not think that that injury to the jaw resulted from any other cause than the passing of the wheel over the neck, would you?

A. The break of the jaw was not caused by the severing of the neck; something hit him.

Dr. Campbell was a disinterested witness. His evidence, above set forth, is of a substantial character, and sufficient to show that in some unaccountable and unknown man-

ner the insured was struck by something besides the car wheel; and the jury, from the evidence above set forth, could draw the conclusion that, from being struck on the jaw with such force as to break it, he was thereby thrown on the rail and further injured, as the evidence shows. In other words, the testimony of Dr. Campbell in this regard is substantial in character and sufficient to sustain the verdict of the jury.

It will also be noticed that nowhere does the defendant claim that the evidence is insufficient to sustain the verdict. But, if the defendant had assigned as a cause for reversal of the judgment the insufficiency of the evidence to sustain the verdict, the general rule is well settled on an appeal from a judgment entered on a verdict that, if there is any substantial evidence to sustain the verdict, the judgment should be affirmed. That rule is applicable here, and, applied, the evidence of Dr. Campbell is sufficient to sustain the verdict.

There is error assigned by reason of the court having given a certain instruction, and particular stress is placed on the following part of it: "If you find that he was impelled to an act of self-destruction by an insane impulse which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overcome by his mental condition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable."

Other extracts from the instruction are as follows:

"I instruct you further, gentlemen, in connection with this matter, that the only defense that the defendant has interposed to the demand of the plaintiff is that the death of Mr. Bodman, while admitted, was not accidental, but was self-inflicted, and was what is ordinarily termed suicide. In this connection, you are instructed that, if you find that the deceased, Fred J. Bodman, did place himself upon the

rail where the wheels of the train were about to pass, you must determine whether or not he was insane or sane at the time. If you do find that he placed himself in the way of the train and he was a sane man at that time, then the death was not accidental, and under those circumstances your verdict should be for the defendant. If, however, you find that he did place himself in the way of the train, but he was at that time insane, and that his act was the mad act of a man bereft of his reason, then the death was an accident, and you should find for the plaintiff and against the defendant.

"In other words, self-destruction of a sane man knowingly and deliberately making way with himself is not an accident, but the self-destruction of a man whose mind is deranged and whose reason is gone, when the self-destruction results from such insanity, is accidental.

"I instruct you further, gentlemen, that it is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring him liable. To do that the act of self-destruction must have been caused by insanity, and the mind of the deceased must have been so far deranged as to make him incapable of using rational judgment in regard to the act which he was committing."

The instruction is too lengthy to set out in full, but sufficient has been above set forth to demonstrate that it was quite comprehensive. We think, as a whole, it fully and fairly states the law applicable to the issues involved in the case. It is therefore clear to our minds that there was no reversible error in giving the instruction, nor was there reversible error in refusing to give the instruction requested by the defendant, the contents of which are as follows:

"The jury are instructed that by the terms of the insurance contract upon which this action is based, and which is in evidence before you, it is provided, among other things,

that the defendant insurance company does not assume any liability for death resulting from accident occasioned by mental infirmity or insanity; and I instruct you that, this being a part of the insurance contract, it is binding upon the parties thereto, and that therefore in this case, if you should find that the deceased, Fred Bodman, came to his death by his own act of self-destruction, even if you should also find that his act in taking his own life was due to disease, or mental or bodily infirmity, or insanity, or fits, yet there could be no recovery in this case by plaintiff, and that because of the terms of the insurance contract above mentioned.

"I instruct you, gentlemen of the jury, that there is just one question for you to determine in this action, and that is: Did the deceased, Fred Bodman, come to his death from an act of self-destruction, or, in other words, did he commit suicide? If you should find that he did not commit suicide, then your verdict should be for the plaintiff; but, on the other hand, if you should find from the evidence that he did commit suicide, then the plaintiff cannot recover, and your verdict must be for the defendant."

The court, in its general instruction, did submit to the jury the question of whether the insured committed suicide while sane, and gave full instructions covering that question. The court properly refused to give the remainder of the instruction for the reason that the defendant did not, and, further, could not, plead and prove as a defense that the act of suicide was committed while the insured was insane.

We have above analyzed these questions quite fully, and have shown that such a condition, contained in a by-law, would be contrary to the laws of this state. In short, by-laws, in this class of insurance, cannot in this state be interposed as a defense to a liability on the policy, if they are against the law, and hence against public poli-

cy. They cannot be made a part of the policy by a provision referring to the constitution, by-laws, or rules of the company attempting to make the same a part of the policy.

The instruction requested was contrary to the law above mentioned, and hence the court did not err in refusing to give it. The instruction requested also related to issues not formed by the pleadings, and was properly denied.

The verdict is not contrary to the evidence, and there was no error in the court denying defendant's motion for a new trial.

The order and judgment of the court appealed from are affirmed.

Respondent is entitled to his statutory costs and disbursements on appeal.

Christianson, J., concurring specially:

This is an action upon an accident insurance contract. The complaint alleges:

"(1) That he (Weber) is the duly appointed, qualified, and acting guardian of the estates of Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman, and Myron Bodman, who are the infant children of Fred J. Bodman, deceased.

"(2) That during the lifetime of the said Fred J. Bodman he was the holder of a policy issued by the defendant, which is an accident insurance corporation, in which said policy the said defendant did insure the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect upon the 12th day of May, 1919.

"(3) That the wards of the plaintiff hereinbefore named are the beneficiaries named in the said policy, and are entitled to the full benefit of all the provisions thereof.

"(4) That on the said 12th day of May, 1919, the said Fred J. Bodman came to his death by external, violent, and accidental means, to wit, by being run over and decapitated by a railroad train.

"(5) That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"(6) That no part of the same has been paid to the wards of plaintiffs, nor to anyone authorized to receive the same in their behalf."

The defendant in its answer admitted the allegations of paragraphs 1, 2, 3, 5, and 6 of the complaint. The answer also contained the following allegation: "Further answering, it alleges that the death of the said Fred J. Bodman was not caused by external, violent, and accidental means, but was caused by the wilful and premeditated self-destruction of the said deceased with suicidal intent, and was due wholly to his own acts, and not to the acts of any other person or agency."

The action was tried to a jury upon the issues framed by these pleadings. The jury returned a verdict in favor of the plaintiff. The defendant moved for a new trial on the grounds: That the verdict is contrary to the evidence; that the verdict is contrary to the court's instructions; that the court erred in giving, and in refusing to give, certain instructions to the jury. The motion for a new trial was denied, and the defendant has appealed to this court from the judgment and from the order denying a new trial. While the defendant specified, in the language of the statute, as grounds for a new trial, that the verdict was contrary to the evidence and contrary to the court's instructions, these grounds were apparently abandoned, and the only question presented on this appeal is whether the trial court erred in giving and in refusing to give certain instructions. The instructions given and refused upon which error is predicated relate to the question whether the deceased was sane or insane at the time of his death. The trial court instructed the jury thus: "If you find that he was impelled to the act of self-destruction

by an insane impulse which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overcome by his mental condition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable."

The defendant requested that the jury be instructed that by the terms of the insurance contract, "the defendant insurance company does not assume any liability for death resulting from accident occasioned by mental infirmity or insanity, . . . and that therefore, in this case, if you should find that the deceased, Fred Bodman, came to his death by his own act of self-destruction, even if you should also find that his act in taking his own life was due to disease, or mental or bodily infirmity, or insanity, or fits, yet there could be no recovery in this case by the plaintiff, and that because of the terms of the insurance contract."

The trial court refused to give this instruction.

It will be noted that the requested instruction refers to, and purports to be based upon, certain provisions of the insurance contract involved in this suit. The defendant does not challenge the correctness of the rule announced in the instruction given by the trial court, considered as an abstract proposition. On the contrary, it admits on this appeal that the authorities sustain the rule that death from suicide is caused by accidental means, within the meaning of a policy of insurance against bodily injuries from "external, violent, and accidental means," if the insured was at the time of the act so insane that he did not understand the nature of the act, or that death would result therefrom. But appellant contends that this rule is not applicable in this case, for the reason that the policy here involved contained a provision that "the accident department of the association does not assume any liability . . . if the occasion of the accident be . . . insanity." Hence, in considering appellant's specifica-

tions of error, the first pertinent question to determine is whether its premise is correct, viz., whether the insurance contract in suit contains the provision defendant asserts that it contains.

It will be noted that the complaint did not purport to set out the policy or the terms and conditions thereof. The complaint merely averred that the deceased was the holder of an accident policy issued by the defendant, whereby he was insured "against injury or death by violent, external, and accidental means." The only issue tendered by the answer was as to the character of the death. The answer alleged affirmatively "that the death was not caused by external, violent, and accidental means, but was caused by the wilful and premeditated self-destruction of the said deceased with suicidal intent, and was due wholly to his own acts and not to the acts of any other person or agency." There was not even an intimation in the answer that the policy contained a provision relieving the defendant from liability from accidents occasioned by insanity. But the defendant contends that, regardless of the issues framed by the pleadings, the defendant became entitled to the benefit of the provision in the policy, and to have appropriate instructions given as regards thereto, by reason of the evidence admitted upon the trial of the case.

Let us see how well this contention is founded. At the commencement of the trial the parties entered into the following stipulation:

"It is stipulated by and between the plaintiff and the defendant that the following facts are conceded by both sides upon the trial of this action:

"I. That Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman, and Myron Bodman are the infant children of Fred J. Bodman, deceased, and that Andrew Weber, the plaintiff in this action, is the duly appointed, qualified, and acting guardian of their estates.

"II. That the defendant, the Interstate Business Men's Accident Association of Des Moines, Iowa, is a corporation engaged in the business of insurance against accident, and that during the lifetime of Fred J. Bodman the defendant issued a policy, in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect on the 12th day of May, 1919.

"III. That the wards of the plaintiff, hereinbefore named, are the beneficiaries named in the said policy, and are entitled to the full benefit of all the benefits thereof.

"IV. That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"V. That no part of the same has been paid to the wards of the plaintiff, nor to anyone authorized to receive the same in their behalf."

In presenting his case in chief the plaintiff, in addition to the foregoing stipulation, offered the testimony of only one witness, who testified to the fact that the insured, Fred Bodman, came to his death on May 12, 1919, by being run over by a railroad train at Ashley in this state. No reference was made to the mental condition of the deceased. The first evidence adduced by the defendant consisted of certain testimony tending to lay a foundation for the introduction in evidence of the policy of insurance. The policy sought to be and eventually admitted in evidence did not purport to be the original one issued to the deceased, but purported to be merely a copy. Defendant's counsel spent much time and adduced considerable testimony for the purpose of laying a foundation for the admission of the copy in lieu of the original, and there was and is the gravest doubt if, in fact, a sufficient foundation was laid to justify the admission of the copy. At all events the question which must

have been uppermost in the mind of the trial judge at the time was whether a sufficient foundation had been laid to admit the proffered exhibit at all. The face of the policy received in evidence was as follows:

"Number 66,707.

"Not Exceeding \$5,000.

"Certificate of Membership.

"Interstate Business Men's Accident Association of Des Moines, Iowa.

"This certifies that Fred J. Bodman is a member of the Interstate Business Men's Accident Association, and is entitled to such benefits as may be provided in and by the articles of incorporation and by-laws of said association in force and effect at the time the accident occurs from which a claim for benefits arises, and by the acceptance of this certificate he agrees to the several provisions and conditions of the said articles of incorporation and by-laws as from time to time they may be amended or changed.

"In witness whereof the said Interstate Business Men's Accident Association at its home office in Des Moines, Iowa, has caused this certificate to be signed by its president and secretary, and its corporate seal to be hereunto affixed this 11th day of December, A. D. 1913.

"Ernest M. Brown, Secy. & Treas.

"G. S. Gilbertson, President.

"C. P. W. Registered."

On the back of the certificate is the following heading in large type, viz.: "The following is a synopsis of the provisions of the articles of incorporation and by-laws now in force and effect. The right of any member to claim benefits or indemnity will be determined by the provisions of the articles of incorporation and the by-laws in force at the time the accident happens out of which any claim arises."

Immediately following this heading is what purports to be a synopsis of the provisions of the articles of incorporation and by-laws in force at the time the certificate was issued. Among other things stated therein is the following: "The ac-

cident department of the association does not assume any liability . . . if the occasion of the accident be . . . insanity."

Immediately following the synopsis of the articles of incorporation and by-laws, at the bottom of the page, is the following, also, printed in large type: "A printed copy of the articles of incorporation and of the by-laws is inclosed with this certificate. The member should read the same carefully, and inform himself of the rights and duties of membership. This duty you owe to yourself and the association."

The certificate of insurance also contains a copy of the application. The original application was also offered in evidence. In the application no reference is made to the fact that the association is not liable "if the occasion of the accident be . . . suicide." In fact, no reference is made to the question of limitation of liability. The application, however, contains this declaration on the part of the applicant: "I hereby agree that I will accept the certificate of membership which may be issued to me, subject to all the provisions, conditions, and limitations contained in the articles of incorporation and by-laws of said association, as the same now are or as they may be legally amended or changed, and I agree to comply with all the provisions thereof."

It will be noted that the certificate of membership states that the assured "is entitled to such benefits as may be provided in and by the articles of incorporation and by-laws of said association in force and effect at the time the accident occurs from which a claim for benefits arises."

These statements speak for themselves. The certificate of membership, by its express terms, did not purport to be the whole contract. It specifically referred to the articles of incorporation and the by-laws as establishing the essential elements of the contract. When the contest was raging, during the trial of the cause, as to whether the cer-

tificate should be admitted, the trial judge by a mere inspection of the certificate was advised that the benefits conferred upon the assured were those provided in the articles of incorporation and by-laws of the association in effect at the time the accident occurred. This necessarily inferred that whatever limitations there were as to liability were also specified in such articles and by-laws. It was necessary that the certificate of membership be introduced as a foundation for the admission of the articles of incorporation and by-laws. But there is no good reason why the trial court should have believed that the defendant, when it offered the certificate in evidence, also thereby sought to prove the contents of the articles of incorporation and by-laws. Manifestly the articles of incorporation must have been a matter of public record in the state where the association was incorporated; and it is a matter of common knowledge that the by-laws of a corporation are generally entered in some appropriate record of the corporation. Not only is it presumed that the ordinary course of business has been followed, but the very "synopsis" which defendant asserts constitutes evidence of the articles of incorporation and by-laws shows that it is not a copy thereof, but is merely a statement of conclusions as to the contents and effect of the articles and by-laws. It also shows that the articles of incorporation and by-laws are not contained in, or in any manner made part of, the certificate of insurance, but are extraneous thereto and were set forth in some other document inclosed therewith. It was deemed necessary to conclude the so-called "synopsis" by stating in large type that "the member should read the inclosed copy of the articles of incorporation and of the by-laws carefully, and inform himself of the rights and duties of membership" in the association. This was urged upon him as a duty which he owed to himself and to the association.

Of course, if the "synopsis" had been a copy, or even a complete statement, of the contents of the articles of incorporation and of the by-laws, this statement and caution would hardly have been necessary.

In the circumstances, how can it be said that the trial court erred in not considering the articles of incorporation and the by-laws of the defendant corporation in the instructions to the jury? How can it be said that the trial court, in admitting the certificate of insurance, must, for the purposes of the submission of the case to the jury, be deemed to have admitted the certificate, among others, for the purpose of proving the articles of incorporation and the by-laws? There is nothing obscure about the rules of evidence relating to the mode of proving the contents of the articles of incorporation and the by-laws of a corporation. Aside from the applicable statutory provisions, the various legal treatises deal fully with the subject. See 3 Enc. Ev. 657; Jones, Ev. §§ 200a, 522; Bacon, Life & Acci. Ins. 4th ed. § 103; Fletcher, Cyc. Corp. § 488. See also Comp. Laws 1913, §§ 7909, 7919, subd. 7.

In the case at bar the defendant was permitted to introduce the certificate of insurance in evidence. This constituted an essential foundation for the introduction of proof as to the contents of the articles of incorporation and of the by-laws. Whether defendant had or desired to present such proof was a matter for it to determine. It failed to present such proof. As the trial court said in a memorandum opinion filed with the order denying a new trial in this case: "As the matter now stands, there is no proof of the existence or contents of the by-laws."

This, in my opinion, correctly states the condition as it existed at the time when the trial court instructed the jury; and of course the instructions given were properly limited to the issues raised by the pleadings and the proof. As al-

ready stated under the pleadings, only one issue was presented, namely, whether the death of the insured was occasioned by accidental means, or whether such death was occasioned by "the wilful and premeditated self-destruction of the said deceased with suicidal intent." Upon this issue the court had before it the policy of insurance, which specifically referred to the articles of incorporation and the by-laws of the corporation for the other elements of the contract. No attempt was made to prove the contents of such articles or by-laws. There was, however, not only the admission in the defendant's answer, but the stipulation made at the commencement of the trial that "during the lifetime of Fred J. Bodman the defendant issued a policy, in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means." So, leaving wholly on one side the question of the sufficiency of defendant's pleading to raise the issue of its limited liability, it seems clear to me that the trial court committed no error in giving the instruction which it gave and in refusing to give the instruction which defendant requested. The instruction which it gave is concededly correct in the absence of evidence on the part of the defendant, showing that its liability was limited by virtue of provisions in its articles of incorporation or by-laws. The instruction which defendant re-

quested purported to be based upon, and asked that there be submitted to the jury for consideration, provisions of the by-laws of the defendant corporation which were not in evidence. In other words, the trial court did what the law required it to do—instructed upon the issues which were properly raised by the pleadings and the proof, and refused to instruct with respect to matters for which there was no basis either in the pleadings or in the proof.

I concur in an affirmance of the judgment and the order appealed from. My reasons for doing so are those set forth above. I express no opinion upon any question except those discussed by me in this opinion.

Bronson and Birdzell, JJ., concur.

Robinson, Ch. J., dissenting:

I dissent. In this case there has not been a fair trial on the merits. There is a question as to whether or not the insurance policy is in evidence. The pleadings are dead wrong. There should be a new trial on amended pleadings and a judgment based on real facts, and not on finespun theories. This court should see that the legal procedure is not made a game of skill and chance, and that a decision for \$5,000 does not turn on the skill or adroitness of counsel in the making of stipulations, or in anything they may do or leave undone.

ANNOTATION.

Death from "suicide" as an accident, or due to accidental means, within policy of accident insurance.

For death or injury resulting from insured's voluntary act (including the taking of poison), as caused by accident or accidental means, see annotation in 7 A.L.R. 1181.

As to death from inhaling gas as within insurance policy, see annotation in 11 A.L.R. 389.

For presumption and burden of proof as to accident in case of death

from poison, see annotation in 7 A.L.R. 1226.

It is to be observed that the annotation is not concerned with the effect of the provision commonly inserted in these policies against suicide.

For constitutionality of statute precluding defense of suicide in action on policy of life or accident insurance, see annotation in 13 A.L.R. 787.

In a strict sense, suicide implies a conscious, intentional, voluntary destruction of one's own life. In a broader sense, however, the term includes the taking of one's life while insane, by acts which, in case of a sane person, would be regarded as suicide, and for the purposes of this annotation the latter meaning is included.

The authorities are in accord that death of an insured by "suicide" while insane, and without any intent to take his own life, is a death by accident, or by accidental means, within the meaning of an accident policy—such death being unexpected and unintended.

United States.—*Accident Ins. Co. v. Crandal* (1887) 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685.

Illinois.—*Grand Lodge, I. O. M. A. v. Wieting* (1897) 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59.

Iowa.—*Tuttle v. Iowa State Traveling Men's Asso.* (1905) 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131.

Michigan.—*Blackstone v. Standard Life & Acci. Co.* (1889) 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156.

Minnesota.—*Olsson v. Midland Ins. Co.* (1917) 138 Minn. 424, 165 N. W. 474.

Missouri.—*Reynolds v. Maryland Casualty Co.* (1918) 274 Mo. 83, 201 S. W. 1128; *Scales v. National Life & Acci. Co.* (1919) — Mo. —, 212 S. W. 8; *Newell v. Fidelity & C. Co.* (1919) — Mo. —, 212 S. W. 991; *Brunswick v. Standard Acci. Ins. Co.* (1919) 278 Mo. 154, 7 A.L.R. 1213, 213 S. W. 45; *Wacker v. National Life & Acci. Ins. Co.* (1919) 201 Mo. App. 586, 213 S. W. 869; *Andrus v. Business Men's Acci. Asso.* (1920) 283 Mo. 442, 13 A.L.R. 779, 223 S. W. 70.

North Dakota.—*WEBER v. INTERSTATE BUSINESS MEN'S ACCL. ASSO.* (reported herewith), ante, 1390.

Wisconsin.—*Cady v. Fidelity & C. Co.* (1907) 134 Wis. 322, 17 L.R.A.(N.S.) 260, 118 N. W. 967.

The court in *Andrus v. Business Men's Acci. Asso.* (1920) 283 Mo. 442, 13 A.L.R. 779, 223 S. W. 70, said: "Where a result is produced by a means unexpected, unintended, and

unanticipated, it is accidental; but if the act and the result produced are exactly what was in accordance with the intention of the actor, it was not accidental. In this case the plaintiff can recover only if death was produced by accidental means. If the insured was sane, fully conscious of the effect of his act, and consciously intended to inflict death upon himself, then death which he inflicted in pursuance of that intention was not accidental."

And it will be observed that in the reported case (*WEBER v. INTERSTATE BUSINESS MEN'S ACCL. ASSO.* ante, 1390) it was held that, where an insured commits suicide while so insane as not to comprehend the nature of the act, nor the physical result which will flow from it, his death is caused by accidental means within the meaning of an accident policy.

And in *Grand Lodge, I. O. M. A. v. Wieting* (1897) 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59, the court stated that there is a substantial concurrence of judicial decisions in the United States that, if at the time of the suicidal act the insured was so affected with insanity as to be unconscious of the act, or of the physical effect thereof, or was driven to its commission by an insane impulse which he had not the power to resist, the act of self-destruction is regarded as though it were the result of accident, or some irresistible external force.

And in *Blackstone v. Standard Life & Acci. Co.* (1889) 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156, death caused by the cutting of his own throat by the insured while insane, without knowing the result of his act, and not intending thereby to kill himself, was held to constitute death by external, violent, and accidental means within the meaning of the accident policy sued on.

But in *Streeter v. Western Union Mut. Life & Acci. Soc.* (1887) 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779, it was held that the suicide of the insured could not be considered as a death by accident if the act was done for the purpose of self-destruction, and the insured was not unconscious

at the time of inflicting the fatal wound, even though he was insane, and his insanity was produced by a fall several weeks before the act was committed.

And in *Fidelity & C. Co. v. Weise* (1899) 182 Ill. 496, 55 N. E. 540, it was held that self-destruction is not classed as an accident, except it appears that the suicide was unconscious of the act or of the physical effect thereof, or was driven to the commission of the deed by an insane impulse which he had not the power to resist.

Of course, where the life of the insured is intentionally taken by his own voluntary act while sane, the death is not by accident or by accidental means. *Tuttle v. Iowa State Traveling Men's Asso.* (1905) 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131; *Reynolds v. Maryland Casualty Co.* (1918) 274 Mo. 83, 201 S. W. 1128; *Scales v. National Life & Acci. Ins. Co.* (1919) — Mo. —, 212 S. W. 8; *Newell v. Fidelity & C. Co.* (1919) — Mo. —, 212 S. W. 991; *Brunswick v. Standard Acci. Ins. Co.* (1919) 278 Mo. 154, 7 A.L.R. 1213, 213 S. W. 45; *Wacker v. National Life & Acci. Ins. Co.* (1919) 201 Mo. App. 586, 213 S. W. 869; *Gates v. Travel-*

er's Ins. Co. (1920) — Mo. App. —, 218 S. W. 927; *Bayha v. Fidelity & C. Co.* (1920) — Mo. —, 217 S. W. 269; *Rollins v. Business Men's Acci. Asso.* (1920) 204 Mo. App. 679, 220 S. W. 1022; *Andrus v. Business Men's Acci. Asso.* (1920) 283 Mo. 442, 13 A.L.R. 779, 223 S. W. 70; *Trembley v. Fidelity & C. Co.* (1920) — Mo. —, 223 S. W. 887; *Woodlock v. Aetna L. Ins. Co.* (1920) — Mo. —, 225 S. W. 994.

And that death by suicide while sane would not be considered accidental is implied in *Merrett v. Preferred Masonic Mut. Acci. Asso.* (1894) 98 Mich. 338, 57 N. W. 169, in which the circumstances attending the death of the insured were equally consistent with several different means of death, including suicide; and the court held that, until there was some evidence tending to show that death resulted from accident rather than from design or natural causes, there was nothing to go to the jury.

And in *Bernick v. Illinois Commercial Men's Asso.* (1912) 175 Ill. App. 511, the uncontradicted evidence and circumstances were held to show that the insured's injury was self-inflicted, and not accidental within the protection of an accident insurance policy.

J. T. W.

RE APPLICATION OF CHARLES BARTHELMMESS et al., Appts., v.

MORRIS CUKOR et al., Composing the Municipal Civil Service Commission of the City of New York, Respts.

New York Court of Appeals—July 14, 1921.

(231 N. Y. 435, 132 N. E. 140.)

Constitutional law — arbitrary promotion of soldiers in civil service — validity.

1. A statute making soldiers and sailors eligible in advance of others on the eligible list for promotion in the civil service violates a constitutional provision that appointment shall be made according to merit and fitness, to be ascertained so far as practicable by competitive examinations, where there is no declaration that such examination is not practicable.

[See note on this question beginning on page 1409.]

Office — civil service — preferences — power to give.

2. Neither the court nor legislature

can add to the preferences fixed by the Constitution for promotion in the civil service.

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— military service as factor in fitness for promotion.

3. The legislature may make military service a factor to be counted in determining fitness for promotion in the civil service.

Office — right to change position on eligible list.

4. The legislature cannot arbitrarily change the position on the eligible list of persons who pass civil service examinations under a constitutional provision that appointment and promotion shall be made according to

merit and fitness, to be far as practicable by examinations.

— discretion of local effect on power of

5. Constitutional authorities to select the appointed or promoted an eligible list to be does not justify the legislature that preference given, in making soldiers and sailors on the list.

APPEAL by applicants from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a justice of the peace for New York County denying an application for a writ of habeas corpus to compel defendants to certify as eligible for promotion to the position of police sergeant the first three names on the existing eligible list for that position, resulting from a competitive examination.

The facts are stated in the opinion of the court.

Messrs. Elihu Root, Samuel H. Ordway, and Albert DeRoode, for appellants, and Mr. Nelson S. Spencer, amicus curiæ, for Civil Service Reform Association:

Article 5, § 9, of the Constitution, prohibits any preference in the matter of appointment or promotion in the civil service as the result of competitive examination, other than the specific preference given by this section of the Constitution to veterans of the Civil War.

Re Sweeley, 12 Misc. 174, 33 N. Y. Supp. 369, affirmed in 146 N. Y. 401, 42 N. E. 543; Re Keymer, 148 N. Y. 219, 35 L.R.A. 447, 42 N. E. 667; People ex rel. Fleming v. Dalton, 158 N. Y. 175, 52 N. E. 1113.

Apart from the enumeration in the constitutional provision of a specific preference for Civil War veterans, the basic requirement of art. 5, § 9, prohibits a statutory exception from such provision.

Hale v. Worstell, 185 N. Y. 247, 113 Am. St. Rep. 895, 77 N. E. 1177; People ex rel. McClelland v. Roberts, 148 N. Y. 360, 31 L.R.A. 399, 42 N. E. 1082; People ex rel. Balcom v. Mosher, 163 N. Y. 32, 79 Am. St. Rep. 552, 57 N. E. 88; Re Beck, 135 App. Div. 156, 119 N. Y. Supp. 1028.

The specific preference given by the law in question was not a valid exercise of the legislative power to develop the principle of the constitutional provision, or to provide for

cases in which competition was not practicable.

Re Keymer, 148 N. Y. 219, 35 L.R.A. 447, 42 N. E. 667.

The statute conflicts with the provisions of the Constitution relating to the power of local and state authorities in the matter of appointment, with the range of selection.

People ex rel. Balcom v. Dalton, 148 N. Y. 32, 79 Am. St. Rep. 895, 77 N. E. 88; People ex rel. Fleming v. Dalton, 158 N. Y. 175, 52 N. E. 1113, 142 App. Div. 122, 119 N. Y. Supp. 1027, affirmed in 201 N. Y. 401, 100 N. E. 1098; People ex rel. Stratton, 79 App. Div. 156, 119 N. Y. Supp. 269; People ex rel. Burch, 79 App. Div. 156, 119 N. Y. Supp. 274.

Mr. James S. Y. Irvine, for respondents.

Messrs. Francis N. L. Gates, Jr., for intervenors.

Messrs. Henry T. Cornellius Wickersham, for the American Legion.

Messrs. John F. O'Brien, Allen, and Arthur Sweet, for the John P. O'Brien, for respondents.

Cardozo, J., deliver opinion of the court:

By an amendment of the Civil Service Law, adopted April 1, 1920, chap. 282, amended Laws, chap. 36, § 245

legislature has said that entrance into the military and naval service of the United States shall give a preference in promotion to officers and employees in the civil service of the state and of its civil subdivisions.

"Any person who while in the military or naval service took and passed such examination [i. e., an examination for promotion], or any person who took and passed such examination and thereafter entered the military or naval service of the United States, shall be placed upon the eligible list of such grade, his salary shall be fixed at the medium amount prescribed for such grade and he shall be preferred for any appointment or promotion thereafter made in such grade in the department in which he shall be employed." Laws 1920, chap. 282.

The act was repealed on May 10, 1920 (Laws 1920, chap. 624, § 2), with the proviso that the repeal was not to impair any rights theretofore accrued thereunder. While it was in force, a vacancy existed in the rank and grade of police sergeant in the city of New York. The manner of filling that vacancy is the controversy here. One Cook, a soldier in the late war, who took a promotion examination while in the military service, is on the eligible list as No. 524. He made claim to a preference on April 27, 1920, before the statute was repealed. Other soldiers, veterans of the same war, are also among the eligible, though their comparative standing is not stated. The three names highest on the list, however, are those of men who have no record of service in Army or in Navy. The municipal civil service commission is about to certify three names to the police commissioner as eligible for promotion, and proposes in so doing to follow the statute and to give preference to the soldiers. The petitioners contend that the statute is unconstitutional, and that the three names to be certified for promotion are those whose standing on the list is highest. The validity

of the statute is thus the question to be determined.

"Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the Army and Navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made." This is the command of the Constitution (article 5, § 9), which, until changed, must be obeyed. The preference which it concedes is restricted to veterans of the Civil War. The statute gives, or attempts to give, a like preference to veterans of other wars. The restriction embodied in the Constitution was no hasty inadvertence. It was established after long debate. The convention was reminded that other wars or other emergencies might come. With this reminder it conceded one preference, and one only. Neither legislature nor court is competent to add another. *Re Keymer*, 148 N. Y. 219, 35 L.R.A. 447, 42 N. E. 667. The legislature may indeed say, if for reasons not merely arbitrary its judgment shall so dictate, that in one calling or another examination is not practicable. *People ex rel. Sweet v. Lyman*, 157 N. Y. 368, 52 N. E. 132; *People ex rel. Moriarty v. Creelman*, 206 N. Y. 570, 575, 100 N. E. 446. Even when it does not say this, it may say that military or naval service (whether in the Civil War or elsewhere) is something to be counted by the examiners, like experience in other fields, whenever service or experience qualifies

Office—civil
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preferences—
power to give.

—military
service as factor
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for office or employment. Service so considered does not override the results of competitive examination, but enters into the results as a contributory factor. A different situation arises when service controls selection, irrespective of qualifying value. It is the difference between an appraisal of merit, an estimate of fitness, and a preference or bonus. The Constitution circumscribes the field of privilege and favor.

This statute is not an estimate of capacity. It is the expression of a preference. The legislature has not said that the test of competitive examination is impracticable, no matter what the position, whenever soldiers or sailors are among the candidates for promotion. It has said in effect that, even though the test of competitive examination be practicable, soldiers and

Constitutional law—arbitrary promotion of soldiers in civil service—validity.

sailors shall be eligible in advance of others. The statute was so construed at the appellate division, and its entire scheme and framework exclude another meaning. Mere entrance into Army or Navy, and that whether voluntary or involuntary, is made sufficient for preferment. Neither the kind nor the quality nor the duration of the service is important. There is not even the requirement of an honorable discharge. Service for a month or a day as cook or as hostler counts as much as service throughout the war and the winning of a cross of honor. The preference is not confined to callings or positions where efficiency might be thought to be promoted by the discipline of camp or ship. The clerk or the bookkeeper is subjected to the same tests as the policeman or the fireman. The myriad offices and employments in the civil service of the state and of hundreds of municipal corporations, with all the countless exactions and variations of their duties, are classified as one, and governed by a single rule. If more is needed to disclose the purpose of the statute, we may find it in the repealing act (Laws 1920,

chap. 624), and the practice attached. The legislature has, in effect, const meaning; has exhibited its plan. As the repeal, a small class arbitrarily chosen, has with special privilege drawn between veterans upon the eligible list in 1920, the date of the host of other veterans upon the list hereafter receive the preference are denied. No one that there is any difference these classes that merit examination less than the one than for the practicable in the future, cable in the past. If once, it is impracticable discrimination points and confirms the preference.

In determining the lawmakers, we have toward determining Neither expressly no tion is the statute a p that the presence of a the candidates make examination futile. (test is futile does the suffer its rejection. mean to say that if nouncement had been control the judgment. The duty would still b giving efficacy to the the field of legislative exercise a supervisory circumstances of evas Re Keymer and People arty v. Creelman, sup rel. Schau v. McWilliam 92, 99, 77 N. E. 785. to say that heroism s more than knowledge employments where l than knowledge, is the dence of fitness. P Schelpp v. Knox, 48 62 N. Y. Supp. 940; Leary v. Knox, 166 L.R.A. 589, 60 N. E. 17 er thing to say that, i drum work of life, the

of shop and of office, of counter and of desk, soldier and sailor, irrespective of the extent and quality of their service, must be presumed to have qualifications sufficient to advance them from the bottom to the top. The discipline of Army and Navy, to justify this exaltation of its significance, must bear something more than a remote or fanciful relation to the duties of office or employment. If that were not so, there might be discrimination without measure. Ex-legislators, and ex-officeholders generally, as well as countless other classes, might plead the discipline of the past as creating a presumption of fitness for the duties of the future. There is no need, however, to dwell upon the consequences of an explicit declaration by the legislature that the test of competitive examination is impracticable for some candidates, though practicable for others, suitors for the same position. The statute makes no such declaration in terms, and the breadth of its extension, its undiscriminating generality,—these and other features,—make it impossible that the declaration be implied. In such circumstances, the condemnation of the act is written in the Constitution in words too plain to be misread. Competitive examination must be the test, if practicable. Competitive examination has not been found to be impracticable. The legislature has substituted a preference for a test.

We are referred to precedents in other jurisdictions where there is nothing in the Constitution to regulate the formation of the civil service. Opinion of the Justices, 166 Mass. 589, 34 L.R.A. 58, 44 N. E. 625; Goodrich v. Mitchell, 68 Kan. 765, 64 L.R.A. 945, 104 Am. St. Rep. 429, 75 Pac. 1034, 1 Ann. Cas. 288. They can have little significance for us. They show that preference of veterans is not the denial to others of the equal protection of the law. They do not show the range of preference under the Constitution of New York. Reward for military or naval service may seem to foster

love of country. Opinion of the Justices, *supra*. It may be an expression of gratitude and patriotism. We have said by our Constitution that valor is not to be rewarded, nor patriotism stimulated, unless in submission to the restraints which we have imposed upon the choice of public servants. Re Keymer, *supra*. The mandate of the people has excluded sentiments and motives that may guide the judgment of the law-makers in jurisdictions where discretion is unfettered. It has subordinated flexibility and discretion to regularity and system.

The argument is made, however, that the Constitution is satisfied if candidates must pass an examination before their names are entered on the list, and that if only this is done the legislature is at liberty to shuffle the places as it will. Preferences or favored classes, it is said, may be created without limit, if confined to those who pass. In that view, the eligible list, in truth, consists of two lists, one primary and the other secondary, one general and the other special. Competition must regulate the one, but favor may constitute the other. We do not so read the simple words in which the Constitution phrases its command. The test is not merely examination. The test is *competitive* examination. Competition is useless if favor may reverse the verdict. Eligibility counts for little if grades of eligibility may be established without restriction. Sublists may then be made up of one political party or another. The three lowest names upon the list may be directed to be certified in advance of the three highest. The victory may go to one class, and the prizes to another. Nothing in *People ex rel. Balcom v. Mosher*, 163 N. Y. 32, 79 Am. St. Rep. 552, 57 N. E. 88, is authority for these bizarre conclusions. We construed the civil service section of the Constitution in the light of another section (art. 10, § 2) which says that local officers shall be chosen by the local authori-

Office—right to
change position
on eligible
list.

ties. We said that this implied some privilege of selection on the part of the public officer who was to exercise the appointing power. The legislature might require him to make a choice among the three highest on the list, but could not exclude judgment altogether by restricting him to the one that was the highest of the three. This statute has another aim. It is not addressed exclusively to the power that appoints. It is addressed to the power that certifies the names of those eligible for appointment. It does not enlarge the range of selection available to the police commissioner in the exercise of his power to promote. It circumscribes the list of those whom the examining officers are to return to him as eligible for promotion. This is not to preserve the power of the local authorities to appoint the local officers. It is to set at naught the test of competitive examination, while imposing new restrictions upon freedom of appointment. The command of the Constitution is not obeyed by

—discretion of
local authorities
—effect on
power of legis-
lature.

such devices. The proviso that permits standing to be inverted in favor of veterans of the Civil War is significant of the prohibition that would have attached if the proviso had been omitted. Competition, as far as practicable, is the test for one list as for another, for subaltern as for principal.

The members of the court are not oblivious of the debt of gratitude that is due to the soldiers and sailors of the nation for sacrifice and service. If discharge of that debt requires a preference in the civil

service, the people can so declare. An amendment of the Constitution extending to veterans of all wars the privilege now enjoyed by veterans of the Civil War has been proposed by concurrent resolution of the legislature (Laws 1919, vol. 2, p. 1793), and at the coming election will go before the voters. This statute as it now stands is an attempt by imperfect and hasty legislation to anticipate the process of orderly amendment. If sustained, it would benefit, not veterans generally, but a small and arbitrary number. Those who went upon the list before May 10, 1920, and whose rights had then accrued, would be entrenched behind a preference in which their own comrades in arms, going upon the list thereafter, would be incompetent to share. At the same time, in return for this dubious and partial gain, there would have been conceded to the legislature a power of discrimination that might undermine the civil service by injecting beneath its foundations an ever-widening stream of favor. Sacrifice and service will seek no reward save in conformity to law, and none other can be theirs.

The court is constrained to adjudge that chap. 282 of the Statutes of 1920 ignores the limitations of the Constitution, and that the preference which it concedes is void.

The order of the Appellate Division and that of the Special Term should be reversed, with costs in all courts, and the application for a mandamus granted.

Hiscock, Ch. J., and Hogan, Pound, Crane, and Andrews, JJ., concur.

Chase, J., deceased.

ANNOTATION.

Constitutionality of provision of Civil Service Law relating to military or naval service of applicant for appointment or promotion.

Generally.

This annotation does not deal with veterans' preference laws generally, but with those acts only which, in connection with the creation of a civil
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service system, seek to give a preference based on military or naval service.

Generally it seems that the validity of a statute preferring certain persons,

on account of military or naval service, for appointment or promotion in the civil service of the state, depends on the character of the preference given. If, in a jurisdiction where a civil service law exists, an absolute right to appointment or promotion is given to veterans, without regard to the competency or fitness of the applicant to perform the duties of the position sought by him, or without requiring him to take an examination therefor, the statute is deemed to be invalid on the ground that, in thus creating a favored class, it violates the constitutional guaranty of equality of privileges and immunities.

Thus, it was said in *Brown v. Russell* (1896) 166 Mass. 14, 32 L.R.A. 253, 55 Am. St. Rep. 357, 43 N. E. 1005, that the Massachusetts legislature could not "constitutionally provide that certain public offices and employments which it has created shall be filled by veterans in preferment to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments." Consequently a statute which provided that an application by a veteran for a certain public office under the civil service of the state, sworn to by him and certified to by three citizens of good repute, should entitle the veteran to the appointment to the office, was held to be unconstitutional on the theory that the Constitution requires that all persons appointed to public office or employment shall be adjudged to be qualified to perform the duties of the office or employment, and that the statute in question entitled a veteran to select those who were to certify to his qualifications, thereby conferring on him a particular and exclusive privilege distinct from any given the community in obtaining public office.

So, where a state Constitution prohibits legislative enactment granting special privileges to certain persons or a particular class of persons, a provision of the Civil Service Law giving

to veterans of the Civil War a preference in appointment is void. *People v. Chicago Civil Service Comrs.* 4 Chicago L. J. Weekly, 126.

If, however, the statute requires a veteran to be examined in the same manner as other applicants, and merely gives a preference for appointment over all other qualified persons, it is constitutional. *Opinion of Justices* (1896) 166 Mass. 589, 34 L.R.A. 58, 44 N. E. 625, wherein it was said: "Section 2 of the Statute of 1896 authorizes veterans to apply for examination under the civil service statutes and rules, and provides that if such veterans pass the examination they shall be preferred in appointment to all male persons not veterans. The effect of the section is that the veterans must first be found qualified, by an examination in accordance with the civil service statutes and rules, to perform the duties of the office or employment which they seek, and if they are found so qualified, they are to be preferred in appointment to all other persons except women. The general court may have been of opinion that a person who had served in the Army or Navy of the United States in the time of the War of the Rebellion, and had been honorably discharged therefrom, or who was a citizen of Massachusetts and had distinguished himself by valiant and heroic conduct in the Army or Navy of the United States, and had received a medal of honor from the President of the United States, is a person who has shown such qualities of character that it is for the interests of the commonwealth to appoint him to certain offices or employments in preference to other male persons, if he is found otherwise qualified to perform the duties. The general court may have so thought, on the ground either that such a person would be likely to possess courage, constancy, habits of obedience, and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the services of veterans in the way provided for by the statute would promote that love of country and devotion to the welfare of the

state which it concerns the commonwealth to foster. If such was the opinion of the general court, we cannot say that it was beyond its constitutional power to enact this section. Of the wisdom of such legislation we are not made the judges. The section does not purport to give an absolute preference to veterans without regard to their qualifications."

Rule in New York.

In New York, the Constitution (art. 5, § 9) provides that "appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the Army and Navy of the United States in the late Civil War, who are citizens, and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made."

In the case of *Re Keymer* (1896) 148 N. Y. 219, 35 L.R.A. 447, 42 N. E. 667, the foregoing provision was held to give no preference to veterans of the Civil War over other citizens of the state in examinations, whether competitive or noncompetitive, but to mean merely that, when as a result of examination a list is made up consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to preference, without regard to his standing on the list. Consequently a statute providing that, as to honorably discharged soldiers and sailors of the Civil War, competitive examinations for appointment in the civil service should not be deemed practicable or necessary, in cases where the compensation or other emolument of the office did not exceed \$4 per day, was held to be in conflict with the Constitution, and void. The court said: "It seems to us clear that this section of the Constitution, read according to its letter and spirit, contemplates that in all

examinations, competitive and non-competitive, the veterans of the Civil War have no preference over other citizens of the state, but, when as a result of those examinations a list is made up from which appointments and promotions can be made, consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to preference without regard to his standing on that list. We come, then, to consider the Act of 1895, which provides in substance that, as to honorably discharged soldiers and sailors of the late Civil War, competitive examinations shall not be deemed practicable or necessary, in cases where the compensation or other emolument of the office does not exceed \$4 per day. It is very clear that this act is in conflict with the section of the Constitution we have examined and construed. In the first place, this act refers only to veterans of the Civil War, and creates a favored class. The veteran who seeks a place in the civil service where compensation does not exceed \$4 per day is exempted from competitive examination, while every other citizen must submit to it. This is contrary to the letter and spirit of the Constitution, and renders the act void."

Likewise, in *Re Sweeley* (1895) 12 Misc. 174, 33 N. Y. Supp. 369, affirmed without opinion in (1895) 146 N. Y. 401, 42 N. E. 543, a statute exempting honorably discharged soldiers and sailors from the operation of the Civil Service Law, and from an examination to test their fitness in cases where they were applicants for positions, was held to conflict with the constitutional provisions heretofore quoted.

A statute providing that whenever it shall appear, after a competitive examination for appointment to a position in the civil service of the state or of the cities affected thereby, that more than one honorably discharged soldier is qualified to fill the same, the board authorized to report names for appointment shall certify to the appointing power all of such honorably discharged soldiers, specifying

their respective grades, etc., limiting such certification, however, to not more than two names in excess of the number of places to be filled, and in all such cases the appointment shall be made from those, not exceeding three in number, so certified, who are graded highest as the result of such examination, has been held to violate the intent and purpose of art. 5, § 9, of the Constitution, in that the principle of competition is evaded, and any one of three veterans may be selected for appointment, instead of him who stands highest among them. *People ex rel. Drake v. Syracuse* (1899) 26 Misc. 522, 57 N. Y. Supp. 617.

In *Re Wortman* (1888) 22 Abb. N. C. 137, 2 N. Y. Supp. 324, decided prior to the adoption of the Constitution of 1894, it was held that art. 12, § 1, of the state Constitution, providing that no other oath, declaration, or test shall be required as a qualification for any office or public trust than that contained in the section of the Constitution in question, and § 1 of the 14th Amendment to the United

States Constitution, prohibiting a state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or which denies to any person within its jurisdiction the equal protection of the law, were not violated by various statutes providing that honorably discharged soldiers and sailors of the United States in the Civil War should be preferred for appointment to positions in the civil service of the state and its municipalities, over other persons of equal standing.

In the reported case (*BARTHELMESS v. CUKOR*, ante, 1404), an act giving a preference in promotion to a person in the civil service of the state or one of its civil subdivisions, taking an examination while in the military or naval service of the United States, or to a person entering the military or naval service after taking such examination, is held to violate art. 5, § 9, of the Constitution, because granting a preference based on military service other than in the Civil War.

L. F. C.

RE WILL OF JOHN DERUSSEAU, Deceased.

ROSE CRAITE et al., Appts.

JOHN MORNEAU, Respt.

Wisconsin Supreme Court — October 18, 1921.

(— Wis. —, 184 N. W. 705.)

Will — effect of epilepsy on testamentary capacity.

1. Neither insanity nor testamentary incapacity can be presumed from the fact that a testator has long suffered from epilepsy.

[See note on this question beginning on page 1418.]

—what is testamentary capacity.

2. One has testamentary capacity who can comprehend the condition of his property, his relations to the persons who are or should be the objects of his bounty, the scope and bearing of the provisions of the will, and memory sufficient to call in mind, without prompting, the particulars or elements of the business to be transacted, and to hold them there a sufficient length of time to perceive at least

their obvious relations to each other, and to be able to form rational judgment in relation to them.

[See 28 R. C. L. 86.]

— undue influence — residence in family.

3. The mere fact that a testator is related to the beneficiary of his will, and lives in his household for a month prior to the execution of the will, does not establish undue influence.

— concealment of execution of will — effect.

4. Undue influence on the part of one in whose favor a will is made on condition that he support testator during life is not shown by the fact that other relatives are not informed of the arrangements, especially where testator had made the same offer without success to another relative.

— effect of breach of contract for support.

5. A will in favor of one who agrees to support an epileptic for life will not be set aside merely because, after compliance with the agreement for nearly five years, testator's malady becomes so bad that it is necessary to place him in an institution.

APPEAL by contestants from a judgment of the Circuit Court for Barron County (Foley, J.) affirming a judgment of the County Court admitting to probate an instrument purporting to be the last will and testament of John Derusseau, deceased. *Affirmed.*

Statement by Jones, J.:

This is an appeal from a judgment of the circuit court for Barron county, Honorable W. R. Foley, circuit judge, affirming a judgment of the county court admitting to probate an instrument purporting to be the last will and testament of John Derusseau, deceased. The will in question was executed on April 29, 1912, the respondent being named sole beneficiary, and the appellants, brothers and sisters of the deceased, being expressly excluded. At the same time a contract was entered into between the respondent and the deceased, whereby the respondent, in consideration of \$15 a month and his being named sole beneficiary, agreed to take the deceased into his home and provide food, clothing, and medical attention for him during his life, and care for him as he would for one of his own infant sons.

The deceased lived at the home of the respondent from the early part of April, 1912, until his removal to the Eau Claire Insane Asylum, after an application by the respondent, in January, 1917. In October, 1917, a brother-in-law secured his release and took him to Rice lake. He returned him soon after to the asylum, but in December, 1917, he again secured his release and arranged for his care in a Catholic Sisters' Home in Dubuque, Iowa, at which place he died in August 1918, at the age of thirty-nine years. The deceased had suffered from epileptic fits since early childhood. Because of this affliction,

relatives as well as strangers were reluctant to have him in their families. As a consequence, since the death of his mother in 1902, he had lived at various places for short terms, sometimes with relatives, sometimes on the farms of neighbors as a farm hand, and a few seasons in the woods with logging crews. For approximately two years previous to the making of the will and contract, he had been employed on the farm of one of his brothers-in-law, John Dorsey, at whose request he was taken to the home of the respondent.

The heirs at law objected to the probate of the instrument in question as the will of the deceased, on the ground that it had been procured by undue influence, and that at the time of its execution the deceased was of unsound mind and not possessed of sufficient mental capacity to make a will. There was testimony to the effect that E. Craite, a brother-in-law, acted on various occasions as business adviser of the deceased, and this witness claims to have influenced him to make certain deals, as well as to have attended to the details. There was testimony to the effect that the respondent was nearly always present when any money was paid to the deceased. Several of the brothers and sisters stated that the deceased talked and acted queerly and foolishly; that he was very forgetful, and sometimes forgot when he had lent money; that he could not be trusted to do certain tasks because

of this forgetfulness; that he could not carry on a connected conversation, except at rare intervals; that no one seemed to like to talk to him or be in his company; that some of his relatives were afraid of him; and that at school he was not able to learn. Mr. Craite testified that the deceased had told him in 1917, and after he had returned from the asylum, that he had never made a will; that, although he had made arrangements with the respondents, he wanted the others to have equal shares. Most of the testimony as to the eccentric conduct and conversation of deceased was given by relatives interested in breaking the will.

The respondent called several witnesses who testified that they had had business transactions with the deceased, in which he acted like anyone else, and always seemed to be able to look after his interests. Numerous witnesses for proponent testified that they noticed nothing unusual in his talk or actions, except when he had the seizures; that he did not talk or act foolishly, except at such times; and that when well he was a good worker and could be trusted. Mr. Whittaker, a notary public who conducted an abstract office, testified to numerous business transactions with him as to drawing satisfactions, mortgage assignments, and deeds. Sometimes he would go to the office alone; sometimes with others. These transactions continued from 1901 to 1912. Mr. Whittaker's evidence was that testator was keen in business matters. Other disinterested witnesses gave similar testimony as to his business transactions. Other facts will be stated in the opinion.

Mr. M. S. Hines for appellants.

Mr. Arthur E. Coe, for respondent:

A person who has epilepsy is not insane.

Jansa's Estate, 169 Wis. 220, 171 N. W. 947.

The legal presumption is in favor of sanity, and on the issue of sanity, or insanity, the burden is upon him who asserts insanity to prove it, and in a doubtful case, unless there ap-

pears a preponderance of proof of mental unsoundness, the issue should be found the other way.

Cole's Will, 49 Wis. 182, 5 N. W. 346; Chafin's Will, 32 Wis. 557; Wright v. Jackson, 59 Wis. 582, 18 N. W. 486; Gunderson v. Rogers, 160 Wis. 468, 152 N. W. 157.

A charge that a will was made as the result of undue influence sounds in fraud, and requires that it be shown by clear and satisfactory evidence.

Duncan v. Metcalf, 154 Wis. 43, 141 N. W. 1002; Re Jackman, 26 Wis. 104; Armstrong v. Armstrong, 63 Wis. 162, 23 N. W. 407; Ball v. Boston, 153 Wis. 27, 141 N. W. 8; Winn v. Itzel, 125 Wis. 19, 103 N. W. 220; Skrinsrud v. Schwenn, 158 Wis. 145, 147 N. W. 370; Boardman v. Lorentzen, 155 Wis. 572, 52 L.R.A. (N.S.) 476, 145 N. W. 750.

Jones, J., delivered the opinion of the court:

If it were not for the testimony that the deceased had suffered from epilepsy since childhood, the facts in this case would call for very little discussion. The testimony given by relatives as to the peculiarities, forgetfulness, lack of reliability, and foolishness in conversation which they attributed to the deceased, was far outweighed by evidence given by disinterested witnesses concerning his general intelligence, and especially his ability to attend to his business affairs. Except for an item of evidence by one of his relatives that he had forgotten a small loan he had made, there is no testimony of any unwise business transactions. On the contrary, the evidence shows that by his industry and frugality, notwithstanding the untoward conditions of his life, he had increased his small inheritance from \$2,000 to \$3,500. In a small way he had become a capitalist, and had invested and reinvested his money with at least average prudence. It is true that sometimes Mr. Craite, his brother-in-law, had advised with him in these transactions, but at other times he went to the conveyancer alone, and seemed to exercise ordinary business judgment, and was "keen enough to get 7 per cent when he could."

It is strongly urged by the appellants, however, that any preponderance of the testimony as to the general business capacity of the deceased is overcome by the fact that he had been an epileptic since infancy. There was testimony that he sometimes had these seizures once or twice a day, sometimes once or twice a month; that sometimes he would be unconscious for an hour, sometimes for a day. Dr. Wallis, witness for contestants, testified that the disease is a progressive one, "in which the seizures become more intense and more frequent until death occurs, which usually does eventually, and during this time the mind is in a progressive state of deterioration," and that the epileptic seizure is followed by mental derangement of some degree, which may last from a few hours to a few days. The doctor further testified: "It's a mental disease, because it is a progressive mental disease, in which the mentality of the patient deteriorates from the minute of the first seizure in direct proportion to the intensity and the frequency of the attacks, until the mind is lost, or death ensues, or the patient is cured. Those are the three conditions."

Contestant's counsel rely largely upon this testimony, and upon the fact that deceased was committed to the insane asylum, as evidence tending to establish his testamentary incapacity when the will was made. This commitment was made four years and eight months after the execution of the will. There was a little testimony to the effect that his mental condition was not very different at the time of the commitment from the condition when the will was made. The evidence is clear, however, that the seizures had become more violent at the later period, and he died about seventeen months after the commitment. The testimony convinces us that the mental and physical condition of the testator had greatly changed in the interval between the execution

of the will and the the insane asylum.

We have been satisfied that the effect of testamentary capacity seldom passed upon the last resort. Only one cited in the briefs of Re Lewis, 51 Wis. 10. In that case, the general showing peculiarities of mind of the testator was weighty than in this. In that case the testator was sixty years of age when executed. He had been in Wisconsin for several years, turned to the state for the purpose of selling his land. On date March 12. On that date he had been seized and became unconscious during another seizure within minutes after the execution of the will, and on the 14th he died. In an opinion by Mr. Justice Lyon, the will was sustained. It is stated: "It is difficult to see how the knowledge of almost all the victims of that malady is to retain their mental faculties at the moment of attack, and the earlier stages of the disease."

In the present case, the proof of any seizure before or after the execution of the will. The testimony of the testator first went to show that he was public, and then to show that he prepared the will, and then to show that he was in a normal frame of mind at the time of the execution. It is evident that he had long been suffering from a deplorable mental condition, and there had probably been a pairment of his mental faculties before the execution. From the answers of the medical examiners, the testator was adjudged insane. It is argued by proponent's counsel that the testator was not then insane; and it is necessary to decide this question. The presumptions are not in favor of the testator, and even if at the time of the execution

does not follow that he was insane four years and eight months before.

Neither insanity nor testamentary incapacity can be presumed

Will—effect of epilepsy on testamentary capacity.

from the fact that a testator has long suffered from epilepsy. It is true that such a condition may be an important fact in connection with other facts in the determination of the question; but it is a matter of common knowledge that many persons have long been the victims of this dread disease, and yet possessed in the intervals between attacks a high degree of mental power. In Ray's Medical Jurisprudence of Insanity, it is said, at page 477: "Zacchias contends that epileptics should not be responsible for any acts committed within three days of a fit, before or after. The principle is undoubtedly sound as it regards criminal acts; and certainly civil acts performed within two or three days after a fit deserve to be closely scrutinized. Not infrequently, however, the intellect may be as clear and strong as usual up to the very moment of an attack, and therefore it would seem as if other and satisfactory reasons should be required for invalidating transactions executed under such circumstances."

It cannot be said that, because a person is an epileptic, he is therefore insane. Re *Rapplee*, 66 Hun, 558, 21 N. Y. Supp. 801; Re *Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649; *Jansa's Estate*, 169 Wis. 220, 171 N. W. 947.

There is no testimony that the testator had hallucinations or delusions in the intervals between attacks. Neither the will nor the accompanying agreement was so complicated as not to be easily understood. We are convinced from the whole testimony, including that relating to epilepsy, that the testator had sufficient capacity to comprehend perfectly the condition of

—what is testamentary capacity.

his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope

and bearing of the provisions of his will, and that he had sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. We therefore hold, with the county judge and the circuit judge, that the testator was competent to execute the will in question.

It is strongly urged by contestants that the will was obtained by undue influence. As the basis of their argument it is urged that the proponent of the will sustained a fiduciary relation toward the testator. There is no evidence that the proponent had been the trusted agent of the deceased prior to the execution of the will. On the contrary, the evidence shows that Mr. Craite, husband of one of the contestants, had been much more active than the proponent in assisting the testator in his business affairs. Apparently there had been no greater intimacy between John Derusseau and Morneau than had existed with other relatives. It is true the deceased had at times lived with Mr. and Mrs. Morneau; but he had also at times lived with other members of his family. Any inference of a fiduciary relationship must rest upon the bare facts of the relationship and residence in the same household with the proponent for about a month just prior to the execution of the will. We do not consider that the evidence shows any such fiduciary relation before, or at the time of, the execution of the will, as to change the ordinary rule as to the burden of proof.

—undue influence—residence in family.

As furnishing one of the elements of undue influence, it is argued that the other relatives were not informed of the execution of the will. As bearing on this subject, it is an important fact that the

—concealment of execution of will—effect.

testator had offered to make a similar arrangement by will to his sister Mrs. Craite, if she would agree to support him, and that she had rejected the offer. His plan of disposing of his property thus became known to one of his sisters, and perhaps it is fair to assume that it became known to the others. We do not believe that, under the circumstances, it became the duty of the respondent to discuss the subject with other members of the family.

It is urged that the deceased was one easily subject to undue influence by others. This subject is partly covered by the foregoing discussion as to his competency. There is a singular lack of testimony that he had been influenced against his will by John Morneau, or anyone else. The evidence that Mr. Craite had, in one or two instances, given advice which had been followed, is the only evidence bearing on the subject.

It is urged that John Morneau showed a disposition to gain an undue advantage, and that he had the opportunity for so doing. Unless the will and the agreement afford such evidence, there is nothing to support this contention. There is no evidence of any importunity on his part, nor that he in any way took any advantage in his business dealings with the testator. It is true that when the testator went to Mr. Whittaker and asked him to draw a will, proponent went with him and heard the conversation. Mr. Whittaker had long known that the testator had epileptic seizures, and for that reason advised him to go to a lawyer who would understand the subject better. When he went to Mr. Coe, the proponent was not present during the interview in which the instructions were given. Mr. Coe had known the deceased for years, and was aware of his affliction. He therefore took unusual care to ascertain whether there was testamentary capacity. He testified as follows: "I did something on that occasion that I never did before and I never have done since; I made an effort, by examining this

man, John Derusseau, as to his past history, and his relatives, and his property, to test his mental capacity, and to that end I went with him to the county judge's office,—Judge Meadows was the county judge,—and I asked him a lot of questions in Judge Meadow's presence, as to his history and his previous life, and after hearing his answers I returned to the office with him and then drew his will. And from his answers—upon his answers—I base my statement that he was, at the time he executed his will, of sound and disposing mind and memory."

At this interview in the presence of the county judge, the proponent was not present.

It is urged by counsel that the will and accompanying agreement are evidence of undue influence; that it was unnatural and unfair to exclude all other relatives, and to make John Morneau the sole beneficiary under the will. The testator was profoundly conscious of his sad condition, and knew that he could not be a welcome inmate in the households of his brothers and sisters. His sister, Mrs. Dorsey, had requested that the Morneaus take him into their home. Mrs. Craite went with the testator to her sister, Mrs. Morneau, and asked her to take care of him. We do not agree that it was unnatural for John Derusseau, under those circumstances, to make some provision with his little property by which his deplorable condition could be to some extent ameliorated, and we do not think that testamentary provisions of this character should be lightly set aside.

Under the circumstances, even if John Morneau had first suggested and requested that some arrangement be made by which he should be compensated for the burden he was to assume, that would not be sufficient proof of undue influence; but it is evident that the idea of some such provision had been entertained by the testator before he went to the home of Morneau. The testimony shows that the other relatives of the

deceased had no peculiar claim upon his bounty. Mr. Craite testified that they were "financiers, living off the interest of their money; they are not farmers; got money to live. They live in the city, and are retired farmers. They are not business men."

It is argued that Morneau breached his contract by taking the testator to the insane asylum. He had borne the burden and responsibility of kindly caring for his

—effect of
breach of
contract for
support.

brother-in-law for four years and eight months. The time came when it was no longer practicable that he should remain in the household. Morneau's own son then had epileptic seizures, which greatly complicated the situation.

We are satisfied with the finding of the trial judge that the will was not obtained by undue influence. Even if John Morneau did breach his agreement nearly five years afterward, that would not be ground for a contest of the will.

Judgment affirmed.

ANNOTATION.

Epilepsy as affecting testamentary capacity.

The decisions involving epilepsy as a ground for avoiding a marriage are collected and discussed in the annotation following *Behsman v. Behsman*, 7 A.L.R. 1503.

The cases agree that the mere fact that one is an epileptic, or subject to epileptic fits, does not deprive him of testamentary capacity. *Liddle v. Salter* (1917) 180 Iowa, 840, 163 N. W. 447; *Wood v. Carpenter* (1902) 166 Mo. 465, 66 S. W. 172; *Thompson v. Quimby* (1853) 2 Bradf. (N. Y.) 449; *Re Rapplee* (1893) 66 Hun, 558, 21 N. Y. Supp. 801, affirmed without opinion in (1894) 141 N. Y. 553, 36 N. E. 343; *Re Johnson* (1894) 7 Misc. 220, 27 N. Y. Supp. 649; *Re Lewis* (1881) 51 Wis. 101, 7 N. W. 829; *Re DERUSSEAU* (reported herewith) ante, 1412.

In the reported case (*RE DERUSSEAU*, ante, 1412) one who since childhood had suffered from epileptic fits was held to have testamentary capacity, although about four years after the will was made he was committed to an insane asylum, and died about seventeen months thereafter. The court said that neither insanity nor testamentary incapacity could be presumed from the fact that a testator had long suffered from epilepsy, although such a condition may be an important fact, in connection with other circumstances, in determining the question. In this case there was no proof of any

attack for some weeks before or after the execution of the will, nor any testimony that the testator had hallucinations or delusions in the interval between attacks. On the other hand there was evidence of the testator's general intelligence and ability to attend to his business affairs.

The above case sets out and quotes from *Re Lewis* (1881) 51 Wis. 101, 7 N. W. 829, supra, in which the will was sustained, although the testator had an epileptic fit the day before he executed the will and another about five minutes after it was executed, and died two days later.

In *Re Rapplee*, 66 Hun, 558, 21 N. Y. Supp. 801, affirmed without opinion in (1894) 141 N. Y. 553, 36 N. E. 343, supra, the court held that a decree revoking probate of a will was erroneous, where there was testimony merely that the testator at times had epileptic fits, and that after such seizures he became for two or three days weak in mind and body, and failed at such times to recognize relatives and others, but it appeared that when he recovered from such attacks his mind again became clear and strong, and he would resume his usual avocation, and that the will was made two weeks after one of these epileptic fits at a time when no circumstances were shown to exist bringing into doubt his ability to make a will. The evidence to show disability was held insufficient

to overcome that of the subscribing witnesses as to his testamentary capacity and the deductions to be made from the undisputed facts relating to the execution of the will.

Epilepsy is not, in itself, proof of insanity, since the impression it makes on the intellectual faculties is gradual, and depends upon the frequency and violence of the attacks. *Thompson v. Quimby* (1853) 2 Bradf. (N. Y.) 449. The court, in admitting the will to probate said that mental aberration did not generally appear until after several or many attacks, and in the course of prolonged cases; that the most to be inferred from the nature of the disease with which the testator was afflicted was that he was the subject of a malady, which, though not always associated with insanity, generally tended, in progress of time, to enfeeble and impair the powers of the mind.

In *Re Johnson* (1894) 7 Misc. 220, 27 N. Y. Supp. 649, the court, in holding that the will should be admitted to probate, said that the fact that the testator had an epileptic fit did not raise a presumption of disability after he had recovered from the attack; that the contestants claimed that it occurred on the morning of the day the will was signed; but that, if so, the court was satisfied from the evidence that it did not affect the testator's capacity in the afternoon.

Epileptic fits on the part of a testator, not beginning until several months after the will is executed, are not evidence of testamentary incapacity, however frequently they may have occurred during the remaining years of his life. *Wood v. Carpenter* (1902) 166 Mo. 465, 66 S. W. 172.

Of course, the fact that one has epileptic fits may be sufficient, with other evidence, to show testamentary incapacity. It seems that, from the nature of the disease, evidence that the testator was afflicted with epilepsy would be competent for this purpose.

Thus, where it was shown by medical witnesses that epilepsy is a disease of the brain, which does not, however, necessarily indicate inability to transact business, the court in *Liddle v. Salter* (1917) 180 Iowa, 840, 163

N. W. 447, held that the fact that a testatrix was afflicted with epilepsy was a circumstance for consideration by the jury in connection with other evidence of lack of testamentary capacity; and reached the conclusion that there was sufficient evidence for the jury to find against the testatrix's competency.

So, in *Hartley v. Lord* (1905) 38 Wash. 221, 80 Pac. 433, the evidence was held sufficient to support a finding of testamentary incapacity, where it appeared that the testator had suffered from epilepsy, or epileptic dementia, for at least fifteen years prior to the execution of the will; that during these years he had had frequent spasms, followed by brief periods of mental derangement, and that, as he grew older, the spasms were of more frequent occurrence and the ensuing mental derangement was more pronounced; that he had one of these spasms not to exceed half an hour before he signed the will; and that for some years prior to that time he had never left home unless accompanied by some person to watch over and look after him. There was also evidence as to testamentary incapacity offered by the subscribing witnesses and others.

And a testatrix suffering from epileptic fits and other mental and bodily impairment was held not to have testamentary capacity in *Re Rounds* (1898) 25 Misc. 101, 54 N. Y. Supp. 710; but the fact that the testatrix was afflicted with epilepsy does not, in this case, seem controlling, in view of the other evidence of mental and physical weakness.

There are, of course, other cases, not involving the question of testamentary capacity, which may profitably be perused in connection with the present subject. By way of illustration only, and as representative of other cases of a similar class, attention is called to several of these.

Thus, in an action to set aside a deed, the court in *Furlong v. Tilley* (1918) 51 Utah, 617, 172 Pac. 676, said that it was admitted that when the grantor was under the influence of

epileptic fits, to which he was at times subject, he was unable to transact business; but that it was a matter of common knowledge, of which the court would take judicial notice, that where a person is so afflicted to the extent there appearing, he is not necessarily disqualified from transacting ordinary business during the intervals between the attacks.

Cases such as that last above cited are of greater interest in connection with the present subject, in view of the doctrine of some courts that less mental capacity is required for the execution of a will than for the making of a contract.

In *Jansa's Estate* (1919) 169 Wis. 220, 171 N. W. 947, the court, in considering the validity of a marriage with an epileptic, said that it could not be affirmed that because he was an epileptic he was therefore insane that it was a matter of common knowl-

edge that epileptics often exhibit great intellectual power.

Of course there are many criminal cases where epileptic insanity has been relied upon by the defendant. It appears to be the general rule, in this class of cases, that proof merely that the defendant was afflicted with epilepsy does not necessarily relieve him from responsibility on the ground of insanity. Attention is called to only one of these cases, as representative of others. Thus, in the syllabus by the court in *Oborn v. State* (1910) 143 Wis. 249, 31 L.R.A. (N. S.) 966, 126 N. W. 737, it is said: "Proof of epilepsy does not, necessarily, directly establish insanity, as epilepsy is not as a matter of fact or law, insanity, though evidence of an epileptic condition may bear, circumstantially, on the mental condition of the afflicted person, to the extent of establishing insanity." R. E. H.

M. W. SCOTT, Appt.,
v.
STATE OF TEXAS.

Texas Court of Criminal Appeals—October 5, 1921.

(— Tex. Crim. Rep. —, 233 S. W. 1097.)

Automobile — statute requiring aid to person struck — construction.

1. A statute requiring an automobilist striking a person to stop and render to the person struck all necessary assistance requires him to render all the aid which would reasonably appear to him, as an ordinary person, at the time to be necessary.

[See note on this question beginning on page 1425.]

Definition — "required."

2. The word "required," in a statute requiring an automobilist who strikes a person to carry him to a physician or surgeon for treatment, if such treatment is "required," means necessary.

Indictment — injury by automobilist — knowingly.

3. An indictment under a statute requiring an automobilist who strikes a person to render assistance to him

need not allege that accused "knowingly" struck him, or that he failed to render aid knowing that he had struck him.

Automobile — lack of knowledge as defense to prosecution — failure to render assistance to person struck.

4. Lack of knowledge of the striking is a defense to a prosecution under a statute requiring an automobilist who strikes a person to stop and render him necessary assistance.

APPEAL by defendant from a judgment of the Criminal District Court

for Tarrant County (Hosey, J.) convicting him of violating the Motor Vehicle Law. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Baskin & Eastus and David Greines, for appellant:

A provision of the penal law which is ambiguous, vague, and so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the state, is invalid and inoperative.

Griffin v. State, 86 Tex. Crim. Rep. 498, 218 S. W. 494; Byrd v. State, 59 Tex. Crim. Rep. 513, 129 S. W. 620; Sloan v. Pasche, — Tex. Civ. App. —, 153 S. W. 672; State v. International & G. N. R. Co. — Tex. Civ. App. —, 165 S. W. 895; State v. Texas & N. O. R. Co. — Tex. Civ. App. —, 103 S. W. 64; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Augustine v. State, 41 Tex. Crim. Rep. 72, 96 Am. St. Rep. 765, 52 S. W. 81; Gulf, C. & S. F. R. Co. v. Dwyer, 84 Tex. 194, 19 S. W. 471; Cook v. State, 26 Ind. App. 278, 59 N. E. 489; Ex parte Marshall, 72 Tex. Crim. Rep. 83, 161 S. W. 112; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 693; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 876; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Baltimore & O. R. Co. v. Railroad Commission, 196 Fed. 690; Strickland v. Whatley, 142 Ga. 802, 83 S. E. 856; Elsbery v. State, 12 Ga. App. 86, 76 S. E. 779; Ex parte Jackson, 45 Ark. 164; United States v. Robinson, 266 Fed. 240; Russell v. State, 88 Tex. Crim. Rep. 512, 228 S. W. 566.

Mr. R. H. Hamilton, Assistant Attorney General, for the State.

Hawkins, J., delivered the opinion of the court:

Appellant was convicted under a prosecution based on article 820M, Vernon's P. C., and his punishment assessed at a fine of \$100 and ninety days confinement in the county jail.

No statement of facts accompanies the record, and the case is presented here on the sole question as to whether said article is sufficiently specific in defining the offense sought to be denounced. In 1917, the legislature passed an act which has sometimes been called the

"Highway Law," but, more properly speaking, one "Regulating Operation of Motor Vehicles." This law was amended at the same session, and again in 1919, and with these amendments is brought forward in Vernon's P. C., as articles 820A to 820Z. We have already had occasion to review this law, upholding some of the provisions, and holding article 820D, relating to glaring headlights, void for indefiniteness (Griffin v. State, 86 Tex. Crim. Rep. 498, 218 S. W. 494), and also that a portion of subdivision (a), article 820K, is likewise inoperative and unenforceable in a criminal proceeding, for the same reason (Russell v. State, 88 Tex. Crim. Rep. 512, 228 S. W. 566).

We quote so much of article 820M as may be necessary, deleting for convenience the portions not here required: "Whenever an automobile . . . strikes any person, . . . the driver of, and all persons in control of such automobile, . . . shall stop, and shall render to the person struck . . . all necessary assistance, including the carrying of such person . . . to a physician or surgeon for medical or surgical treatment, if such treatment be required, or if such carrying is requested by the person struck."

Appellant was charged under this law. If the law can be held good, the indictment is sufficient.

Counsel for appellant, in his brief, admits the article is commendable in purpose. This is true with reference to the whole of the act in question. Not until 1917 did our legislature undertake general legislation on the subject, but in many states the necessity for statutory enactments to supplement the common-law rules was recognized many years before. With the constantly increasing use of motor vehicles both for business and pleasure purposes, the demand for road regulations in their use had become imperative. The driver who may

.strike a person or vehicle to-day may to-morrow himself be the victim.

The general rule for the construction of statutes, of course, applies, and has been recognized not only by the courts of our own but of other states, as well as by the text-writers on motor vehicles.

The following quotation is from Black's Interpretation of the Law, § 115, and is copied as § 130, p. 93, in "The Law Applied to Motor Vehicles," by Blakemore: "Statutes enacted by the legislature in the exercise of the police power, for the promotion or preservation of the public safety, health, or morals, may sometimes impinge upon the liberty of individuals, by restricting their use of their property, or abridging their freedom in the conduct of their business. When this is the case, such statutes ought always to receive such a construction as will carry out the purpose and intention of the legislature with the least possible interference with the rights and liberties of private persons; such enactments being 'designed to further the general welfare by derogating from the liberty of a few.'"

Likewise, in Huddy on Automobiles, § 68, we find the following:

"A statute creating a criminal offense is entitled to a strict construction so that the application of the act will not be extended beyond the clear intention of the lawmakers. But nevertheless the guiding principle in the interpretation of statutes is the ascertainment of the legislative intent, and a statute should not receive such a narrow construction as to exclude those acts intended to be included within its application.

"A common-sense interpretation must be given to a statute, considering the whole statute in construing a part thereof. In construing a motor vehicle law, the court should give force and effect to every part of it, to carry out the intent of the legislature, if possible, such intent to be ascertained from the lan-

guage in its plain and natural meaning."

Also part of § 241: "A highway is for the use of the public at large; indeed, it has been defined to be a road which every citizen has a right to use. This being so, it is necessary that the travel and traffic on the highway shall be governed by certain laws, so that the rights of each citizen may be certain of protection."

Section 775 from same author: "Statutes have been enacted in some jurisdictions requiring an automobilist, upon causing injury to property or to another traveler, to stop his machine, and furnish his name or other means of identification to the traveler injured, or to a police officer, or to give assistance to the person injured. The flight of an automobilist after causing injury to another is deemed such a serious offense that it is made a felony in some jurisdictions. The constitutionality of such a statute is affirmed by the courts, though there is a strong argument that it compels one to give evidence against himself. Such a law is affirmed on the ground that it is within the police power of the state."

Since motor vehicles have become a common means of travel upon the public highways, many statutes have been enacted in an effort to protect the public health and safety from the consequences of the use of automobiles upon the roads and streets. Some of these statutes have been assailed upon the ground that they manifested an exercise of power not inherent in the legislative department of the government, and others have been attacked upon the ground that in them are found unreasonable requirements. 6 R. C. L. p. 397; Berry, Automobiles, § 1601; Ex parte Parr, 82 Tex. Crim. Rep. 528, 200 S. W. 404; State v. Mayo, 106 Me. 62, 26 L.R.A.(N.S.) 502, 75 Atl. 295, 20 Ann. Cas. 512; People v. Rosenheimer, 209 N. Y. 115, 46 L.R.A.(N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161; State v. Sterrin, 78 N. H. 220, 98 Atl. 482.

In some of these decisions, statutes requiring that one causing an injury by collision with an automobile shall do some affirmative act, such as furnishing information showing his name and address, have been upheld, for the reason thus stated in one of the opinions: "The legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the state. It has been so held in *State v. Mayo*, 106 Me. 62, 26 L.R.A.(N.S.) 502, 75 Atl. 295, 20 Ann. Cas. 512, and *Com. v. Kingsbury*, 199 Mass. 542, L.R.A.1915E, 264, 127 Am. St. Rep. 513, 85 N. E. 848. Doubtless the legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person must be exercised in a mode consistent with the equal rights of others to use the highway. That the motor vehicle, on account of its size and weight, of its great power, and of the great speed which it is capable of attaining, creates, unless managed by careful and competent operators, a most serious danger, both to other travelers on the highway and to the occupants of the vehicles themselves, is too clearly a matter of common knowledge to justify discussion." *People v. Rosenheimer*, supra.

And, in another, the conclusion is stated in the following language:

"The defendant also claims that the statute is unconstitutional, in that it requires him to furnish evidence which might be used against him in a criminal proceeding. Bill of Rights, art. 15. The same question has been raised in other states, and in each the conclusion has been reached that the statute is valid. *People v. Rosenheimer*, 209 N. Y. 115, 46 L.R.A.(N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161; *Ex parte Kneedler*, 243 Mo. 632, 40

L.R.A.(N.S.) 622, 147 S. W. 983, Ann. Cas. 1913C, 923; *People v. Diller*, 24 Cal. App. 799, 142 Pac. 797. In each of these cases it is pointed out that the operation of an automobile upon the public highways is not a right, but only a privilege which the state may grant or withhold at pleasure (*Com. v. Kingsbury*, supra), and that what the state may withhold it may grant upon condition. One condition imposed is that the operator must, in case of accident, furnish the demanded information. This condition is binding upon all who accept the privilege.

"The statute confers a privilege which the citizen is at liberty to accept by becoming a licensee or not as he pleases. Having accepted the privilege, he cannot object to any conditions which have been attached thereto by a grantor, with power to entirely withhold the privilege." *State v. Corron*, 73 N. H. 434, 445, 62 Atl. 1045, 6 Ann. Cas. 486; *State v. Sterrin*, supra.

We have just recently received a supplemental brief from appellant, citing the *Russell Case*, supra, and urging that it and the *Griffin Case*, supra, and other authorities cited by him, are decisive of this case. In the subsequent discussion we are not unmindful of the principles upon which these cases were disposed of, but have reached the conclusion that the law in question can be upheld without doing violence thereto.

A party operating an automobile which may injure another in collision ought to be impelled by humanitarian motives, in the absence of any law, to tender aid in an effort to minimize the result of the injury. In doing this he would naturally and instinctively do the thing which to him, under the circumstances, appeared to be proper and necessary to alleviate suffering. If his own car was injured so that it might still be operated, perhaps the most natural thing for him to do would be to try and get the injured persons

to a physician or surgeon as quickly as possible.

The statute ought not be given such a construction as would or might result in manifest harm to a person accused of violating it. It would be impracticable for the legislature to undertake to say that in a certain kind of accident this particular kind of aid should be extended, and in another accident aid of some other character would be proper. Every case must be governed by the circumstances attendant upon it. What would appear to be "all necessary aid" in one case might not so appear in the next one; likewise, it might reasonably appear to be necessary to get the injured person to a physician or surgeon for treatment in one instance, and not in another; hence the fact that it would be futile for the lawmakers to undertake to be specific in particularizing what aid should be rendered becomes apparent. That the statute contains a humane provision cannot be gainsaid. If it can be construed to require that to be done which ought to be done even in the absence of the law, and without hurt to the individual, it ought, as so construed, to be upheld.

It would be manifestly unfair, in measuring the extent of the aid rendered, to have the court or jury pass upon that issue in the light of developments subsequent to the time of the accident. An injury might appear slight at the time, suggesting little necessity for aid of any kind, but internal injuries of serious nature might develop later. An accused could not be held criminally liable for a failure to do what was not reasonably apparent to him as necessary at the time. One acting in apparently necessary self-defense does so from what appears to him, viewed from his standpoint at the time, with all the facts and circumstances within his knowledge, and not from the viewpoint of somebody else, or the jury, in the light of subsequent events.

We have reached the conclusion

that a fair and reasonable construction of the statute in question is that the party should render all the aid which would reasonably appear to him, as an ordinary person, at the time to be necessary, including taking the injured persons to a physician or surgeon, if so requested by them, or if it reasonably appears to accused that medical treatment be necessary. We think the word "required," in the connection used, means only "necessary." The jury ought to be so instructed (if it be an issue) that, if accused gave all the aid of which under the circumstances reasonably appeared to him to be necessary, he should be acquitted, and that, if under all the circumstances it did not reasonably appear to him to be necessary to carry the injured parties to a physician or surgeon for treatment, he could not be convicted for a failure to do so, unless he was requested by them to be so taken, and declined.

**Automobile—
statute requiring aid to
person struck—
construction.**

**Definition—
"required."**

We can perceive no violence to the general rule of construction in reaching this conclusion. No new provision has been read into the law. We only construe what "all necessary aid" means in the statute, and say it must be determined from an accused's standpoint as to how much and what character of aid appeared to be necessary under any given state of facts. Surely the driver of an automobile should have no trouble in understanding in advance that, in case of an accident, he is expected and required to do what appears to him to be necessary to alleviate suffering.

We think no error was committed by the trial judge in overruling the motion to quash the indictment and in arrest of judgment, because of the matters urged against the sufficiency of the statute in question.

Appellant complains that the indictment is defective in not alleging

(— *Tex. Crim. Rep.* —, 233 S. W. 1097.)

that accused "knowingly" struck the party injured, or that, "knowingly" he had struck him, he failed to stop and render aid.

**Indictment—
injury by
automobilist—
knowingly.**

We cannot agree to this contention. The word "knowingly" or "knowing" does not appear in the description of the act denounced as an offense, and it is not necessary for the state to so allege. If it becomes an issue on the trial, lack of knowledge on the part

of a defendant that he had injured someone would excuse him, and be a defense to a prosecution under the article in question. The trial judge recognized this as the law, and submitted that issue to the jury.

**Automobile—
lack of knowl-
edge as defense
to prosecution
—failure to
render assist-
ance to person
struck.**

Believing the article of the statute should be upheld as construed in this opinion, the judgment of the trial court is affirmed.

ANNOTATION.

Construction and effect of statute in relation to conduct of driver of automobile after happening of an accident.

With regard to a statute making it a felony for one who has caused injury by the operation of a motor vehicle, to leave the place of accident without leaving his name, address, and license number, the court in *Ex parte Kneedler* (1912) 243 Mo. 632, 40 L.R.A.(N.S.) 622, 147 S. W. 983, Ann. Cas. 1913C, 923, said: "The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence."

The word "causing" in a statute defining the offense, "whoever knowingly goes away without stopping and making himself known after causing injury to any person or property," is used in the ordinary sense of the word, and does not mean "who was legally responsible for the death." *State v. Verrill* (1921) — Me. —, 112 Atl. 673. And see *People v. Rosenheimer* (N. Y.) *infra*.

In *People v. Finley* (1915) 27 Cal. App. 291, 149 Pac. 779, it was held that the express purpose of the Motor Vehicle Act (Stat. 1913, 649) is to repeal only those acts and parts of acts which are inconsistent therewith, and so, since the Motor Vehicle Act is si-

16 A.L.R.—90.

lent upon the subject of rendering medical or other assistance to an injured person, the provision of the Penal Code (§ 367c), denouncing as felony the failure to render medical or other assistance, and providing the punishment therefor, is in full force and effect.

The object of the provision, "knowing that injury has been caused to a person or property due to the culpability of the said operator, or to accident," in a statute which provides that such a one shall be guilty of a felony if he leaves the place of such injury or accident without stopping and giving his name, residence, etc., is to make the statute more clearly applicable to all cases, however caused, than would be apparent if these words were omitted. *People v. Rosenheimer* (1913) 209 N. Y. 115, 46 L.R.A.(N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161.

Knowledge of accident or injury.

But the knowledge of injury to personal property, within the meaning of a statute requiring the operator of a motor vehicle to stop, does not mean an absolute, positive knowledge. If injury is inflicted under such circumstances as would ordinarily superinduce the belief in a reasonable person that injury would flow, or had flowed, from the accident or collision, then it is the duty of the motor operator to

stop his vehicle. *Woods v. State* (1916) 15 Ala. App. 251, 73 So. 129.

Knowingly to go away without stopping and making himself known, one must be aware that there has been harm done; it must be present in his mind that there has been an injury; and then, with that in his mind, he must deliberately go away without making himself known. *State v. Verrill* (1921) — Me. —, 112 Atl. 673.

And see the reported case (*SCOTT v. STATE*, ante, 1420) to the effect that lack of knowledge of injury is matter of defense.

And in *Robertson v. McAllister* (1912) 19 Can. Crim. Cas. 441, 5 D. L. R. 476, in holding that a conviction of the driver of an automobile, because he did not "return to the scene of the accident" when his automobile injured the buggy of another, must be quashed, since he did not know of the accident, the court said that means of knowledge, even where such means are neglected, are not sufficient, but that there must be actual knowledge. And the court added that it was satisfied that in this case neither the driver of the motor nor the driver of the buggy knew that the buggy had been injured, since the evidence showed that the driver of the motor stopped his car and asked the occupant of the rear seat if the buggy was injured, and was assured that it was not; and also that the driver of the buggy did not intimate that any injury had been done, although he drove past the auto, and was later himself passed by it.

And in upholding the constitutionality of a provision of the Code, as against the contention that it did not expressly embody in its phraseology words limiting its application to those persons who knowingly caused their vehicles to collide with those occupied by others, the court in *People v. Fodern* (1917) 33 Cal. App. 8, 164 Pac. 22, said: "Our reading of the section in question convinces us that the element of knowledge of the fact of the collision is necessarily to be implied, from the requirements of the act to the effect that drivers of such vehicles must stop and render aid to those

who may possibly have been injured in the collision."

In a prosecution under a statute declaring that one operating a motor vehicle who, "knowing" that an injury has been caused to a person or to property due to his culpability or to accident, leaves without giving his name, residence, and operator's license number to the injured party, or reporting the same to the nearest police station or office, shall be guilty of felony, it was said in *People v. Curtis* (1916) 217 N. Y. 304, 112 N. E. 54, Ann. Cas. 1917E, 586, apparently as a matter of construction of the terms of the statute, that it was essential to a conviction, in a case of collision due to the skidding of defendant's car, that the jury should be satisfied beyond a reasonable doubt that the defendant knew that an injury had been caused. It was so declared notwithstanding it was apparently admitted that the defendant knew of the fact of the collision. There was, however, evidence that defendant was assured by a companion that there had been no injury as the result of the collision; and it does not seem probable that the court, as the statement might seem to imply, meant that the defendant's ignorance of the fact of injury would be a defense, even though he made no effort to learn the facts in that regard. In a later appeal of this case in (1919) 225 N. Y. 519, 122 N. E. 623, in affirming a conviction, the court stated that there was an obligation imposed upon defendant as the operator of the automobile, no matter what he had been told, to ascertain for himself whether the occupant of the other automobile was injured or his property damaged; and that had he discharged that obligation he would, before leaving the scene of the accident, have given to the injured party his name, residence, street number, and the number of his license.

Requirement that operator stop.

A statute which provides that "any person operating a motor vehicle who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to

accident, leaves the place of said injury or accident without stopping and giving his name, residence including street and number and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of the said injury or accident, then reporting the same to the nearest police station or judicial officer, shall," etc., was said in *People v. McLaughlin* (1917) 100 Misc. 340, 165 N. Y. Supp. 545, 36 N. Y. Crim. Rep. 13, affirmed in (1918) 185 App. Div. 945, 173 N. Y. Supp. 917, to mean that unless a malefactor of this character is injured personally, or a situation is somehow created whereby an immediate report cannot be made by him, he is required to stop and report immediately. In this case it was held that there was evidence to support a conviction under such statute, where it was clearly shown that after the mishap the operator of the automobile, being uninjured and his machine uninjured, did not stop, but, on the contrary, ran straight on for a number of miles and turned into his own yard.

And although one injured by being struck by an automobile was unconscious, and no other person was present, the driver of the automobile will, if he leaves without waiting for the arrival of someone who might demand the information, be guilty of violating a statute which provides that "any person operating a motor vehicle, knowing that injury has been caused to a person, shall forthwith bring his motor vehicle to a stop, return to the scene of the accident, give to any proper person demanding the same his name and address, the number of the driver's license, the registration number of the motor vehicle, and the name and address of each occupant thereof." *State v. Sterrin* (1916) 78 N. H. 220, 98 Atl. 482. The court stated: "It is apparent that the legislature could not have intended to make it easier for the operator of a car to escape detection, in case of severe injury like the one here inflicted, than where the injury was trifling. The object was to secure information in cases where identification might be difficult if the statute was not observed. Nor is it

true that this intent is not fairly expressed by the language used. The statute means that the person causing the injury must return to the place of the accident, and there remain for a sufficient time to give 'proper persons' a reasonable opportunity to demand of him the information which the statute requires that he should give upon such demand. It is manifest that what conduct will, or will not, amount to a compliance with this obligation, must vary with the varying circumstances of the individual cases."

A criminal complaint under a statute providing that "every driver of a motor vehicle after knowingly causing an accident by collision or otherwise or knowingly injuring any person, horse, or vehicle shall forthwith bring his motor vehicle to a full stop, return to the scene of the accident and give to any proper person demanding the same the number of his driver's license, the registration number of the motor vehicle, and the names and residences of each and every male occupant of said motor vehicle," was not insufficient in that it only stated that the respondent did not bring the motor vehicle to a full stop, or return to the scene of the accident. *State v. Smith* (1909) 29 R. I. 513, 72 Atl. 710. It was contended that the essential parts of this provision of the law are, to bring the motor vehicle to a full stop, return to the scene of the accident, give the number of the driver's license, registration number of the motor vehicle, and names and residences of each and every male occupant of the motor vehicle—and that all of these must be alleged in the complaint. The court, however, said: "These objections are not well founded. As we have already stated, if the driver of a motor vehicle, after knowingly causing an accident, etc., fails to return to the scene of the accident, he puts it out of the power of any person there to demand of him the numbers, names, and residences referred to in the statute. If he is not there he cannot be interrogated. If he cannot be examined there, he cannot give the information there. If he absconds, it follows that he cannot give the required answers at the place

of the accident. He is commanded to do it in person, on demand. If he had returned to the scene of the accident, and no one had demanded the numbers, names, and residences, he would not have been obliged to volunteer such information—it is only after demand that the statute requires him to make answer. The complaint is free from the objections urged against it."

Under a statute providing that, "whenever an automobile . . . collides with any vehicle containing a person, the driver of . . . such automobile . . . shall immediately cause such automobile . . . to stop and shall render . . . to the occupant of the vehicle collided with all necessary assistance including the carrying of such . . . occupant to a physician or surgeon for medical or surgical treatment, if such treatment be required or if such carrying is requested by . . . any occupant of the vehicle struck," the court in *People v. Kaufman* (1920) — Cal. App. —, 193 Pac. 953, in considering this question, said: "The purpose and propriety of the act are apparent. It was designed to prohibit, under pain of severe punishment, negligent or wanton drivers of motor cars from seeking to evade civil or criminal prosecutions by escape before their identity could be established, and, similarly, to prohibit all drivers, whether negligent or not, from leaving persons injured in collisions with cars driven by them, in distress and danger for want of proper medical or surgical treatment. It was not designed to be used as a club to exact monetary settlement for injuries, either to persons or property. One of two automobile drivers who may have been equally negligent in bringing about a collision in which neither driver was injured, by first demanding that he be carried to a hospital or surgeon, could not, by the expedition of his demand, put the stamp of felony upon the other, who might refuse the request made in the terms of the statute, but made in bad faith. In the present case the complaining witness was driving alone. With the appellant, in the car he was driving,

were four other persons. If none of them was hurt or required medical or surgical treatment, any one of the five in appellant's car might first have asked the complaining witness for transportation to a surgeon, and he might have been accused of felony if he had said, 'There is no reason why I should provide transportation for you.' Upon no reasonable hypotheses can the criminality of either of two actors be made to depend entirely upon which of the two shall first make a request of the other. Every statute must receive reasonable construction, and this is particularly true of statutes defining crimes."

Requirement that operator make himself known.

To make oneself known is to disclose one's identity—to show or make known to some person or persons in the vicinity who one is, and what one's name is, and where one may be found; and so it would not be a sufficient compliance with the statute for the operator of an automobile to furnish someone with the number of the car, since the operator might not be the owner of the car, and that might not be sufficient for the purpose of ascertaining who was the person who might be wanted. *State v. Verrill* (1921) — Me. —, 112 Atl. 673.

And in construing a statute which made it an offense for the driver of an automobile knowingly to go away without stopping and making himself known, after causing injury to person or property, the court in *Com. v. Horsfall* (1913) 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682, said: "Its obvious purpose is to enable those in any way injured by the operation of an automobile upon a public way to obtain forthwith accurate information as to the person in charge of the automobile. It should be interpreted in such a way as to effectuate this end. Manifestly, it imposes active and positive duties upon the operator of the automobile. It is not satisfied by stopping at some remote, obscure, or inaccessible place, nor by a mere passive willingness to answer inquiries. In unmistakable language it requires the tendering on the spot,

and immediately, of explicit and definite information as to himself, of a nature which will identify him readily and make it simple and easy to find him thereafter. While the statute does not state in terms to whom this information shall be given, its plain indication is that it must be furnished to those whose person or property has been injured, if reasonably possible, and, if not, to someone in their interest, or to some public officer or other person at or near the place at the time of injury. But the inhibited conduct consists of 'knowingly' going away without giving this information. There are many statutes which prohibit the performance of a certain act, without regard to the intent of the actor or his knowledge that elements are present which constitute a crime. . . . It would have been simple for the legislature to have made the act of going away by the driver of the automobile, without making himself known, after injuring person or property, a crime, and this would have been accomplished by omitting the word 'knowingly' from the statute. The insertion of this word cannot be treated as immaterial. It is a principle of statutory construction that all words found in the act shall be given effect, if possible. 'Knowingly' is a word frequently inserted in statutes creating crime. In such connection, it commonly imports a perception of the facts requisite to make up the crime. For one who operates an automobile 'knowingly' to go away without making himself known requires a consciousness not only of the fact that he is going away, but of the further fact that he has not made himself known. If in truth he has delegated the duty of revealing his identity to an agent, and honestly and with good reason supposes that this delegated duty has been performed, he cannot be said 'knowingly' to have failed to do what the statute requires, even if the agent did not discharge his duty. If the transaction was genuine throughout, the driver of the automobile may thoroughly, though mistakenly, believe that the requirement of the law has been observed."

In *People v. Rosenheimer* (1913) 209 N. Y. 115, 46 L.R.A.(N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161, supra, the court stated: "The statute does not require the operator of the motor vehicle to state the circumstances of the occurrence tending to show his responsibility, but merely to stop and identify himself. Undoubtedly it does require him to make known a fact which will be a link in the chain of evidence to convict of crime, if in fact he has been guilty of one. Whether the compulsory furnishing of such a link is a constitutional violation may be questioned."

Cases holding that the requirement of certain information does not offend the constitutional provision against self-crimination are not within the scope of the annotation.

Under a statute (Motor Car Act 1903) which provides that, if a driver who commits an offense under a section thereof refuses to give his name and address, that refusal shall in itself constitute an offense under the act, and which further provides that it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he also shall be guilty of an offense under the act, in order that the owner of the car may be guilty of the offense, it is not essential that the information first be required of the driver. *Rex v. Hankey* [1905] 2 K. B. (Eng.) 687, 74 L. J. K. B. N. S. 922, 93 L. T. N. S. 107, 69 J. P. 219, 54 Week. Rep. 80, 21 Times L. R. 409, 3 L. G. R. 554, 21 Cox, C. C. 1. The court stated that that part of the section creates a distinct offense on the part of the owner, and to say that the owner is bound to give the required information only after a refusal by the driver would be to defeat the whole object of the latter part of the section, which is to meet the difficulty, and even the impossibility, which frequently arises, of getting the name from the driver himself. It appears that in this case the driver did not stop at all, and the party complaining did not know who he was. J. H. B.

JOSEPH DUTEAU, Appt.,
v.
ARTHUR C. DRESBACH, Respt.

Washington Supreme Court (Dept. No. 2) — December 28, 1920.

(— Wash. —, 194 Pac. 547.)

Contract — to procure evidence — validity.

1. A contract by a layman with an attorney who has taken a case on a contingent fee, to seek out the witnesses and keep in touch with them and assist in every way possible to obtain a judgment, for a share in the fee, is void as against public policy.

[See note on this question beginning on page 1433.]

Appeal — judgment on pleadings — pleadings, a defense to which no allegation not answered taken as answer was made must be taken as true. true on appeal.

2. In case of judgment upon the

APPEAL by plaintiff from a judgment of the Superior Court for King County (Smith, J.) in favor of defendant in an action brought to recover an amount alleged to be due and unpaid for plaintiff's share of attorney's fees. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. R. B. Brown for appellant.

Mr. Benton Embree, for respondent:

A contract to pay for procuring evidence to be used in a cause, coupled with the condition that the contractee's right to compensation shall depend upon the character of the testimony to be procured, or upon the result of the suit in which the same is to be used, is contrary to public policy and void.

6 R. C. L. 757; 13 C. J. p. 448; Wellington v. Kelly, 84 N. Y. 543; Goodrich v. Tenney, 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44; Quirk v. Muller, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077; Neece v. Joseph, Ann. Cas. 1912A, 655, and note, 95 Ark. 552, 30 L.R.A. (N.S.) 278, 129 S. W. 797; Clark, Contr. p. 429; Hughes v. Mullins, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209; Patterson v. Donner, 48 Cal. 369; Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154; Sherman v. Burton, 165 Mich. 293, 33 L.R.A. (N.S.) 87, 130 N. W. 667; Eggleston v. Pantages, 103 Wash. 458, 175 Pac. 34; Reed v. Johnson, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381; Stirtan v. Blethen, 79 Wash. 10, 51 L.R.A. (N.S.) 623, 139 Pac. 618; Lewer v. Cornelius, 72 Wash. 124, 129 Pac. 911; Alpers v. Hunt, 86 Cal. 78, 9 L.R.A. 483, 21 Am. St. Rep.

17, 24 Pac. 846; Langdon v. Conlin, 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834.

Where an issue is tendered by the pleadings upon a material matter it is error to render judgment upon such pleadings.

Rourk v. Miller, 3 Wash. 73, 27 Pac. 1029; 11 Enc. Pl. & Pr. p. 1032.

Mount, J., delivered the opinion of the court:

This appeal is from a judgment on the pleadings rendered by the lower court upon motion of the defendant. The plaintiff has appealed.

The appellant's complaint, in substance, alleges that in the year 1907 one Albert E. Tills was injured in an accident on the Great Northern Railroad in this state, and was thereby greatly damaged; that the defendant, Arthur C. Dresbach, was at the time engaged as a practising attorney at bar of the courts of this state, and was employed as such attorney by said Albert E. Tills to prosecute an action against the Great Northern Railway Company for damages on account of the injury to Mr. Tills; that pursuant to

that employment Mr. Dresbach did bring an action and procured a judgment in the sum of \$20,000 against the railroad company; that this judgment, together with interest, was collected by Mr. Dresbach, and from the proceeds thereof he received the sum of \$10,000 for his attorney's fee in that cause; that at the time Mr. Dresbach was employed by Mr. Tills, it was agreed between the appellant and Mr. Dresbach that the appellant would hunt up testimony and evidence in behalf of A. E. Tills, in order that said Dresbach might be able to secure a judgment in said cause, and would seek out the witnesses and keep in touch with them, find all the evidence and testimony with reference to the merits of said action, and bring the same to said Arthur C. Dresbach, and assist in every way possible to obtain judgment against the Great Northern Railway Company; that said Arthur C. Dresbach agreed to pay to the appellant one half of all the fees that the said Dresbach should obtain in that cause; that the appellant devoted his entire time traveling over the state, and obtained evidence in support of the claim of the plaintiff in that case, found all the witnesses, and kept in touch with them, and brought said witnesses and testimony to the said Dresbach; that upon their evidence the judgment was secured; that Dresbach has not paid the appellant one half of his attorney's fee received in that case, but has paid only the sum of \$265, and alleges that there remains due \$4,735, for which he prays judgment.

A demurrer to this complaint was overruled, and thereupon the respondent answered the complaint, admitting his employment by Mr. Tills, and that he recovered the judgment of \$20,000, and received one half thereof as his fees, but denied that he had made any contract to divide his fees with the appellant. As an affirmative defense he alleged that he was employed by Mr. Tills as an attorney to prosecute

the action against the Great Northern Railway referred to in the complaint; that pursuant to that employment he prosecuted the case to judgment, and received his fees and compensation for his services in the sum of \$10,000; that in that case it was agreed between Tills and respondent that respondent should receive as his fees one half of whatever amount should be recovered in said cause by Tills against the Great Northern Railway Company, and, in the event nothing was so recovered, then the respondent should receive no compensation for his services in that cause, which agreement was at all times known to appellant. After this answer was filed and no reply was made thereto, the respondent moved the court for a judgment on the pleadings upon the ground that the pleadings showed that the contract alleged in the plaintiff's complaint to have been entered into between the respondent and appellant is in contravention of public policy and unenforceable and void. The court took that view of the pleadings, and granted judgment in favor of the respondent and dismissed the action.

It is argued by appellant that the court erred in sustaining the motion for judgment on the pleadings. His reason therefor, as we gather from the brief, is that the alleged contract between the respondent and the appellant was denied by the respondent's answer. It is argued that because of this denial there was a question for the jury as to whether such a contract was entered into. The affirmative defense alleges, in substance, that the respondent took the case of Mr. Tills against the Great Northern Railway Company upon a contingent fee of one half thereof, and in case of no recovery there was no fee, and that the appellant knew of that contract. This defense must be taken as true, because no answer was made thereto. The only issue left in the case, therefore, was whether

Appeal—
judgment on
pleadings—
allegation not
answered taken
as true.

or not the respondent entered into a contract with the appellant to divide his fee with the appellant upon his agreement to seek out the evidence "in order that said defendant might be able to secure a judgment in said cause," knowing that Mr. Dres-

Contract—to
procure evi-
dence—validity.

bach's fee was contingent upon a judgment being secured. We have no doubt that a contract of this kind is against public policy and void. The rule is stated in 6 R. C. L. p. 757, § 164, as follows: "Contracts to pay for collecting and procuring testimony to be used in evidence, coupled with the condition that the contractee's right to compensation depends upon the character of the testimony procured or upon the result of the suit in which it is to be used, have been universally condemned by the courts as contrary to public policy, for the reason that such agreements hold out an inducement to commit fraud or procure persons to commit perjury. The contracts themselves are pernicious in their nature. They create a powerful pecuniary inducement on the part of the agents so employed that the testimony should be given of certain facts, and that a particular result should be had."

If the allegations of the complaint in this case are true, and if the allegation of the affirmative answer is also true, which we think must be admitted under the pleadings here, then that rule applies with all its force to this case, for here Mr. Dresbach was employed upon a contingent fee to prosecute the case of Tills against the Great Northern Railway Company. In case he succeeded he was to obtain one half of the recovery. In case he did not succeed he was to receive no fee. The appellant in this case knew of these facts, and undertook to furnish testimony in order that Mr. Tills might secure judgment. His right to compensation depended upon the character of the testimony which he might procure and upon the result of the suit. Such contract clearly comes within the rule

above stated. In *Reed v. Johnson*, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381, we said, quoting from 22 Am. & Eng. Enc. Law, p. 1014, ¶ 4: "Equity will not assume jurisdiction to compel the specific performance of a contract that is illegal in any of its features. If the nature of the contract is such that its enforcement would be in violation of public policy, specific performance will not be granted. The least taint of illegality or want of equity will preclude a decree."

In *Delbridge v. Beach*, 66 Wash. 416, 119 Pac. 856, we said: "It is a well-settled principle of law that agreements against public policy and sound morals will not be enforced by the courts."

After citing a number of authorities and quoting from *Brown v. First Nat. Bank*, 137 Ind. 655, 24 L.R.A. 206, 37 N. E. 158, we said: "It follows, to state the rule comprehensively, that all agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void, though not open to the charge of actual corruption. 3 Am. & Eng. Enc. Law, 879-881; *Bishop, Contr.* § 549. And this is true, regardless of the good faith or intent of the parties at the time the contract was entered into, or the fact that no evil resulted by or through the contract."

In *Lewer v. Cornelius*, 72 Wash. 124, 129 Pac. 911, we said: "A court will not knowingly aid in the furtherance of an illegal transaction. And in harmony with this principle, it does not concern itself as to the manner in which the illegality of a matter before it is brought to its attention. If such illegality appears in the pleadings of either party, it will not inquire into the technical accuracy of such pleading; if it appears in the statement of witnesses at the trial, it will not inquire into the technical admissibility of such statement as evidence; but will, in either case, start an inquiry of its own, and if it be

found that the differences which it is called upon to adjudicate arise out of an illegal transaction, it will leave the parties where it found them, to work out their differences as best they may"—citing a number of cases.

In *Eggleston v. Pantages*, 103 Wash. 458, 175 Pac. 34, we said: "It is well settled that agreements against public policy and sound morals will not be enforced by the courts. It is a general rule that all agreements relating to proceedings in courts which may involve anything inconsistent with the full and impartial course of justice therein are void, though not open to the

actual charge of corruption. This is true, regardless of the good faith or intent of the parties at the time the contract was entered into, or the fact that no evil resulted by or through the contract."

Taking the pleadings in this case all together, we think it is plain that the contract here sued upon, even if entered into, was, under the allegations of the answer, which were not denied, plainly against public policy and therefore void.

The judgment appealed from is therefore affirmed.

Holcomb, Ch. J., and Mitchell, Main, and Tolman, JJ., concur.

ANNOTATION.

Validity of employment to obtain evidence.

- I. Introductory, 1433.
- II. Champerty and maintenance, 1433.
- III. Merely employing one to get information, 1435.
- IV. Contract to furnish prescribed kind or amount of evidence, 1437.
- V. Effect of contingent fee:
 - a. In general, 1440.
 - b. Contract to share attorney's fee, 1440.
- VI. Purpose of evidence or character of contractor, 1442.

I. Introductory.

This annotation will be limited strictly to a consideration of contracts by which, for a consideration, one undertakes to expend time and effort to obtain evidence for use in a lawsuit, either by securing witnesses who will testify in the suit, or documents which may be used as evidence. This excludes all cases where extra compensation is offered a witness to disclose facts already in his possession, or which he may discover by effort. The latter class of cases will be found in the annotation to *Thatcher v. Darr*, post, 1442. Cases dealing with the rights of persons who act upon public offers of reward will also be excluded because the question of rewards may well become a subject of independent consideration, since other questions are more frequently involved than the

mere question of the validity of such a contract. Contracts by which one is employed, for a stated compensation, merely to look up witnesses and ascertain what testimony they are willing to give, are generally upheld. But any attempt to effect a particular result by proving a particular fact, or establishing the claim of the employer, is regarded as invalid, as tending to subornation of perjury.

II. Champerty and maintenance.

In England, both the statutes and the common law looked with disfavor upon any attempt by one person to foment litigation between others. Therefore, all contracts by which one undertook to finance or otherwise assist another in a litigation, or to purchase the chose in action for the purpose of prosecuting the action himself, were held to be void. Some of the cases in which the agreement was to furnish evidence for a lawsuit have been held to be obnoxious to this rule. Therefore, it has been held that contracts to furnish the evidence which would enable the other contracting party to win a suit in which he was alleged to be interested, for a share of the recovery, were void. *Powell v. Knowler* (1741) 2 Atk. 224, 26 Eng. Reprint, 539; *Parker v. Baylis* (1800)

2 Bos. & P. 73, 126 Eng. Reprint, 1163; Stanley v. Jones (1831) 7 Bing. 369, 131 Eng. Reprint, 143; Reynell v. Sprye (1852) 1 DeG. M. & G. 660, 42 Eng. Reprint, 710, 21 L. J. Ch. N. S. 633; Hutley v. Hutley (1873) L. R. 8 Q. B. (Eng.) 112, 42 L. J. Q. B. N. S. 52, 28 L. T. N. S. 63; 21 Week. Rep. 479.

Parker v. Baylis (1800) 2 Bos. & P. 73, 126 Eng. Reprint, 1163, was an action to recover upon a promise by the next of kin of one holding property in trust that, in case the beneficiary would bear the expense of having her appointed administratrix and furnish evidence to enable her to receive dividends then due on the trust property, the administratrix would turn them over to the beneficiary, and it was held that there was no consideration to support the promise. There is no discussion of the proposition as to furnishing evidence, but the case goes off on the ground that the money sought was not assets of the estate, but was received by the administratrix in the character of trustee, and therefore could not be taken out of the general assets of the estate.

In Hutley v. Hutley (1873) L. R. 8 Q. B. (Eng.) 112, 42 L. J. Q. B. N. S. 52, 28 L. T. N. S. 63, 21 Week. Rep. 479, it appeared that an agreement to secure evidence was merely part of an undertaking by a relative of an heir at law, to advance money, instruct an attorney, and obtain evidence to contest the will by which the heir was deprived of the property, for a share of the recovery. The agreement was held void as amounting to champerty.

One who undertakes to make out another's title to an estate for a share in the recovery cannot have a specific performance of the agreement, but will be left to his action at law. Powell v. Knowler (1741) 2 Atk. 224, 26 Eng. Reprint, 539.

A court of equity will discourage an agreement by which one undertakes to ascertain and establish a doubtful right in consideration of sharing in the recovery, whether it amounts strictly to a champerty or maintenance or not. The court says such an agreement may or may not have amounted

strictly in point of law to champerty or maintenance so as to constitute a punishable offense, but must be considered clearly against the policy of the law, clearly mischievous, clearly such as a court of equity ought to discourage and relieve against. Reynell v. Sprye (1852) 1 DeG. M. & G. 660, 42 Eng. Reprint, 710, 21 L. J. Ch. N. S. 633.

● A bargain by a man who has evidence in his own possession respecting matters in dispute between third persons, and who professes to have the means of procuring more evidence, to purchase a share in the recovery at the price of the evidence which he possesses or can procure, cannot be enforced. The court said that the offense of champerty consisted in purchasing an interest in the thing in dispute, with the object of maintaining and taking part in the litigation. It continues: In the present case Stanley does purchase an interest in the subject-matter of the dispute, not in terms indeed, but in substance and effect, since he bargains distinctly for a share in the sum to be recovered. He does not stipulate that he is to furnish money for carrying on the suit, or that he is to carry it on himself, but he stipulates that he would and should use and exert his utmost influence and means for procuring such evidence as should be required to substantiate the claim. And if there is any difference between this contract and direct champerty, it appears to be strongly against the legality of this contract. The bargain to furnish and to procure evidence for the consideration of a money payment, in proportion to the effect produced by such evidence, has a direct and manifest tendency to pervert the course of justice. Stanley v. Jones (1831) 7 Bing. 369, 131 Eng. Reprint, 143.

A contract by one to furnish the evidence and bear the expense of a suit to establish the title of an alleged heir to valuable property, in consideration of a large share of the recovery, is so mischievous and tainted with champerty that a court of equity will not enforce it. Casserleigh v. Wood (1902) 56 C. C. A. 212, 119 Fed. 308.

In *Wood v. Casserleigh* (1902) 30 Colo. 287, 97 Am. St. Rep. 138, 71 Pac. 360, which involved the same contract as was passed upon in the preceding case, the court reached a different result, saying: The contract in question does not show upon its face that plaintiff was to procure testimony of any certain character, or furnish sufficient to establish the principal question of fact which was deemed material, but on the contrary simply required him to furnish evidence which was then in his possession, and which he had secured prior to the execution of the contract. It cannot be said, therefore, that the agreement of the plaintiff to furnish the testimony referred to in the contract, or any act upon his part in securing it, would involve him or any person in any act having the slightest taint of illegality, or which would be obnoxious to the pure administration of justice, or injurious to public interests, and therefore is not void as against public policy. The court thereby affirmed (1900) 14 Colo. App. 265, 59 Pac. 1024, where the case was treated largely as one of maintenance, and the court held that such an offense did not exist in Colorado. Upon the question of public policy, the court said the contract required plaintiff simply to furnish evidence which was in his possession at the time of the preparation and the execution of the contract. The character and nature of the evidence are specifically stated in the agreement, and they were not such that, upon principle, the furnishing of it would be prohibited by any rule of public policy. The natural presumption is that the evidence to be produced was record evidence. The court further says the contract did not require plaintiff to furnish any evidence except that specifically stated in it. In addition to this, plaintiff alleged that he furnished the attorney other evidence necessary to institute proceedings,—not evidence used or to be used on the trial,—and hence no reasonable presumption could arise that the furnishing of such information, whatever it was, had a tendency to obstruct justice or interfere with

its administration by the court, or to encourage perjury, or the commission of any other unlawful act.

A consideration of the facts as stated in the various reports of the above cases seems to indicate that a valuable mining property was owned by a man who died leaving an heir in a distant state. The plaintiff was in possession of evidence that would establish the title of the heir. Instead of disclosing, or offering to disclose, this evidence to the heir for a consideration, as in most of the English cases cited by the court in support of its ruling, plaintiff entered into a contract with the heir by which he undertook to prosecute the suit on behalf of the heir for two thirds of the recovery. It would be difficult to imagine a case more conducive to subornation of perjury and all the other evils against which the Statutes of Maintenance were leveled, than such a case. The chance of winning an interest in a mining claim worth hundreds of thousands of dollars for the expense of a lawsuit based on evidence to be furnished by the plaintiff is a temptation to produce the proper evidence, even if a part of it is manufactured, which frail humanity could hardly resist.

III. Merely employing one to get information.

A contract by which one merely employs another to render services in looking up evidence to be used at a trial is valid, and it is immaterial whether the person employed is an attorney at law, a professional detective, or a mere layman. *Hare v. McGue* (1918) 178 Cal. 740, L.R.A. 1918F, 1099, 174 Pac. 663; *Haley v. Hollenback* (1917) 53 Mont. 494, 165 Pac. 459; *Singer Mfg. Co. v. City Nat. Bank* (1907) 145 N. C. 319, 59 S. E. 72; *Chandler v. Mason* (1829) 2 Vt. 193; *Cobb v. Cowdery* (1867) 40 Vt. 25, 94 Am. Dec. 370; *Yeatman v. Dempsey* (1860) 7 C. B. N. S. 628, 141 Eng. Reprint, 962, 29 L. J. C. P. N. S. 177, 6 Jur. N. S. 778, 1 L. T. N. S. 402, 8 Week. Rep. 219, affirmed in (1861) 9 C. B. N. S. 881, 142 Eng. Reprint, 347, 7 Jur. N. S. 1245, 9 Week. Rep. 743.

A contract by a man threatened with a divorce suit to pay a person for looking up the acts, conduct, and past history of his wife, and locate, interview, and secure witnesses to testify on his behalf, is valid. *Hare v. McGue* (Cal.) *supra*. The court says: "A contract is void whereby one agrees to obtain or procure testimony of certain facts which will successfully support or defeat a lawsuit, or which provides that payment to the party procuring such testimony is to be contingent upon the result of the action for which he is engaged to procure it. It is the element of payment contingent on the success of the litigation in which the evidence is to be produced, or the fact that the agreement is to procure evidence not of facts necessary to the success of the party litigant who contracted for their production, which vitiates the contract. It is the contingency on the one hand, and the agreement to furnish a given set of facts essential to a successful litigation on the other, and both of which in their nature are calculated to induce false charges and the production of perjured testimony, to subvert the truth and pervert justice, through fraud, trickery, and chicanery at the hands of unscrupulous private detectives or other conscienceless persons, which has impelled the law, with wisdom, to declare such contracts illegal."

In a suit by holder against indorser of a note, where failure to make demand on the maker was sought to be justified on the ground that the note was without consideration, it appeared that the note was given for information as to witnesses who could give needed information in a pending lawsuit, and the court says that it considered that such information, given in good faith and furnishing the maker with important testimony, might furnish a good consideration for the note. *Chandler v. Mason* (1829) 2 Vt. 193.

In *Cobb v. Cowdery* (1867) 40 Vt. 25, 94 Am. Dec. 370, in consideration of an undertaking to furnish the names of witnesses conversant with the matters involved in a lawsuit, and

information in respect to the facts which could be proved by them, a judgment was to be satisfied and surrendered. Suit was brought to enforce the judgment, and the contract was set up as a defense. Plaintiff claimed that the contract was void as against public policy, because it was a contract to fix a price on the testimony of Cowdery as a witness, and thereby tended to obstruct and prevent the due administration of justice. The court said that it was plain that there was no illegality in the thing which defendant agreed to do, unless it was illegal because its tendency was to prevent or impede the due course of public justice. It was a contract to give information in respect to evidence, and to disclose, not to suppress, the truth, and the tendency of the disclosure cannot be regarded as in any respect interfering with or obstructing the administration of justice.

An agreement by a layman to search for bona fide witnesses, and to hunt up such bona fide, competent, and legitimate testimony as he may be able to obtain, to be produced at the trial, is not invalid. *Haley v. Hollenbeck* (1917) 53 Mont. 494, 165 Pac. 459. The court says plaintiff did not agree to furnish evidence that would establish defendant's claim, nor was he to have any portion of the possible recovery. No authority has been found which holds such a contract open to objection because it contravenes public policy. And it was held immaterial that the compensation was contingent on the success of the litigation. The court says it cannot be questioned that it was lawful for a litigant to employ a layman, at a stipulated compensation to be paid in any event, to do for him what he could do for himself—find the witnesses and ascertain the character of their testimony; and if he is physically unable to do this, and has no funds unless he succeeds in establishing his claim for damages, the making of such a contract is necessarily the only means by which he can gain assistance. Unless he may employ a layman upon a contingency he is effectually barred of his

right. The attorney on a contingent fee may, and frequently does, include in his employment the service of finding witnesses. Does this fact render his contract illegal? "We apprehend that no one will assert this. Why, if the attorney's contract was valid, is not that of the layman also?" Payment for services rendered in visiting another state and securing witnesses in a divorce suit is not illegal. *Singer Mfg. Co. v. City Nat. Bank* (1907) 145 N. C. 819, 59 S. E. 72. The court says it does not justify the conclusion, in the absence of other evidence, that he was to secure false and suborned testimony.

Yeatman v. Dempsey (1860) 7 C. B. N. S. 628, 141 Eng. Reprint, 962, 29 L. J. C. P. N. S. 177, 6 Jur. N. S. 778, 1 L. T. N. S. 402, 8 Week. Rep. 219, was an action for breach of a contract to procure evidence to show insanity of plaintiff's wife, and attend and give testimony of the facts at a suit for divorce. The action was held maintainable, but there is no discussion of the validity of the contract. The case went off on the question whether or not the contract had been proved and the amount of damages to be awarded. The decision was affirmed in (1861) 9 C. B. N. S. 881, 142 Eng. Reprint, 347, 7 Jur. N. S. 1245, 9 Week. Rep. 743, without discussion, *Pollock, C. B.*, observing that the circumstances of the case were of a peculiar character, and not likely to form a precedent.

IV. Contract to furnish prescribed kind or amount of evidence.

If the contract is not merely to gather the evidence, but goes further and requires the contracting party to furnish evidence to prove a specified fact or to win the suit, the contract will be held to be invalid. The tendency of such a contract is to offer inducements to manufacture evidence or suborn perjury, and will not be countenanced by the courts.

Arkansas.—*Neece v. Joseph* (1910) 95 Ark. 552, 30 L.R.A.(N.S.) 278, 129 S. W. 797, Ann. Cas. 1912A, 655; *Josephs v. Briant* (1913) 108 Ark. 171, 157 S. W. 136, on second appeal (1914) 115 Ark. 538, 172 S. W. 1002, Ann. Cas.

1916E, 741; *Luce v. Endsley* (1920) 145 Ark. 287, 224 S. W. 619.

California.—*Patterson v. Donner* (1874) 48 Cal. 369.

Illinois.—*Gillett v. Logan County* (1873) 67 Ill. 256.

Montana.—*Hughes v. Mullins* (1907) 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209; *Quirk v. Muller* (1894) 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077.

New York.—*Lyon v. Hussey* (1894) 82 Hun, 15, 31 N. Y. Supp. 281.

North Carolina.—*Smith v. Hartsell* (1908) 150 N. C. 71, 22 L.R.A.(N.S.) 203, 63 S. E. 172.

Ohio.—*Getchell v. Welday* (1895) 4 Ohio S. & C. P. Dec. 65.

Wisconsin.—*Manufacturers & M. Inspection Bureau v. Everwear Hosiery Co.* (1912) 152 Wis. 73, 42 L.R.A.(N.S.) 847, 138 N. W. 624, Ann. Cas. 1914C, 449.

England.—*Sprye v. Porter* (1856) 7 El. & Bl. 58, 119 Eng. Reprint, 1169, 26 L. J. Q. B. N. S. 64, 8 Jur. N. S. 330, 5 Week. Rep. 81, 38 Eng. L. & Eq. Rep. 67.

In *Sprye v. Porter* (Eng.) *supra*, an agreement to furnish evidence then in possession of the promisor for a share in the recovery was held valid, the court saying there was no undertaking to assist in carrying on the litigation, or to provide any further assistance, or in any way to assist or countenance the other contracting party. But if it appeared that he was to furnish evidence of such nature, and in such quantity, as to insure success in a suit, the contract would be illegal. In such case the bargain is for an interest in the property in dispute, and for litigation to recover it, and to maintain the other contracting party in a suit in a manner of all others the most likely to lead to perjury and the perversion of justice. Such an agreement is illegal.

An agreement by one to furnish for compensation evidence, through the medium of a certain person as a witness, which shall substantiate the claims in a pending lawsuit, the compensation being contingent upon the favorable outcome of the suit, and the employer agreeing to defend any

action which may be brought against the witness because of the testimony given by him, is void. *Hughes v. Mullins* (Mont.) *supra*.

A contract to procure evidence to win a lawsuit, or to secure possession of documents to prevent their use by the adversary, is void. *Josephs v. Briant* (1913) 108 Ark. 171, 157 S. W. 136; that ruling was followed as the law of the case on second appeal in (1914) 115 Ark. 538, 172 S. W. 1002, Ann. Cas. 1916E, 741.

A contract to produce evidence to prove the truth of the accusation in a slander case is void. *Luce v. Endsley* (1920) 145 Ark. 287, 224 S. W. 619.

In *Quirk v. Muller* (Mont.) *supra*, where one was employed, not only to make search and inquiry for witnesses and to ascertain the names of persons acquainted with the facts and circumstances, but also to procure such other testimony as would entitle the employer to recover the possession of certain property, the compensation to be a percentage of the recovery, it was held that the contract was void as an agreement to procure testimony that would win a lawsuit. The court said: "We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury, but the contract had the tendency, and opened the very strong temptation, to the procurement of perjury." And later in the opinion it is said: "We think that nothing here said can be interpreted as forbidding the offering of rewards for the detection of crime, or the employing of persons to search for material witnesses, or important papers or documents or exhibits which have been lost."

A contract to furnish evidence to establish the claim of a party to a litigation to be commenced is against public policy. *Lyon v. Hussey* (N. Y.) *supra*. The court says the recognition of contracts of this character would be the introduction of all sorts of fraud and deception before courts of justice, in order that persons might receive compensation out of the results of their successful manufacture of proofs to be presented to

the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such a contract would never be recognized in any court of justice.

In *Smith v. Hartsell* (N. C.) *supra*, which involved the question of the validity of a contract to testify in a lawsuit, the court says contracts are invalid which obligate the promisor to procure testimony to establish a given result.

An agreement to secure and furnish evidence by which the other contracting party can obtain a judgment in a case to be brought by him for a contingent fee is void. *Getchell v. Welday* (Ohio) *supra*.

A contract to pay a person to find and furnish all the proofs that can be established of a certain fact which has a bearing on a pending suit is void as against public policy. *Neece v. Joseph* (1910) 95 Ark. 552, 30 L.R.A. (N.S.) 278, 129 S. W. 797, Ann. Cas. 1912A, 655, the court says: "The vice of the contract does not consist in the fact that the defendant employed the plaintiff to obtain evidence in his divorce suit; but the contract is, on its face, illegal, because of the improper provision that the evidence to be procured shall be of a given state of facts, of a tendency to enable defendant to win his suit. It will be observed that the contract did not provide for the payment of his services in procuring for use such testimony as actually existed, but it contemplated the procurement of evidence tending to establish a given state of facts, regardless of any other consideration.

In *Patterson v. Donner* (1874) 48 Cal. 369, the agreement was to procure two witnesses who would swear that they had seen what purported to be a genuine grant of a certain parcel of real estate. The court says: "We fully agree that a stipulation that one shall, in consideration of a large sum of money, not only procure witnesses, but procure them to swear to a particular fact, is unlawful." But since the agreement in that case was a condition of defeasance of a conveyance of real estate, the court said that,

since it was void, the conveyance became absolute.

A contract by a county sought to be held liable upon railroad bonds, the validity of which depends upon the validity of an election, to pay a certain amount for every vote proved to be illegal, and a lump sum in addition in case the county's liability is defeated, is illegal and void. *Gillett v. Logan County* (1873) 67 Ill. 266. The court says: "The contracts themselves are pernicious in their nature. They created a powerful pecuniary inducement on the part of the agents so employed that testimony should be given of certain facts, and that a particular result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors, and to make use of other 'base appliances,' in order to secure the necessary results which were to bring to these agents their stipulated compensation. The tendency of such arrangements must be to taint with corruption the atmosphere of courts, and to pervert the course of justice. A pure administration of justice is of vital public concern. It tends to evil consequences that any such venal agency as is constituted by these contracts should have a part in the conduct of judicial proceedings where the attainment of right and justice is the end. Should contracts of this character receive countenance, we might, among the multiplying forms of agency of the time, have to witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in court, for pay contingent upon success in their suits."

A contract with a detective agency to put detectives into plaintiff's plant, and for a contingent fee to apprehend persons guilty of embezzling goods, is void. *Manufacturers & M. Inspection Bureau v. Everwear Hosiery Co.*

(1912) 152 Wis. 73, 42 L.R.A. (N.S.) 847, 138 N. W. 624, Ann. Cas. 1914C, 449. The court says the whole tendency of the contract is to induce the promisee, in order to earn his money, to make charges against and fasten upon other persons charges of larceny and embezzlement, and then, in addition to this, assume the character of public officers and apprehend such persons, and bring them before the officers of defendant with the stolen goods not on their person, but in their possession. The tendency of the contract is to the commission of unlawful acts on the part of the parties to it, either a contract to procure evidence to produce a certain result, or to induce the making of charges by the plaintiff in order to earn his fee. It is not necessary that the contingency upon which the compensation of the promisee arises shall be the winning of a lawsuit. Any other contingency that would have the same effect in instigating false charges, or in inducing the promisee to stretch his evidence up to a given mark, in order to get his pay, would be the same in principle. If there were no fee contingent upon success, but a regular compensation, there could be no illegality about it. It is the contingent nature of the compensation and its tendency to induce false charges and all the fraud and trickery of the private detective business that, *prima facie*, stamps this contract with illegality.

But in *J. I. Case Threshing Mach. Co. v. Fisher* (1909) 144 Iowa, 45, 122 N. W. 575, it was held that an agreement by a manufacturer with one selling his product and also that of a rival manufacturer, to pay the agent for furnishing evidence that he could secure better terms from the rival than from the manufacturer, is not illegal although it is intended to use such testimony in a suit by the manufacturer against the owner of the patent under which both manufacturers are operating. The court said there was nothing in this transaction tending in the remotest way to the corruption of justice.

*V. Effect of contingent fee.**a. In general.*

There are dicta in several of the cases cited in the former subdivisions of this annotation, indicating that the courts thought that if the contract was to procure the evidence for a contingent fee it would not be upheld. But the decisions, so far as they have passed on the question, do not hold that the mere fact that the recovery is to be contingent upon the success of the suit is sufficient to nullify the contract. See *Sprye v. Porter* (1856) 7 El. & Bl. 58, 119 Eng. Reprint, 1169, 26 L. J. Q. B. N. S. 64, 3 Jur. N. S. 330, 5 Week. Rep. 81; *Haley v. Hollenbeck* (1917) 53 Mont. 494, 165 Pac. 459, — *supra*.

In *Fenn v. McCarrell* (1904) 208 Pa. 615, 57 Atl. 1108, where the distribution of the proceeds of a judgment was attacked, and it appeared that a portion of it had gone to one rendering services in the suit, it does not appear just what the character of the service was, but the referee says it is true that contracts by litigants with others, in consideration of aid given, to share the fruits of the litigation, were not looked upon with favor, either at common law or in equity, but it could not be said that in Pennsylvania they have been regarded as so contrary to public policy as to be entirely void.

In *Wellington v. Kelly* (1881) 84 N. Y. 545, which was an action to enforce a mortgage which was alleged to have been paid by a volunteer, there was an agreement by him to furnish the evidence of the payment in consideration of half of the amount due on the mortgage, in case the action should be defeated. The evidence furnished was mostly papers in his own possession, but he produced a witness to prove the fact of payment, and the court said that it perceived no objection to a recovery of the amount promised unless the rule is that every agreement made with a third person to furnish evidence in a litigation, for a compensation contingent upon the event, is illegal. And it states that it could find no authority for so extensive a proposition. It concedes that an agreement by a stranger to

furnish evidence to substantiate a claim or defense, for a compensation depending upon the success of his efforts, is dangerous in its tendency, as furnishing an inducement to perjury and the subornation of witnesses. But it states that in this case the volunteer was not a stranger in interest to the subject of the litigation. His antecedent relation to the mortgage made it just that he should be indemnified for the money advanced by him in case the payment should be available in the foreclosure action. The mere fact that the agreement might furnish a temptation to him to furnish false testimony does not stamp the agreement as illegal *per se*.

b. Contract to share attorney's fee.

Although the courts do not condemn contracts between the parties to a suit and one undertaking to look up evidence for them for a contingent fee, in all cases, they do hold invalid contracts by which persons agree with the attorneys in the case to furnish the evidence for a share in the fee which the attorney is to receive.

Delaware. — *Johnson v. Higgins* (1917) 7 Boyce, 548, 108 Atl. 647.

Illinois. — *Goodrich v. Tenney* (1893) 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44.

Kentucky. — *Lucas v. Allen* (1881) 80 Ky. 681.

Minnesota. — *Holland v. Sheehan* (1909) 108 Minn. 362, 23 L.R.A. (N.S.) 510, 122 N. W. 1, 17 Ann. Cas. 687.

Missouri. — *Carey v. Gossom* (1920) 204 Mo. App. 695, 218 S. W. 917.

Nebraska. — *Langdon v. Conklin* (1903) 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834.

New York. — *Re Schapiro* (1911) 144 App. Div. 1, 128 N. Y. Supp. 852.

Washington. — *DUTEAU v. DRESBACH* (reported herewith) ante, 1430.

An agreement by a layman to procure clients for an attorney and procure legitimate witnesses to testify on behalf of such clients, for a share of the fees earned by the attorney, is against public policy and void. *Langdon v. Conklin* (Neb.) *supra*. The ruling was put upon the

ground that it was an attempt by one not entitled to practise law to break into the conduct of proceedings in a court of record, to which he was not a party, by attempting to form a limited and silent partnership with one who had complied with the provisions of the law and was entitled to the emoluments of the profession.

An agreement between an attorney and a layman to divide contingent fees to be received by the attorney in a suit, for services of the layman in procuring evidence, is repugnant to every instinct of propriety and justice, and should be regarded as immoral, illegal, and void. *Johnson v. Higgins (Del.) supra.*

In *Holland v. Sheehan (Minn.) supra*, an agreement between an attorney and a layman that the latter should look up accident cases and bring them to the former, for a share of the contingent fee, which involved the understanding that he was to assist in the preparation of the cases for trial by looking up evidence, was held void. The question of the effect of the agreement to look up the evidence is not considered, however, the case turning upon the other branch of the contract.

An agreement by an attorney who has taken a personal injury case on a contingent fee, to pay a physician, for furnishing testimony which would sustain a recovery, a substantial portion of his fee, is professional misconduct justifying a disbarment of the attorney. The court says if agreements between attorneys and witnesses upon whose testimony the clients' cases depend, to share in the attorneys' fees for conducting the prosecution, are to be approved, it would be almost impossible to prevent perjury. The court further says: "A witness who demands and receives compensation, or a promise of compensation, for giving his testimony, is necessarily a discredited witness, and an attorney and counselor at law who knowingly makes an agreement with a witness by which he agrees to pay a witness a sum of money or an interest in the recovery as compensation for the giving of particular testimony,

16 A.L.R.—91.

rather than other testimony, or in consequence of an express or implied threat to testify against a party proposing to call him as a witness unless he receives compensation from the party proposing to call him, is making an agreement which is plainly contrary to public policy, and one which is subversive of the orderly and efficient administration of justice." *Re Schapiro (N. Y.) supra.*

A contract to procure for an attorney affidavits of persons alleged to have known of a transfer alleged to have been in fraud of creditors, which will show that no consideration was paid by the purchaser, so as to enable the attorney, who is to acquire outstanding claims against the assignor, to enforce them against the property, for a share of the recovery, is void. *Goodrich v. Tenney (Ill.) supra.* The court, after showing that the agreement with the attorney involved and provided for perjury, said: "If transactions of this kind should receive sanction, and contracts based upon them be enforced, the suborner of perjury would become a potent, if not a necessary, factor in litigation. The fact that the purchase was made in good faith would be no protection to the buyer. Premium would be offered to the dishonest and unscrupulous, and result in the perversion of justice and bringing its administration into deserved disrepute. It is not enough that the parties may have intended no wrong, or that the testimony produced in the case may have been true. It is the tendency of such contracts to the perversion of justice that renders them illegal."

Where a statute prohibits attorneys from dividing fees with persons not lawyers, an agreement by an attorney to divide his fee for defending one accused of crime, with a deputy constable for looking up evidence for the defense, is void both under the statute and under the common law, which prohibits a police officer from selling his services to defendant in a state case. *Carey v. Gossom (Mo.) supra.*

In *Lucas v. Allen (Ky.) supra*, a contract between an employee of a city and attorneys that the former

would furnish evidence of the collection of illegal taxes, for a share of the fees earned by the attorney in suits to recover the payments made, was held invalid on the ground that it partook of maintenance in the worst form, and also violated the duty of the employee to the city.

VI. Purpose of evidence or character of contractor.

The purpose of the evidence may be such as to render an agreement to procure it void, and also the one undertaking to procure it may bear such a relation to the public that it will be against public policy to permit him to enter into an agreement to procure evidence.

An agreement by which the contractor undertakes to furnish proof to secure a divorce for his employer is void. *Barngrover v. Pettigrew* (1905) 128 Iowa, 533, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206, 104 N. W. 904. The ground of the ruling is that the contract contravened public policy, because it was intended to put an end to a marriage relation.

An agreement by an attorney to procure evidence for a contemplated divorce action, not for the purpose of the divorce itself, but to force a settlement of property rights and compel delivery to the wife of the largest share possible of the husband's estate, without anything to show that

the wife had any ground for divorce, is void. *Delbridge v. Beach* (1912) 66 Wash. 416, 119 Pac. 856. The court said that the law will not permit its processes to be used in a divorce suit, or otherwise, to coerce a husband into an unwilling division of his separate property with his wife, except where she discloses some legal ground for a divorce.

In *Elliott's Succession* (1876) 28 La. Ann. 183, a claim of attorneys for entering "upon the business of securing evidence" in a contemplated suit for separation between decedent and his wife was held not to be legitimate. The court says an attorney ought not to recover on such a demand.

In *Kennedy v. Hodges* (1895) 97 Ga. 753, 25 S. E. 493, a contract to pay a deputy sheriff of the county a reward for furnishing sufficient evidence to convict the parties who committed a murder is held void as against public policy, because it tended to interfere with the due performance by the officer of his duties.

But in *Harris v. More* (1886) 70 Cal. 502, 11 Pac. 780, an agreement to pay for services in searching for evidence which would lead to conviction of persons suspected of crime was held legal, if made with a deputy sheriff, where the services were to be performed out of the territory to which his jurisdiction extended.

H. P. F.

J. G. THATCHER et al., Plffs. in Err.,

v.

D. L. DARR.

Wyoming Supreme Court — August 6, 1921.

(— Wyo. —, 199 Pac. 938.)

Contract — to give testimony — public policy.

1. A contract to issue stock of a corporation to be formed and subsequently purchase it from the holder, in consideration of the agreement of the other contracting party to make affidavits as to the truth concerning his acts and intentions with respect to the application by the first party for a patent to land in which the second party claims an interest, is not invalid as against public policy.

[See note on this question beginning on page 1457.]

— to give testimony by affidavit in support of land claim.

2. An agreement to issue stock of a corporation and subsequently purchase it from a witness who, by affidavit, shall give testimony to aid in the securing of a patent for land which the corporation is to be formed to operate, is not invalid as providing pay for performance of merely a legal duty, where there is no statutory provision for compelling testimony by affidavit in aid of land claims, or fix-

ing fees to be allowed for such service.

[See 6 R. C. L. 756, 757.]

— to pay on receipt of patent — effect of exclusion of part of land.

3. The right to enforce a contract for purchase of stock within a specified time after issuance of a patent to certain described real estate is not defeated by the fact that part of the described land was excluded from the patent, if it was done with consent of the promisor and without knowledge of the promisee.

ERROR to the District Court for Big Horn County (Metz, J.) to review a judgment sustaining a demurrer to the amended petition, and dismissing an action brought to recover damages for alleged failure of defendant to purchase and pay the agreed price for certain shares of the capital stock of a corporation. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Louis J. O'Marr and Alexander C. Shaw for plaintiffs in error.

Messrs. E. E. Lonabaugh and C. A. Zaring, for defendant in error:

Plaintiff cannot recover because of the fact that the condition on which the payment was to be made did not take place.

Redman v. Aetna Ins. Co. 49 Wis. 431, 4 N. W. 591; Gould, Pl. chap. 4, § 13; *Patrick v. Colorado Smelting Co.* 20 Colo. 268, 38 Pac. 236; *Chitty*, Pl. 15th Am. ed. 308; 2 *Parsons*, Contr. 656; *Root v. Childs*, 68 Minn. 142, 70 N. W. 1087; *Briggs v. Rutherford*, 94 Minn. 23, 101 N. W. 954; *Wilson v. Clarke*, 20 Minn. 367, Gil. 318; *Husenetter v. Gullikson*, 55 Neb. 32, 75 N. W. 41; *Sutton v. Lowry*, 39 Mont. 462, 104 Pac. 545; *Hall v. International Liberty Union*, 161 Ky. 299, 170 S. W. 631; *Floyd v. Pugh*, 201 Ala. 29, 77 So. 323; *National Union F. Ins. Co. v. School Dist.* 131 Ark. 547, 199 S. W. 924.

The contract in question is void as against public policy.

9 Cyc. 500; *Greenhood*, Pub. Pol. p. 5; *Pollock*, Contr. 285; *Quirk v. Muller*, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077; *Hughes v. Mullins*, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209; *Cowles v. Rochester Folding Box Co.* 179 N. Y. 87, 71 N. E. 468; *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281; *Re Imperatori*, 152 App. Div. 86, 136 N. Y. Supp. 675; *Re Schapiro*, 144 App. Div. 1, 128 N. Y. Supp. 852; *Re O'Keefe*, 49 Mont. 369,

L.R.A. 1915A, 520, 142 Pac. 638; *Brown v. First Nat. Bank*, 137 Ind. 655, 24 L.R.A. 206, 37 N. E. 158; *Goodrich v. Tenney*, 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44; *Patterson v. Donner*, 48 Cal. 369; *Stanley v. Jones*, 7 Bing. 369, 131 Eng. Reprint, 143; *Reynell v. Sprye*, 1 De G. M. & G. 660, 42 Eng. Reprint, 710, 21 L. J. Ch. N. S. 633; *Powell v. Knowles*, 2 Atk. 224, 26 Eng. Reprint, 539; *Boardman v. Thompson*, 25 Iowa, 487; *Dawkins v. Gill*, 10 Ala. 206; *Neece v. Joseph*, 95 Ark. 552, 30 L.R.A. (N.S.) 278, 129 S. W. 797, Ann. Cas. 1912A, 655; *Bowling v. Blum*, — Tex. Civ. App. —, 52 S. W. 97; *Getchell v. Welday*, 4 Ohio S. & C. P. Dec. 65; *Phelps v. Manecke*, 119 Mo. App. 139, 96 S. W. 221; *Quirk v. Muller*, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077; *Young v. Thomson*, 14 Colo. App. 294, 59 Pac. 1030; *Clifford v. Hughes*, 139 App. Div. 730, 124 N. Y. Supp. 478; *Ramschasel's Estate*, 24 Pa. Super. Ct. 262; *Wright v. Somers*, 125 Ill. App. 256; *Dodge v. Stiles*, 26 Conn. 463; *Laffin v. Billington*, 14 N. Y. Anno. Cas. 360, 86 N. Y. Supp. 267; *Johnson v. Pietsch*, 94 Ill. App. 459; *Burnett v. Freeman*, 134 Mo. App. 709, 115 S. W. 488; *Pollak v. Gregory*, 9 Bosw. 116; *Boehmer v. Foval*, 55 Ill. App. 71; 2 *Elliot*, Contr. 1913, § 721.

Potter, Ch. J., delivered the opinion of the court:

In this case a general demurrer was sustained to the amended peti-

tion, which had been filed by leave of court after a like demurrer to the original petition had been sustained, and, the plaintiffs electing to stand upon their amended petition, a judgment was rendered dismissing the action. The case is here on error for the review of that judgment.

The action was brought to recover damages for the alleged failure of the defendant to purchase and pay the agreed price for certain shares of the capital stock of a corporation. The amended petition alleges: That on or about March 14, 1914, the plaintiffs and defendant entered into a written agreement whereby the defendant promised to purchase from the plaintiffs, and they agreed to sell to the defendant, seventy shares of the capital stock of the Torchlight Drilling & Mining Association, Limited, at the par value of \$100 per share, within one year from the date of the issuance of patent to said association by the United States government for the east half of section 24, township 55 north, of range 83 west, in the state of Wyoming, for which patent the said association had theretofore applied; said stock having theretofore been issued to plaintiffs by the defendant pursuant to said agreement. That the agreement provided that as soon as patent issued the defendant should notify the plaintiffs thereof, and designate some solvent bank in the city of Portland, Oregon, to act as trustee, and to whom plaintiffs should deliver their certificates of stock until payment should be made therefor. The alleged agreement is then set out in full in said petition. That shows an agreement between the seven plaintiffs, as parties of the first part, who are named therein and described as all of Portland, Oregon, and the defendant, as party of the second part, who is described as of Basin, Wyoming, dated March 14, 1914, and it recites that on the 9th day of December, 1904, the parties of the first part executed and delivered to R. B. Magruder a certain power of attorney, authorizing

him to locate and dispose of mineral lands in their names; that said Magruder transferred said power of attorney to Philip Minor, who made use of the same for the location of mineral lands upon the public domain, and by such authority took up 320 acres of land in the state of Wyoming, to wit, the east half of section 24, township 51 north, range 93 west; that said Minor, acting under authority of said power of attorney, transferred said land to the Torchlight Drilling & Mining Association, Limited; that in the month of December, 1910, said association made final proof on said land, and sought to obtain a patent to the same from the United States government, and "that the government required certain testimony from the parties of the first part;" and "that the said parties of the first part, believing that they had certain rights and interests in the land, and that they have never received any benefits or things of value for their rights or services," the agreement then provides as follows:

"Now, therefore, it is hereby agreed that the parties of the first part will aid and assist the said Torchlight Company to procure a patent to said lands, and for that purpose will make affidavit or affidavits concerning their acts and intentions in connection with the whole matter, and if required will give such testimony whenever called upon to do so by the party of the second part, or his representative, and in all other ways give such help to obtain such patents as they may be able to furnish. It being understood between the parties hereto that such affidavits must agree with the truth as shown by the affidavits given Special Agent Rath and the statements this day made to said D. L. Darr.

"In consideration of such services to be rendered in behalf of said Torchlight Company, or to the party of the second part, the said party hereby agrees to issue to the parties of the first part seventy shares of the stock of the said Torchlight

Company of the par value of \$100 per share.

"It is further agreed that the party of the second part will buy said stock at its par value within one year from the date of the issuance of said patent, provided, however, that as soon as such patent is issued the said party of the second part shall notify the parties of the first part by letter addressed to their now known addresses, and shall at the same time designate some solvent bank in the city of Portland, state of Oregon, to act as trustee, and to whom the parties of the first part shall immediately deliver their certificates of said stock to be held by such trustee until payment for the same shall be made at the price above stated, and within one year from the date of the issuance of said patent.

"It is mutually understood and agreed that the promise to buy said stock is absolutely binding upon the party of the second part, and the agreement to sell to the party of the second part is absolutely binding upon the parties of the first part, and at the par value of said stock.

"In witness whereof we have hereunto set our hands, and to a duplicate copy thereof the day and the year above written."

The agreement, as thus set out in the petition, appears to have been signed by each of the parties, and its execution acknowledged by each on the day of its date before a notary public in the county of Multnomah in the state of Oregon. Following the said alleged copy of the agreement, it is further alleged that on August 25, 1915, more than one year prior to the commencement of the action, patent to a part of the "above-described land" was issued to said association by the United States government, to wit (describing same by subdivisions situated in section 24, township 51 north, range 93 west); that said association, before the issuance of the patent, and without the knowledge, consent, or fault of plaintiffs, or either of them, abandoned and waived its claim and

right to the remaining part of the east half of said section, not included in the patent, and by reason of said abandonment and waiver, patent for all of said east half was not issued; and that such abandonment and waiver were with the knowledge, consent, and at the instance of the defendant; that it was intended and understood by the terms and conditions of said contract that the plaintiffs were obligated to sell to defendant, and the latter was obligated to purchase from the plaintiffs, said stock at its par value within one year from the time of the issuance of the patent; that at all the times mentioned plaintiffs have been, and now are, able, ready, and willing to sell and deliver said shares of stock to defendant, or to deliver the same to any trustee designated by him according to the terms of said agreement, and that defendant has wholly failed, neglected, and refused to accept and pay for said stock, or to designate a trustee to whom the same may be delivered as provided by said agreement, although defendant has been heretofore requested to do so; that plaintiffs have performed each and every of the terms, conditions, and stipulations of said contract on their part to be performed; that, by reason of the premises, plaintiffs have been damaged in the sum of \$7,000, no part of which has been paid, although demanded. The prayer is for judgment for said sum, with interest from August 25, 1916.

The variance in the above recital between the description of the land in the contract and in the preceding averment of the amended petition with respect to the township and range occurs in said petition. In alleging the agreement to purchase the stock, it describes the land as in township 55 north of range 83 west, while the contract describes it as in township 51 north of range 93 west. In the corresponding averment of the original petition the range was described as 93, as in the contract. In a later averment of the amended

petition the land for which patent was issued is alleged to be part of the "above-described land," and the township and range are described as 51 north and 93 west, thus agreeing with the description of the land in the contract as set out in the petition, indicating that the variance aforesaid may have been the result of inadvertence; and it may be deemed as of no importance on this hearing, since no question is raised concerning it, and if, as we suppose, the same tract of land was intended by the description in the first averment of the petition aforesaid as that mentioned in the contract, and as including the land for which patent was issued, the mistake can easily be remedied by amendment.

It is conceded by the briefs that two points only were suggested in the court below against the sufficiency of the amended petition, and they are urged here in support of the ruling sustaining the demurrer, viz.: (1) That, a part of the land having been excluded from the patent, as shown by the petition, it affirmatively appears thereby that the condition precedent of the obligation to purchase the stock had not occurred; (2) that the contract is void as against public policy.

The second point, challenging the validity of the contract, is based upon the provision therein for the giving of testimony by the plaintiffs in aid of the application for the patent; and it is contended that the giving of such testimony was the consideration for the promise to purchase the stock; and that the contract, in substance and effect, provides for the payment of \$7,000, the agreed purchase price, as compensation for the giving of such testimony, contingent upon the issuance of the patent as the result thereof. But cases are cited indiscriminately to the effect that contracts to procure testimony for a compensation, made to depend upon the favorable character of the evidence to be secured, or upon the result of the litigation in which it is to be used, or to testify for a com-

pensation dependent upon the recovery or the amount of it, or for a sum in excess of legal witness fees, are contrary to public policy and illegal, because offering enticement to perjury and tending thereby to pervert the course of justice. They state the general rule as to the several classes of contracts mentioned. 6 R. C. L. 756, 757; 13 C. J. 448, 449; Quirk v. Muller, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077; and see notes to the case of Hughes v. Mullins, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 212 et seq.; Wood v. Casserleigh, 30 Colo. 287, 71 Pac. 360, in 97 Am. St. Rep. 145 et seq., and Neece v. Joseph, 95 Ark. 652, 129 S. W. 797, in 30 L.R.A. (N.S.) 278 et seq., and in Ann. Cas. 1912A, 657. But as to each class of such contracts there are exceptions to the rule, or qualifications limiting its application. And the question here is whether any such rule is applicable to the facts of this case shown by the amended petition. Every contract to procure testimony or to testify as a witness is not necessarily illegal.

"An agreement by a person to testify is not, in the absence of anything else, contrary to public policy, particularly where it does not appear that he is to receive more or less than the usual or ordinary witness fees. Where, however, his compensation is contingent on the success of a litigation, or he is to be paid more than his legal fees, or other elements occur which tend to show that his evidence may be improperly influenced, the contract is against public policy." 13 C. J. 448, 449.

"At least, where it does not appear that he is to receive more than the ordinary witness fees, one who promises to testify agrees to do what is entirely proper for him to do, and that which the law would compel him to do without any agreement. Standing alone, as a rule, such an agreement would not be a sufficient consideration to uphold an executory contract; but it is not an immoral or illegal stipulation, and

should not have the effect of avoiding a contract that is otherwise legal and binding." 6 R. C. L. 756, 757.

Where a witness simply consents to make a disclosure of the truth, with no inducement to produce any special result, the rule does not apply. *Nickelson v. Wilson*, 60 N. Y. 362. In *Yeatman v. Dempsey*, 7 C. B. N. S. 628, 141 Eng. Reprint, 962, it was said by Erle, Ch. J.: "Every man has full power to contract to do that which is not prohibited by law; and, if a party chooses to contract to attend and give evidence without a subpoena and without conduct money, I see no reason why he should not be allowed to do so."

In that case, where one had been employed in the capacity of surgeon and apothecary, to collect and prepare medical and other evidence material to a suit, and attend and give evidence at the trial, for a stated compensation, it was held that damages, if any were shown, might be recovered upon the breach of the agreement by the party so employed through his failure to appear and tender himself as a witness at the trial.

To bring a case within the rule invalidating contracts to testify for a compensation exceeding legal fees, where that is the only ground of objection, it must appear that the required testimony was such as might be compelled, or, in other words, that the agreed compensation is to be paid for performing merely a legal duty, and also, of course, that fees for the service required of the witness are fixed by law. In a comparatively recent case in New York, cited in defendant's brief, the rule is stated as follows: "Where a witness who is not interested in the result of the controversy resides within this state, and is amenable to process therein, an agreement to compensate him in an amount in excess of the legal fees, for attending as a witness and testifying only as to facts within his knowledge, is contrary to public policy and void."

Clifford v. Hughes, 139 App. Div. 730, 124 N. Y. Supp. 478.

In *Armstrong v. Prentice*, 86 Wis. 210, 56 N. W. 742, it was held that attendance as a witness in an action pending in another state is a sufficient and valid consideration for a promise to pay the witness more than legal fees, since such attendance could not have been compelled, the court, by Winslow, J., saying: "It is objected that the plaintiff has recovered for attendance as a witness a sum largely in excess of legal fees, and that a promise to pay a witness more than legal fees for his attendance is void, because he is simply performing a legal duty. However this may be in a case where the attendance of a witness may be compelled by subpoena, it certainly does not apply in a case like the present, where the actions were pending in another state, and the witness could not be compelled to attend. In the latter case, it is evident that there is sufficient consideration to support a promise to pay additional compensation."

In the case of *Dawkins v. Gill*, 10 Ala. 206, often cited upon this question and cited here, the court expressly excluded from consideration the question whether a fixed and certain compensation might not be made to a witness who could not be required by subpoena to attend in person, and one of the grounds stated for holding the contract void, if not the principal ground, was that the condition of the contract that the compensation should be reduced one half, if the party for whom the testimony was to be given was unsuccessful in the suit, gave the witness an interest in the result of the suit, which, if valid and known, would have rendered him incompetent to testify, since such interest would be that of a party; a ground clearly inapplicable where a party is not disqualified as a witness. So, in *Walker v. Cook*, 33 Ill. App. 561, which holds that a witness attending court upon a subpoena is not entitled to recover, upon a contract for compensation, an amount exceeding the legal fees, the court said: "If no sub-

pœna had been served upon him, and he had attended as a witness under an agreement for compensation made with appellant, and not in pursuance of the process of the court, a different question would be presented."

In *Dodge v. Stiles*, 26 Conn. 463, the leading case in this country holding that the statutory fee is all that a witness is entitled to where he has been summoned to attend and testify, and that any attempt to secure more is against the policy of the law, the court stated the reason of the rule, and certain exceptions thereto, as follows: "Were it otherwise, and witnesses might be allowed to make terms for testifying, there would be room for oppressive conduct and for corruption. Witnesses, knowing that their testimony was indispensable, would, under one pretense or another, make terms for their testimony, and such as might be induced to represent their testimony as important would be tempted to barter their oaths at the expense of truth and justice. Now, a promise to pay more than the statute fees for just this statute service, without further service or loss by the witness, may be said to be without consideration. It cannot be important in our view whether the promise be made after the service of the subpoena, contemporaneously with it, or before, provided the promise refers to this duty and is founded on no other consideration. . . . There may be a further consideration, in which case an executory promise for extra compensation will be upheld; as if the witness was about going abroad at the time he might be wanted to attend court, and agrees that he will remain and give up his journey and is summoned, or, living at a distance from the place of the court, more than 20 miles, so that his deposition could be taken, agrees that he will attend in person. In these and the like cases the promise is one for indemnity, and is founded on a new and meritorious consideration, and is good. . . . If a witness agrees

with a party that he will attend and testify without being summoned, and he is not summoned and so not brought under the order or censure of the court, we suppose any reasonable promise for compensation is good and may be enforced; for the proceeding or service is not under nor in pursuance of the statute."

The case of *Nickelson v. Wilson*, 60 N. Y. 362, has been cited above. Nickelson and one Scott were under indictment for obtaining certain notes of Wilson by false pretenses. Wilson had sued them for the amount of the notes, and Scott had commenced bankruptcy proceedings against Wilson. An agreement made between counsel for Nickelson and Wilson, by their authority, provided substantially as follows: That Nickelson shall testify to all he knows in the bankruptcy case, and in the civil and criminal cases; that if no judgment be recovered against Scott in the civil case, there shall be none against N., and if judgment goes against both it shall not be enforced against N. for more than \$1,000, which may be paid in one of Wilson's notes; that Nickelson shall have control for his benefit of the judgment against Scott for the sum he is to account for to Wilson. Nickelson testifying fully as above, the counsel will recommend nol. pros. against Nickelson. Wilson's counsel was the district attorney. Pursuant to the agreement Nickelson waived his personal privilege, and testified for Wilson in the civil and bankruptcy cases, and also on the criminal trial as a witness for the prosecution. Wilson recovered judgment against Scott and Nickelson for the amount of the notes, upon which the latter paid \$1,000, but Wilson and his assignee in bankruptcy refused to release him from the judgment or to transfer an interest therein, and thereupon the action was brought by Nickelson against Wilson and his said assignee for specific performance of the contract, and to restrain them from enforcing the judgment against him in violation thereof. Upon the con-

tention that the contract was void because of Nickelson's agreement to testify under the stated conditions, the court construed the agreement as requiring merely a disclosure of the truth, with no inducement to produce any special result, but the contract was held valid, also, upon the ground that Nickelson was under no legal duty to testify, the court saying: "The performance of this agreement involved a waiver by Nickelson of his personal privilege of declining to answer questions, his answer to which might tend to criminate him; and this waiver constituted the consideration for the whole agreement."

And the court concluded the discussion by saying: "The defendant deemed the testimony of the plaintiff essential to enable him to recover the judgment in question. It is conceded and found that the plaintiff performed his part of the agreement; and it is fairly presumable that the judgment was obtained by means of his testimony. It would be exceedingly unjust to enforce that judgment against him under the circumstances."

A similar case in principle is *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370. The contract required Cowdery to give one Downer information as to witnesses and what could be shown by them in a suit in which the latter was interested, and required Downer, in consideration of such service, to deliver up to Cowdery, to be satisfied, a certain judgment upon which the action had been brought against him. The contract having been set out in Cowdery's answer, it was claimed that it was without consideration on the ground that Cowdery had agreed thereby to do no more than he was under legal and moral obligation to do, and that it was illegal and void because fixing a price on his testimony as a witness. The court held that, although the duty to furnish the information without reward might be established by the principles of ethics as a moral duty, "it was a duty of imperfect obliga-

tion, and one which could not be enforced at law," and said: "Whatever might have been Cowdery's duty to Downer in respect to furnishing this information to him, it was a duty which the law did not impose and could not enforce; and, however strong may have been his moral obligation to do that which he agreed to do, it is only promises founded on the performance of duties imposed by law which are regarded in law as merely gratuitous and not binding. . . . If this was a contract to suppress evidence, it would clearly have been illegal on this ground, but there is no such feature in it. It was a contract to give information in respect to evidence,—to disclose, and not to suppress, the truth,—and the tendency of the disclosure cannot be regarded as in any respect interfering with, or obstructing, the administration of justice."

The contract in the case at bar provides for the giving of testimony by plaintiffs only in the form of affidavits. It does not appear therefrom that the plaintiffs had been, or that it was contemplated that they might be, subpoenaed as witnesses, or that they were, or would be, amenable to any such process. The making of an affidavit is usually a voluntary act. 1 R. C. L. 761; 1 Enc. Pl. & Pr. 309, 310. And it cannot be compelled, in the absence of a statute authorizing such procedure. 2 C. J. 377; *Bacon v. Magee*, 7 Cow. 515; *Crenshaw v. Miller* (C. C.) 111 Fed. 450. And no statute has been cited under which the affidavits to be made by plaintiffs could have been compelled, or prescribing fees therefor, and we know of none. Until 1903 no witness fees in Land Office hearings concerning the public lands of the United States were provided for by law, nor was there any provision for summoning witnesses or compelling their testimony at such hearings, but their appearance was voluntary. *Weeks v. Cobb*, 2 Land Dec. 223, *Re Higday*, 10 Land Dec. 385. By an act of Congress reapproved January 31, 1903

(32 Stat. at L. 790, chap. 344, Comp. Stat. §§ 4499-4503, 8 Fed. Stat. Anno. 2d ed. pp. 524, 525), provision was made for the compulsory attendance of witnesses before the register and receiver of a land office, or before a commissioner to take the deposition of a witness residing outside the county in which the hearing occurs, and providing also for witness fees. See Commissioner's Circular Letters, 32 Land Dec. 132, 33 Land Dec. 58, 36 Land Dec. 473, 39 Land Dec. 601. But no provision is made by said statute, or amendments thereto, for compelling testimony by affidavit or allowing fees therefor. It is clear, therefore, upon the facts shown by the petition demurred to, that the contract cannot be held invalid on the ground that it provides for compensation for the performance

Contract—to give testimony by affidavit in support of land claim.

merely of a legal duty, or in excess of legal fees.

But the point that seems to be most strongly urged against the validity of the contract is that the provision for the purchase of the stock within one year after the issuance of the patent is, in effect, an agreement to pay the stated price as a part of the consideration for the giving of the testimony, contingent upon the patent being issued as a result of such testimony. Counsel do not agree in their construction of the contract with reference to the effect of that provision. Counsel for plaintiffs insist that it is a separate and independent provision, and that the sole consideration for the giving of the testimony was the promise to issue the stock, basing that construction, principally, upon the further provision in the contract declaring the promise to buy and the promise to sell the stock to be "absolutely binding upon" the parties respectively. And they also contend that, in any event, the contract is not invalid for the reason that the plaintiffs agreed only to testify to facts within their knowledge at the time, which had been

reduced to writing and given to the special agent, and stated to defendant, and that the delivery of the stock was in no way contingent upon the outcome of the proceedings for patent, or the issuance thereof, nor upon the character of evidence to be given. And, finally, that the stock was issued and delivered in settlement of the claims of plaintiffs in the land applied for.

Without deciding the question whether defendant's promise to purchase the stock is to be construed as part of the consideration for the giving of the affidavits, that may be conceded for the purpose of the discussion. But we think it should not be conceded, from what appears in the contract alone, that the obligation to purchase the stock was made dependent upon the character of the evidence to be given by plaintiffs, or its effect in procuring the patent. The agreed service of plaintiffs was not to procure the patent, nor to establish the applicant's right thereto. They were merely to make affidavits as to the truth concerning their acts and intentions concerning the matter recited in the contract, and that it was so understood by the parties seems to be disclosed by the alleged fact of the issuance of the stock to plaintiffs before the issuance of the patent. It was not a part of the condition of the obligation to purchase the stock that the patent should be issued as the result of the affidavits, but the provision therefor, as we understand the contract, was to become effective upon the issuance of the patent, without regard to the effect of the affidavits as a controlling or contributory cause, though it was no doubt expected that the giving of the affidavits would assist in procuring the patent upon the application then pending.

In that view of the contract, it may be at least doubtful whether the rule invalidating contracts to furnish or give evidence for a compensation contingent upon the result would be applicable. In the leading English case on the subject, *Stanley v. Jones*, 7 Bing. 369, 131

Eng. Reprint, 143, the party seeking to enforce the contract held to be invalid had represented to the other party that he was in possession of evidence to prove that the latter was entitled to recover a considerable sum of money from other parties, and had agreed to communicate such evidence upon receiving a stated sum of money expended in obtaining such evidence, and upon the promise to pay him one eighth of the amount of money thereafter recovered from said other parties, or either of them, "through the means of him (Stanley), after the payment of the expenses of recovering such money." And in Pollak v. Gregory, 9 Bosw. 115, cited and distinguished in Nickelson v. Wilson, 60 N. Y. 362, and cited here by defendant, the contract was held illegal for the reason that it provided for a further payment upon the condition that the testimony given "shall have been such as led to the satisfactory termination of said suits to the interest" of the party for whom the testimony was to be given. But, referring to the rule contended for, where the parties contracting to furnish the evidence might be required to testify, the court says, in *J. I. Case Threshing Mach. Co. v. Fisher*, 144 Iowa, 45, 122 N. W. 575: "But here there was no inducement held out to defendants to procure evidence that should accomplish a specific result"—and it was held that there was nothing in the transaction tending "in the remotest way to the corruption of justice." And in *Haley v. Hollenback*, 53 Mont. 494, 165 Pac. 459, where the contract was between a litigant and a stranger to the controversy, and provided that the latter was to search for bona fide witnesses and such bona fide, competent, and legitimate testimony as he might be able to obtain to be produced upon the trial, and the litigant agreed that "if she should recover in her said suit she would pay plaintiff well for such services," the contract was held to be valid; the case being distin-

guished from two cases previously decided by the same court, and often cited on this question (*Quirk v. Muller*, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077, and *Hughes v. Mullins*, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 212), the court saying: "Plaintiff did not agree to furnish evidence that would establish defendant's claim, nor was he to have any portion of the possible recovery."

See also *Neece v. Joseph*, 95 Ark. 552, 30 L.R.A. (N.S.) 278, 129 S. W. 797, Ann. Cas. 1912A, 655, and *Josephs v. Briant*, 108 Ark. 171, 157 S. W. 136.

It is unnecessary, however, to decide whether or not the contract in this case might be sustained alone upon the ground that the plaintiffs did not agree to give such testimony as should be sufficient to establish the applicant's right to the patent, or in connection with the fact that the plaintiffs could not be compelled to give the required testimony. There is another element in the contract clearly distinguishing it from the contracts held to be invalid in the cases cited in support of defendant's contention here. The recitals show that the plaintiffs were not strangers to the subject-matter of the proceeding in which their affidavit testimony was to be used. It recites, in substance, that the lands had been located in their names under the Mineral Land Laws of the United States, under a power of attorney executed by them, and transferred under the authority of that instrument by the party to whom the power had been transferred, and that they believe that they had certain rights and interests in the land, for which and their services they had received no benefit or thing of value. We are not informed as to the precise nature or extent of the rights or interests in the land claimed by the plaintiffs, or which they believed they had, either by the contract or any averment of the petition, and the petition, including the contract therein set out, is all we have before us on this hearing.

Nor do we think it necessary, as against the demurrer, for the petition to have alleged the nature and extent of the rights or interests which the contract recites the plaintiffs were claiming or believed they had. But we think it must be assumed, at least, that the plaintiffs were claiming, or believed that they had, substantial interests, for which, though transferred by authority of the power of attorney, they had received no consideration. It seems also reasonable to suppose that the government was requiring of the plaintiffs, as original locators of the land, the required affidavit testimony, and that the same was deemed essential by the defendant to complete the showing to establish the right to the patent applied for, or to satisfy the government as to the applicant's good faith in the matter. And in that respect, since the plaintiffs were under no legal duty to furnish the evidence, the cases of *Nickelson v. Wilson*, 60 N. Y. 362, and *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370, are strongly in point, the difference in those cases being that the consideration for the agreed testimony was the cancellation of a judgment. For it was said in the *Nickelson Case* that under the circumstances it would be exceedingly unjust to enforce the judgment against him, and in the *Cowdery Case* that, when the agreement was performed on his part, it became an accord, executed and accepted in satisfaction of the entire claim on the judgment.

But in all of the cases cited, or that we have seen, establishing or applying the rule avoiding contracts to furnish or give testimony or evidence, whether for excessive fees, or for a compensation dependent upon the result, the party to whom the compensation was to be paid was an entire stranger to the transaction or controversy; and that fact is stated in several of the cases. In the leading case of *Stanley v. Jones*, supra, the court said that the party was "a stranger to the controversy." In *Lyon v. Hussey*, 82 Hun,

15, 31 N. Y. Supp. 281, it is said: "Here was a layman who . . . was a stranger to the transaction, and who forced himself upon the attention of the defendant with a statement of his ability . . . to employ counsel . . . and procure the evidence."

And in *Clifford v. Hughes*, 139 App. Div. 730, 124 N. Y. Supp. 478, the rule as to a witness was stated so as to apply only to one "who is not interested in the result of the controversy, and resides within this state, and is amenable to process therein."

Where, however, the witness is shown to have been otherwise interested in the proceeding or the subject-matter thereof, a contract for compensation, though dependent upon the result, has been sustained. *Wellington v. Kelly*, 84 N. Y. 543; *Smith v. Hartsell*, 150 N. C. 71, 22 L.R.A.(N.S.) 203, 63 S. E. 172; *Gaines v. Molen* (C. C.) 30 Fed. 27. In *Wellington v. Kelly*, it appeared that when a trustee was seeking to foreclose and collect a mortgage given by one Brown, which a receiver had satisfied and discharged, and delivered to one Hill upon payment by him of the amount due, Hill had entered into an agreement with Brown to furnish him the papers and evidence necessary to defeat the foreclosure action, and Brown agreed that if said action should be defeated with such papers and evidence, and a recovery on the mortgage finally prevented, he would pay Hill one half of the amount of the mortgage. That action was defeated by judgment for the defendants, and Hill's assignee sued to recover upon said agreement. Brown having died pending the action, his executors were substituted as defendants in his stead, and they contended that the agreement was illegal, "for the reason that it tended to pervert justice by holding out an inducement to Hill for the fabrication of false papers and the furnishing of false evidence." The court first says: "In considering the question of the validity of the contract, it is

to be observed that no corrupt intention appears upon its face; and, construing it in view of the situation of the parties and of what was done under it, there is no ground for supposing that it was entered into for the purpose of perverting justice by the production of false testimony in support of the defense in the foreclosure action."

Then, after referring to the peculiar relations between Hill and Brown through the payment of the mortgage voluntarily by the former, and the several questions that might be presented thereby concerning Hill's rights and Brown's legal or moral obligation to him, the court says further: "It will be seen that the respective rights and obligations of Hill and Brown, growing out of the payment by Hill, and the subsequent transactions, were not free from doubt; and under the circumstances mentioned the agreement in question was made. . . . As between Brown and Hill, it was equitable that, if Brown was able to avail himself of the act of Hill as a payment of the mortgage, he should indemnify Hill for his advances; and we perceive no objection to the recovery in this case, unless the rule is that every agreement made by a third person to furnish evidence in a litigation for a compensation contingent upon the event is illegal. I find no authority for so extensive a proposition. In *Stanley v. Jones*, 7 Bing. 369, 131 Eng. Reprint, 143, . . . the person making the agreement to communicate the information was an entire stranger in interest to the proposed litigation, and professed to have knowledge of facts of importance to the party, but which he did not disclose. Lord Denman said that such an agreement was illegal from its manifest tendency to pervert justice, and we fully assent to the decision in that case. . . . But in this case Hill was not a stranger in interest to the subject of the litigation. His antecedent relation to the mortgage made it just that he should be indemnified for the money advanced

by him, in case his payment should be available to Brown, in the foreclosure action. The mere fact that the agreement might furnish a temptation to Hill to prevaricate or furnish false testimony does not, we think, stamp the agreement as illegal per se, and no illegal or improper intent on the part of any of the parties is disclosed by the evidence."

Smith v. Hartsell, 150 N. C. 71, 22 L.R.A. (N.S.) 203, 63 S. E. 172, was an action brought upon a contract between the heirs at law of a decedent and Smith, whereby said heirs agreed that in case they should recover the estate they would pay out of the money received a stated sum, which was justly due said Smith from the decedent, and the said Smith agreed "to do everything proper and legitimate, and to aid them in every way to recover said estate," and to "give all and true evidence when called upon, in any suit that it may be necessary to bring in reference to said estate." It was contended, among other things, that the contract was contrary to public policy because containing a stipulation to testify in a court of justice. The court, after stating the general rule condemning contracts to procure testimony to establish a given result, or contracts to testify for a sum made to depend on the recovery or the amount of it, and citing cases in support of the rule, said: "But this contract, as we interpret it, does not necessarily come under the condemnation of any of these decisions. The agreement of plaintiff in this respect was to give all true evidence, 'when called on in any suit it may be necessary to bring to recover the estate.' It does not appear—certainly not on the face of the agreement—that he is to receive more or less than the usual or ordinary fees of a witness for so testifying. He only agrees to do what is entirely proper for him to do, and which the law would compel him to do without any agreement. Standing alone, as a rule, this agreement would not be a sufficient consideration to uphold an

executory contract, but it is not an immoral or illegal stipulation, and should not have the effect of avoiding a contract that is otherwise legal and binding. *Cobb v. Cowlery*, 40 Vt. 25, 94 Am. Dec. 370; *Nickelson v. Wilson*, 60 N. Y. 362; *Wellington v. Kelly*, 84 N. Y. 543. According to the complaint, the facts of which are admitted, the plaintiff held, as heretofore stated, a valid and just debt against the estate of G. W. Robbins, and could have enforced its collection by law. This course would and might have involved delay, and defendants, who were liable, whenever this estate agreed to pay plaintiff's claim and just debt, for which these assets were liable, whenever this estate was recovered and came into their hands; the plaintiff, on his part, to do everything that was 'legitimate and proper to aid them, and to give true evidence whenever called on.'

Gaines v. Molen, *supra*, is closely in point. The action in that case was brought to compel the specific performance of a contract to convey an undivided half of certain real estate in Hot Springs government reservation in Arkansas. It appeared that Gaines had executed a quitclaim deed to defendant, Molen, and that on the same day said defendant executed a contract to convey an undivided half interest in the property within thirty days after acquiring title from the government. The deed was placed on record immediately, but the contract was kept secret until after the acquisition of title from the government. The defendant averred both want and illegality of consideration, and the court said that in face of the recitals in the contract the burden of proof was on them to make good their defense. The deed and contract were executed after the United States Supreme Court had decided that the title to said reservation was in the government, and not in either of the three existing claimants. The land was within the limits of a tract which plaintiff had purchased years before, and which

had been inclosed and cultivated by him. The defendant, Molen, had permission from the plaintiff to occupy the ground in controversy and build upon it, and a few months prior to said transaction he did build a small house thereon. Plaintiff agreed to furnish the evidence to enable the defendant to establish his claim to the property, "if an anticipated act for the benefit of the occupants of Hot Springs should be passed by Congress," and, when such act was passed creating the Hot Springs commission, said defendant filed his petition before the commission, asking the right to purchase, and said plaintiff gave testimony before the commission upon which the certificate of purchase was awarded to defendant. The decision was by Circuit Judge Brewer, who said: "I think it very clear that the claim of defendants that this contract was without consideration, or that the consideration was illegal, cannot be sustained. Obviously there was a settlement between the parties. The plaintiff, William H. Gaines, had some claims, as between himself and defendant, to the ground, and probably to the buildings, which were settled and adjusted by this deed and contract. He unquestionably had that prior occupancy which it was thought might be of value in the future acquisition of title from the government, and which in fact proved to be of value, the benefits of which the defendant sought to acquire, and did acquire. The plaintiff was not simply contracting to furnish testimony to support a claim of the defendant believed to be good, or believed to be fictitious; but he was contracting with a view of preserving his own rights, and uniting the claims of himself and defendant in the one person, for the greater convenience, and in the hopes of better success, in any proceeding which might be initiated. The fact that he contracted to furnish the testimony, and did in fact furnish it, works no estoppel as between himself and defendant. *Hobbs v. Mc-*

Lean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870. The contract which was made was in no manner a violation of any act of Congress, nor did it contravene any public policy. It was a contract between two parties who might possibly be contesting claimants under some future act of Congress for a settlement of their respective claims. The case of *Southerland v. Whittington*, 46 Ark. 285, is very much in point, and the decision of that learned court is in accord with the views I have expressed. See also *Lamb v. Davenport*, 18 Wall. 314, 21 L. ed. 762."

That case was cited with approval upon the point that, in the absence of a statute making a contract illegal which disposes of conflicting claims to public lands, such a contract is not void, in *St. Louis Min. & Mill Co. v. Montana Min. Co.* 171 U. S. 657, 43 L. ed. 323, 19 Sup. Ct. Rep. 61, 19 Mor. Min. Rep. 575, which case affirmed the decision in *Montana Min. Co. v. St. Louis Min. & Mill Co.* 20 Mont. 394, 51 Pac. 824, 19 Mor. Min. Rep. 218, and held that, where an application for patent to a mining claim embraces land claimed by another, the latter is under no obligation to file an adverse claim, but may make a valid settlement with the applicant by contract, which can be enforced against him after he obtains his patent. And the court, by Mr. Chief Justice Fuller, said: "Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may sell it, mortgage it, or part with the whole or any portion of it as he may see fit [citing cases]. The location of the Nine Hour lode was in all respects sufficient and valid. When the dispute afterwards arose between Robinson and Mayger as to a portion of it, there was nothing to compel the filing of an adverse claim. The settlement made gave Robinson an equitable title immedi-

ately, and ultimately he was to have the complete legal title to a piece of ground which, it seems, rightfully belonged to him. The government was not defrauded in any way, nor was there any legal or moral fraud involved in the transaction. The settlement and adjustment of the dispute with reference to the right of possession appears upon its face to have been satisfactory to the parties when made, and should be upheld unless contravening some statute or some fundamental principle of law recognized as the basis of public policy. There was no such statute, and settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored, and are apparently of frequent occurrence in regard to mining land claims; nor is there anything in the decision of this court to throw doubt on their validity."

The facts were that Mayger had applied at the Land Office for a patent to the St. Louis claim, and in the survey included a part of the Nine Hour claim, whereupon its owners brought an action against Mayger to determine the right to the possession of the particular premises, and for the purpose of settling and compromising that action, and agreeing upon the boundary lines between the two claims, Mayger executed and delivered a bond for a deed to the owners of said Nine Hour claim, whereby he agreed that, upon obtaining a patent as applied for, he would execute and deliver a good and sufficient deed for the premises, which, it was agreed, were a part of the last-mentioned claim. Mayger then obtained a patent upon his application, and the action in the case cited was brought to compel the agreed conveyance. See also *United States v. Biggs* (D. C.) 157 Fed. 264, where the cases on the point are reviewed.

Whether the plaintiffs had or were claiming such an interest as would have furnished a reasonable ground for the bringing of an action to determine the right of possession, or that would have rendered the is-

suance of the patent as applied for inequitable as against them, we do not know, and that can be disclosed only by further proceedings in the case. But, in view of the facts recited in the contract, it is not inconceivable that they may, at least, have had or claimed such an interest, and might have protested the application for patent, or, under certain conditions, instituted adverse proceedings in the Land Office. For, although the Federal statute relating to adverse claims opposing the issuance of patent to a mining claim has reference only to claims arising from independent and conflicting locations of the same ground, and not to a controversy between co-owners or parties claiming under the same location, the rules and practice of the Land Department permit one claiming as a co-owner to institute adverse proceedings as well as to file a protest, though such a party is not required to do either, but may assert his equity in the patent title in an action to have the patentee declared trustee for his benefit. *Davidson v. Fraser*, 36 Colo. 1, 4 L.R.A. (N.S.) 1126, 84 Pac. 695; *Lindley, Mines*, 2d & 3d eds. §§ 646, 728; *Morrison, Min. Rights*, 10th ed. 413; id. 15th ed. 605.

We do not think it can properly be held upon the facts shown by the petition that the plaintiffs might not lawfully compromise or settle their claims in the manner provided by the contract in question, if that was the purpose thereof, or that the contract was illegal as against public policy on the ground stated.

The point stated as the first ground of objection to the petition, viz., that, a part of the land having been excluded from the patent, the condition precedent of the obligation to purchase the stock had not occurred, is sufficiently answered, we think, by the averment of the petition to the effect that the applicant for the patent, before the issuance thereof, with the consent and at the instance of the defendant and

without the knowledge, consent, or fault of plaintiffs, or either of them, abandoned and waived its claim and right to the remaining part of the land not included in

—to pay on receipt of patent
—effect of exclusion of part of land.

the patent, thereby causing the patent to be issued for the part only included therein. The principle is stated in *Case v. Beyer*, 142 Wis. 496, 125 N. W. 947, quoting from *Jones v. Walker*, 13 B. Mon. 163, 56 Am. Dec. 557, as follows: "He who himself prevents the happening or performance of a condition precedent, upon which his liability, by the terms of the contract, is made to depend, cannot avail himself of his own wrong and relieve himself from his responsibility to the obligee, and shall not avail himself, to avoid his liability, of a nonperformance of such precedent condition, which he has himself occasioned, against the consent of the obligee."

The doctrine is stated in *Teachnor in Tibbals*, 31 Utah, 10, 86 Pac. 483, and cases cited in support thereof, as follows: "The law is that where one . . . voluntarily puts it out of his power to do what he agreed to do, in the way agreed upon, he commits a breach of contract and becomes liable generally."

In that case the agreement was to pay as the balance of the purchase price of a mining claim a certain sum out of the first net proceeds of the sale of ore thereafter extracted therefrom. It was expected that sufficient ore would be extracted to pay such balance out of the net profits thereof, but the mine was sold by the obligated party before selling the ore, and it was held that he could not thereby escape liability. A pertinent statement of the rule is found also in *Marvin v. Rogers*, 53 Tex. Civ. App. 423, 115 S. W. 863, wherein the court says: "It seems clear that, where a contract is made which is performable at the time of the occurrence of a future event, the law imputes to the promisor an agreement that he will put no obstacle in the way of the

—to give testimony—public policy.

happening of that event, and that he will hold himself in readiness to co-operate where his co-operation is a necessary element in the happening of the contingency. If, in violation of this implied covenant on his part, he does something which prevents the happening of the event, the contract becomes absolute, and must be performed as if the event had occurred."

The case of *Dill v. Pope*, 29 Kan. 289, is to the same effect, where the defendant, a purchaser of property at a stipulated price, payable upon a certain condition, had, by selling the property, disabled himself from complying with the condition. In holding that the defendant's liability thereupon became absolute, and the money presently due, Judge Brewer, delivering the opinion of the court, said: "That a party to a contract, who by his own act prevents the happening of a condition,

is estopped thereafter to say that such condition has not happened. No party to a contract can interfere to prevent the performance of any condition, and then claim any benefit or escape any liability from the failure of such performance."

It is unnecessary, therefore, to consider the question presented by the briefs as to whether the provision of the contract in question is to be construed as requiring the issuance of patent for all of the land as applied for, without omitting any part, as a condition precedent to the liability to purchase the stock.

Holding, for the reasons stated, that the court erred in sustaining the demurrer to the amended petition, it follows that the judgment must be reversed, and the case remanded for further proceedings not inconsistent with this opinion. It will be so ordered.

Kimball and Blume, JJ., concur.

ANNOTATION.

Validity of contract to testify.

I. Fact witness:

- a. In general, 1457.
- b. Agreement to pay witness invalid:
 1. Specified compensation, 1458.
 2. Contingent fee, 1460.
- c. Witness not subject to process, 1461.

II. Expert witness:

- a. In general, 1462.
- b. Extra preparation:
 1. In general, 1463.
 2. Contingent fee, 1464.

I. Fact witness.

a. In general.

The only cases which will be considered in this annotation are those involving the question of the validity of a contract to pay witnesses for giving their testimony. Cases are sometimes cited upon the question which involve the right to an extra allowance of costs because of the character of the witness, or of the place of his residence, but the fact that a person can-

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not charge the extra expense of his witnesses against his adversary has little bearing upon the question whether or not he may not be liable upon a contract which he has made to pay extra compensation for their attending court at his request. The uniform rule is that a witness who is within the reach of the process of the court is bound to respond to a subpoena and testify to such facts as may be within his knowledge, and that he is entitled only to such allowance as may be provided for him by statute.

In *Fuller v. Mattice* (1817) 14 Johns. (N. Y.) 357, it was held that a witness coming from beyond the jurisdiction of the court is entitled only to the fees allowed by the fee bill. In that case, however, there was no agreement for extra compensation before the witness came into the jurisdiction of the court, and, after jurisdiction of him was acquired, he was subject to the same rule that applied to other witnesses, and could be

compelled to testify without extra compensation.

And in *Willis v. Peckham* (1820) 1 Brod. & B. 515, 129 Eng. Reprint, 821, 4 J. B. Moore, 300, 21 Revised Rep. 706, recovery on a promise to pay a witness for loss of time was denied, on the ground that it was without consideration, the question of its validity not being discussed.

The question of the validity of an employment to obtain evidence is discussed in the annotation to *Duteau v. Dresbach*, ante, 1430.

b. Agreement to pay witness invalid.

1. Specified compensation.

The courts hold that it is part of the duty of every citizen to give his services in testifying in any court proceeding when he is properly summoned to performance of that duty, and that it is against public policy for him to attempt to exact any compensation beyond what is provided by statute for such service. Therefore, any agreement which he may exact from the person desiring his testimony, to compensate him for his time or services beyond the statutory fees, is unenforceable. This is sometimes put upon the ground that the promise to pay is without consideration to support it, because the promise to testify is merely to perform what the law requires, which cannot furnish a consideration. But the majority of the cases put the ruling upon the ground that such a contract is against public policy.

Connecticut. — *Dodge v. Stiles* (1857) 26 Conn. 463.

Illinois.—*Walker v. Cook* (1889) 33 Ill. App. 561; *Boehmer v. Foval* (1894) 55 Ill. App. 71; *Wright v. Somers* (1906) 125 Ill. App. 256.

New York. — *Cowles v. Rochester Folding Box Co.* (1903) 81 App. Div. 414, 80 N. Y. Supp. 811; *Clifford v. Hughes* (1910) 139 App. Div. 730, 124 N. Y. Supp. 478.

North Carolina.—*Sweany v. Hunter* (1808) 5 N. C. (1 Murph.) 181.

Pennsylvania. — *Ramschasel's Estate* (1904) 24 Pa. Super. Ct. 262.

England. — *Pool v. Sacheverel*

(1720) 1 P. Wms. 675, 24 Eng. Reprint, 565.

What has been said to be the leading case in this country is *Dodge v. Stiles* (1857) 26 Conn. 463, in which it was held that, where the statute prescribes the fees to which witnesses are entitled, any attempt, directly or indirectly, to secure more, is against the language and policy of the law. The court says: "Were it otherwise, and witnesses might be allowed to make terms for testifying, there would be room for oppressive conduct and for corruption. Witnesses knowing that their testimony was indispensable would, under one pretense or another, make terms for their testimony, and such as might be induced to represent their testimony as important would be tempted to barter their oaths at the expense of truth and justice. Now a promise to pay more than the statute fees for just this statute service, without further service or loss by the witness, may be said to be without consideration. It cannot be important, in our view, whether the promise be made after the service of the subpoena, contemporaneously with it, or before, provided the promise refers to this duty and is founded on no other consideration. There may be a further consideration, in which case an executory promise for extra compensation will be upheld; as, if the witness is about going abroad at the time he may be wanted to attend court, and agrees that he will remain and give up his journey, and is summoned; or, living at a distance from the place of the court,—more than 20 miles,—so that his deposition could be taken, agrees that he will attend in person. In these and the like cases the promise is one for indemnity, and is founded on a new and meritorious consideration, and is good. . . . If a witness agrees with a party that he will attend and testify without being summoned, and he is not summoned and so not brought under the order or censure of the court, we suppose any reasonable promise for compensation is good and may be enforced; for the proceeding or service is not under nor in pursuance of the statute."

Where a witness who is not interested in the result of the controversy resides within the state and is amenable to process therein, an agreement to compensate him in any manner in excess of legal fees, for attending as a witness and testifying generally as to facts within his knowledge, is contrary to public policy and void. *Clifford v. Hughes* (1910) 139 App. Div. 730, 124 N. Y. Supp. 478.

An agreement to pay an inventor, who, after assigning his patent to one person, attempted another assignment to another, for becoming a witness in favor of the first assignee in an action to establish title to the invention, is without consideration, since it is contrary to public policy and will not be given force and effect by the court. *Cowles v. Rochester Folding Box Co.* (1903) 81 App. Div. 414, 80 N. Y. Supp. 811. The court says the agreement is repugnant to every instinct of propriety and justice, since it in effect provides for payment as a consideration for giving evidence in an action which it is agreed shall be brought. This was affirmed in (1904) 179 N. Y. 87, 71 N. E. 468, where the court says it would be contrary to sound public policy to recognize and to enforce an agreement to recompense a person for giving his evidence in an action to be commenced.

In *Wright v. Somers* (1906) 125 Ill. App. 256, the court held that an agreement to pay a fact witness extra compensation for loss of time in becoming a witness in a case was void as against public policy. The court says if the claim was allowed it would give ground for witnesses to exact unreasonable fees for their testimony, and might make it impossible for a poor suitor to obtain his rights. The statute had fixed the amount of fees to which a witness was entitled, and the court said to demand more is forbidden by the policy and spirit of the statute. Further, the court says: "If a witness who knows a fact material to the issue in the cause, either before or after the service of a subpoena upon him, can traffic with the suitor who desires to call him as to the value of his testimony, and then call upon

the courts to enforce the contract thus made, the tendency to evil consequences is apparent. Such a ruling leans toward the procurement of perjury; toward the raising up of a class of witnesses who, for a sufficient consideration, will give testimony that shall win or lose the lawsuit, toward the perversion of justice; and toward corruption in our courts."

A witness duly subpoenaed, and attending under direction of the subpoena, cannot recover on a promise for extra compensation, whatever might have been the rule had he attended under his contract without service of process. *Walker v. Cook* (1889) 33 Ill. App. 561.

A contract by which, for a money consideration, a person is to testify, and induce others to testify, in favor of his employer in a proceeding by him to recover money alleged to have been lost by another's embezzlement, is against public policy and void. *Boehmer v. Foval* (1894) 55 Ill. App. 71.

An agreement to remit the penalty imposed by statute upon a witness for failure to attend when summoned, if he will attend at the next term of court, is unenforceable, because an agreement to pay for what the witness is, by law, required to perform. *Sweany v. Hunter* (1908) 5 N. C. (1 Murph.) 181.

A contract to pay extra compensation for testimony in an eminent domain proceeding, to persons who had no greater knowledge of values than any others living in the neighborhood, is void as against public policy. *Ramschael's Estate* (1904) 24 Pa. Super. Ct. 262.

Where, in a proceeding to establish title to an estate, a person claimed marriage to deceased, both acting under assumed names, at a certain place, at a certain date, and the record showed that such a marriage occurred, the court held that it was contempt of court, and punishable, to offer a reward by advertisement to a person who would prove that the names were of actual persons who were married on that day. The lord chancellor says this tends to the suborning of witness-

es, is very dangerous, and not only greatly criminal, but a contempt of the court, being a means of preventing justice in a cause now pending. It is a reproach to the justice of the nation, and an insufferable thing, to make a public offer in print to procure evidence, and is tantamount to saying that such persons as will come in and swear, or procure others to swear to such a thing, shall have a reward. *Pool v. Sacheverel* (1720) 1 P. Wms. 675, 24 Eng. Reprint, 565.

But in *Plating Co. v. Farquharson* (1881) L. R. 17 Ch. Div. (Eng.) 49, 50 L. J. Ch. N. S. 406, 44 L. T. N. S. 389, 29 Week. Rep. 510, an advertisement of a reward by a person sued for infringing an alleged patent, for documentary evidence to prove that the alleged patented process was in use at a specified date, was upheld. The court said that it is not very likely that anyone would tender a forged document for the reward offered. And the conclusion was that this was a proper mode of obtaining evidence. And with respect to the *Pool Case* (Eng.) *supra*, the master of the rolls says: "It does not appear to me that an advertisement for a witness to prove a thing not in the knowledge of the man who advertised for it, but which he believes to be true, can be treated as subornation of perjury, because subornation of perjury means doing something to induce people to come forward to prove that which the person seeking to prove it believes to be false."

And in *Smith v. Hartsell* (1908) 150 N. C. 71, 22 L.R.A. (N.S.) 203, 63 S. E. 172, it was held that an agreement by a creditor of an estate with the heirs, to give all true evidence when called upon in any suit that may be necessary to establish the claim of the heirs, in consideration of their agreement to pay his claim when the property came into their possession, is not unlawful. The court says it does not appear, certainly not on the face of the agreement, that he was to receive more or less than the usual or ordinary fees for testifying. He only agrees to do what is entirely proper for him to do, and which the law

would compel him to do without any agreement. It is not an immoral or illegal stipulation, and should not have the effect of avoiding a contract that is otherwise legal and binding.

2. *Contingent fee.*

All agreements to pay witnesses extra compensation for their testimony being void, the fact that the compensation is to be contingent on the success of the suit is rather an immaterial factor. Of course, such an agreement is doubly vicious, not only as violating the statutory fee bill, but as offering a direct temptation to commit perjury, since, if the compensation is dependent on, or will be increased by, the favorable outcome of the proceedings, the inevitable tendency will be to color the testimony to bring about the desired result.

So, an agreement by a judgment creditor that, in case the debtor will testify in his favor in a pending suit, and he is successful in the suit, he will release the judgment against the witness, is void on the ground that its tendency is to pervert the administration of justice. *Bowling v. Blum* (1899) — Tex. Civ. App. —, 52 S. W. 97.

Where an attorney serving for a contingent fee was a witness in the case, the court said that if it appeared that the contingent fee was a reward for his services as a witness, the contract would not only be reprehensible, but highly immoral, against public policy, and therefore illegal and void. But since it appeared in the evidence that the fee was for professional services, the court held that the mere fact that he was also a witness did not render the contract invalid. *Perry v. Dicken* (1884) 105 Pa. 83, 51 Am. Rep. 181.

As will appear in the immediately succeeding subdivisions of this annotation, there are cases where the testimony of the witnesses cannot be secured by the ordinary process of the court, and an agreement to pay them for attending and testifying will be sustained; but the right to compensation must not be made contingent on the success of the litigation.

Thus, an agreement to pay a witness, intending to leave the state, a compensation dependent upon the success of the trial, in case he remains in the state and testifies in the case, is, as the court says, in its inevitable tendency, to give the witness a bias in favor of the party calling him. This creates such an interest in the event of the suit as would prevent his testifying if the contract was valid, and such a contract would be a fraud on the administration of justice. Such contracts are against sound public policy, because their inevitable tendency would be, if not to invite perjury, at least to sway the mind of the witness, and thus contaminate the stream of justice at the source. Both morality and sound policy forbid such contracts. *Dawkins v. Gill* (1846) 10 Ala. 206.

c. Witness not subject to process.

If for any reason the witness is not subject to the process of the court, either because he is beyond the jurisdiction, or the court is not authorized to subpoena witnesses, or the testimony is privileged, a contract to pay him for attending and testifying will be upheld.

United States.—*Gaines v. Molen* (1887) 30 Fed. 27.

Colorado.—*Lincoln Mountain Gold Min. Co. v. Williams* (1906) 37 Colo. 193, 85 Pac. 844.

New York.—*Nickelson v. Wilson* (1875) 60 N. Y. 362.

Wisconsin.—*Armstrong v. Prentice* (1893) 86 Wis. 210, 56 N. W. 742.

Wyoming.—*THATCHER v. DARR* (reported herewith) ante, 1442.

England.—*Schimmel v. Lousada* (1812) 4 Taunt. 695, 128 Eng. Reprint, 504; *Sturdy v. Andrews* (1812) 4 Taunt. 697, 128 Eng. Reprint, 504; *Lonergan v. Royal Exch. Assur. Co.* (1831) 7 Bing. 729, 131 Eng. Reprint, 282, 1 Dowl. P. C. 233, 5 Moore & P. 805.

In *Lonergan v. Royal Exch. Assur. Co.* (Eng.) supra, which was a rule to review a taxation of costs which disallowed an amount paid a foreign witness for loss of time, Park, J., says that, since the witness refused to

appear except upon compensation for loss of time, the party had no alternative but to accede thereto, implying that the contract to pay the compensation was valid, and the amount paid was directed to be allowed as costs against the losing party.

And the expense of maintaining a foreign witness was allowed as costs in *Schimmel v. Lousada* (Eng.) supra, and *Sturdy v. Andrews* (1812) 4 Taunt. 697, 128 Eng. Reprint, 504.

But compensation for loss of time was refused in case of merchants brought from a foreign country as witnesses, in *Moor v. Adam* (1816) 5 Maule & S. 156, 105 Eng. Reprint, 1009, the court maintaining the distinction which had grown up in England, which allowed extra compensation to physicians and lawyers, but denied it to other classes of witnesses.

An agreement for extra compensation to a witness who is beyond the jurisdiction of the court, so that he cannot be reached by subpoena, is enforceable. *Armstrong v. Prentice* (Wis.) supra.

The employment of persons in one state to examine a mine for the purpose of testifying as to its value in a case pending in a Federal court in another state, in which it is sought to hold the officers of the corporate owner liable for sending false statements through the mails, is not void as tending to subvert or obstruct public justice. *Lincoln Mountain Gold Min. Co. v. Williams* (Colo.) supra.

A contract between a settler on public land and one whom he has permitted to occupy a portion of the tract, to furnish the evidence before the Land Office necessary to establish the latter's claim to the portion occupied by him, in consideration of a conveyance to himself of one half the claim, for the purpose of settling the controversies between themselves, is not against public policy. *Gaines v. Molen* (Fed.) supra. The court says the plaintiff was not simply contracting to furnish testimony to support a claim of defendant, believed to be good or believed to be fictitious, but he was contracting with a view of preserving his own rights and uniting

claims of himself and defendant in one party for the greater convenience, and in the hopes of better success in any proceeding which might be initiated.

So, the reported case (*THATCHER v. DARR*, ante, 1442) holds that a contract for testimony to be given before the Land Department, which could not require the attendance of the witness, was not invalid.

Where an agreement was made with one of two persons accused of fraud, against whom a civil action for recovery of the proceeds and a criminal prosecution were pending, that if he would testify fully in the cases, and judgment in the civil case went against defendants, he would be called upon to pay only a certain amount of it, and he waived his privilege, which he could not be required to do, and testified fully according to agreement, the court held that the contract was not against public policy. The court said that the evil of agreements to pay for testimony consisted in the condition which holds out to the witness a temptation to falsify his testimony so as to produce the result on which his compensation is dependent. Where a witness simply consents to make a disclosure of the truth, and has no inducement to produce any special result, the mischief is not apparent. *Nickelson v. Wilson* (1875) 60 N. Y. 362.

But one who has entered into a conspiracy to defraud the true claimant of government land of his claim cannot enforce a contract by such claimant to pay him for testifying to the conspiracy in a contest in the Land Office. *Hagan v. Wellington* (1898) 7 Kan. App. 74, 52 Pac. 909. The court says the contract to furnish the testimony is void as against public policy. The witness cannot be permitted to profit by the information possessed by reason of the unlawful conspiracy.

Very closely related to the cases within this subdivision are the bargains sometimes made with persons accused of crime to extend clemency to them if they will testify for the state, but since that is not strictly a

compensation for their testimony, and the cases deal strictly with the administration of the criminal law, that class of cases has been reserved for treatment in a separate note.

II. *Expert witness.*

a. *In general.*

The rule is that a so-called expert witness is not entitled to extra compensation for any testimony which he may be required to give under an ordinary subpoena of the court. The extent to which he may be compelled to testify under ordinary process is considered in the annotation to *Pennsylvania Co. v. Philadelphia*, 2 A.L.R. 1576.

In *Collins v. Godefroy* (1831) 1 Barn. & Ad. 950, 109 Eng. Reprint, 1040, 1 Dowl. P. C. 326, 9 L. J. K. B. 158, an attorney brought an action to recover compensation for loss of time in attending as a witness at a trial, and the court assumed that an offer to pay a certain sum, made after action brought, was evidence of an express promise to pay, but held that, the witness having attended under a subpoena, a promise to make remuneration for loss of time was without consideration and would not support an action. The court concludes that, on principle, an action does not lie for compensation to a witness for loss of time in attending under a subpoena.

In *Webb v. Page* (1843) 1 Car. & K. (Eng.) 23, one called as an expert to estimate the damages caused by negligence in carrying goods applied for compensation for loss of time, before being sworn. There does not appear to have been any contract to pay him, and there is no discussion of the validity of such a contract had it existed, but the court says: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge; without such testimony,

the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay."

A physician called to attend court as a witness cannot bargain for extra compensation for the service of attending court as a witness. And he cannot make charges for examinations and consultations preparatory to trial, dependent on the contingency of being required to testify in a lawsuit. The court says plaintiff's duty as a citizen compelled him to appear as a witness and give testimony, without any other pay than fees allowed by law, and he should not be permitted to evade that duty by the palpable excuse of a contract for a contingent fee. *Burnett v. Freeman* (1909) 134 Mo. App. 709, 115 S. W. 488.

b. Extra preparation.

1. In general.

If the service required of the expert is such that he cannot be compelled to render it under the ordinary process of the court, an agreement by the one seeking the service, to compensate the expert for it, is valid.

In *Tiffany v. Kellogg Iron Works* (1908) 59 Misc. 113, 109 N. Y. Supp. 754, it was held that the law implies a contract to pay for time and labor expended in preparing to testify as an expert in a lawsuit.

In *Barrus v. Phaneuf* (1896) 166 Mass. 123, 32 L.R.A. 619, 44 N. E. 141, where a party to a suit had apparently engaged the services of an expert some time before the trial, and rendered the services required of him, but was subpoenaed to testify at the trial for the mere statutory fees, and then brought action for additional compensation, the question of the validity of the contract does not seem to have been raised, the court stating that the question is whether or not there was any sufficient consideration for a promise to pay extra compensation, and, the court having found that there was such consideration, a judgment in his favor was sustained.

A contract to pay an expert in an eminent domain proceeding to investi-

gate the effect of the improvement on remaining property and qualify himself to testify upon the question of damages, as well as consult with counsel in the case, is not necessarily illegal as tending to corrupt practice, but if the agreement is to pay in proportion to the recovery, it will be condemned. *Johnson v. Pietsch* (1901) 94 Ill. App. 459.

In *Re Schapiro* (1911) 144 App. Div. 1, 128 N. Y. Supp. 852, which was a proceeding to disbar an attorney for agreeing to pay an expert witness a portion of his contingent fee for testifying in the case, the court says: "We are aware that witnesses who are to be called to give expert testimony which involves the special knowledge and skill of the witnesses, and often requires examination and study upon a particular branch of science, are, from the necessities of the case, justified in demanding and receiving compensation for their time and labor devoted to the investigation of the particular science about which they are to testify; but this practice has been allowed from the necessities of the case, and the inability of courts and juries to determine questions without the benefit of such expert knowledge. Such agreements, however, can never be valid where the amount to be paid is to depend upon the testimony that is to be given, and where the right to compensation depends upon the result of the litigation.

In *Burnett v. Freeman* (1907) 125 Mo. App. 683, 103 S. W. 121, which was an action on quantum meruit to recover the reasonable value of the services of a physician as an expert witness in a lawsuit, the court held that he could be compelled to attend and give his testimony under a subpoena, even though merely his opinion was called for, but the court says he could not be required to fit himself especially for lines of inquiry. He could not be expected to make examinations, perform professional services, and the like. He could not be compelled to do that, any more than an ordinary person with no knowledge of the facts pertaining to a case could be required to go and post himself so

as to become a witness. The court further says that a contract would be valid to pay an expert witness for any service which the law does not compel him to give as a witness free of charge. But an agreement to pay an expert for being a witness as to those matters which his duty as a citizen requires him to testify to would be invalid.

In *Philler v. Waukesha County* (1909) 139 Wis. 211, 25 L.R.A. (N.S.) 1041, 131 Am. St. Rep. 1055, 120 N. W. 829, 17 Ann. Cas. 712, which was an action by a physician against a county for services performed as an expert in a criminal case, there is a dictum to the effect that, if a person desires that any witness equip himself with knowledge by research or inspection, he may employ him to do so, but such employment will be controlled by the ordinary rules of contract express or implied.

In *People ex rel. Tripp v. Cayuga County* (1898) 22 Misc. 616, 50 N. Y. Supp. 16, which involved the validity of a contract by a district attorney employing an expert for a murder trial, the court says it is a well-known fact that expert witnesses are usually paid extra compensation for their services when called in many cases, and the question as to the amount they shall receive is usually regulated by contract.

In *People ex rel. Hamilton v. Jefferson County* (1898) 35 App. Div. 239, 54 N. Y. Supp. 782, which was an action for services rendered by an expert in a criminal case, it appeared that the statute provided for payment of expenses incurred by the district attorney, and, the contract having been made by him, the court says it was competent for the attorney to bind the county for such services.

And in *People ex rel. Bliss v. Cortland County* (1891) 39 N. Y. S. R. 313, 15 N. Y. Supp. 748, it was held that the district attorney has a right to contract to pay a stipulated sum per day for the services of expert witnesses.

In *People v. Montgomery* (1871) 13 Abb. Pr. N. S. (N. Y.) 207, the employment of an expert for a large com-

pensation without the knowledge of accused was made the ground of a motion for new trial, after conviction, but the court ruled that there was nothing improper in so doing. The court says the expert could not have been required, under process of subpoena to examine the case and to have used his skill and knowledge to enable him to give an opinion upon any point of the case, nor to have attended during the whole trial. "Professional witnesses, I suppose, are more or less paid for their time and services and expenses when called as experts in important cases, in all parts of the country."

In *Brown v. Travelers' Life & Acci. Ins. Co.* (1898) 26 App. Div. 544, 50 N. Y. Supp. 729, which was an action to recover compensation for services performed in qualifying to testify as an expert, there is no discussion of the legality of such a contract, but the court says: "We see no reason why the defendant, having employed him, should not pay for all work which he may have performed in perfecting himself in the details of the accident."

2. *Contingent fee.*

The compensation of expert witnesses cannot be made to depend upon the contingency of the successful outcome of the litigation.

A contract to pay an expert witness a percentage of the recovery is void. *Laffin v. Billington* (1904) 86 N. Y. Supp. 267.

A contract by a physician for a percentage of the recovery, for acting as an expert in a personal-injury action, is against public policy. *Davis v. Smoot* (1918) 176 N. C. 538, 97 S. E. 488. The court recommended an investigation with a view to prosecution for contempt against the physician for collecting the fee.

An agreement to pay the physician of one negligently injured one third of the amount recovered for the accident, with the contemplation that he should be a witness in the case, is void. *Sherman v. Burton* (1911) 165 Mich. 293, 33 L.R.A. (N.S.) 87, 130 N. W. 667. The court says the plaintiff's interest in the amount of the damages

furnished a powerful motive for exaggeration, suppression, and misrepresentation—a temptation to swell the damages so likely to color his testimony as to be inimical to the pure administration of justice, and therefore invalid.

In *Re Avenue A* (1911) 144 App. Div. 107, 128 N. Y. Supp. 999, where there was an agreement to give a corporation one third of the recovery for furnishing expert witnesses in an eminent domain proceeding, the court says no one would contend that an agreement to pay an expert witness one third of the recovery was valid.

An employment of an expert to estimate the value of the plant of a public utility for the purpose of fixing a rate, the compensation to be paid on condition that his estimate is materially less than that of the expert employed by the utility, is void as against public morals, as tending to induce perjured testimony. The court says any inducement offered to a witness to give testimony is subject to both legal

and moral condemnation. Such a contract is *malum in se*, which no court will enforce. *Hough v. State* (1911) 145 App. Div. 718, 130 N. Y. Supp. 407, reversing (1910) 68 Misc. 26, 124 N. Y. Supp. 878.

An agreement of an expert to testify in a patent litigation, for a fee contingent on a favorable outcome of the litigation, is void as against public policy. *Pollak v. Gregory* (1861) 9 Bosw. (N. Y.) 116. The court says an agreement by which a person is to be paid a stipulated sum for giving testimony, on condition that it leads to a termination of the suit favorable to the other contracting party, is illegal and void, as having a direct and manifest tendency to pervert the course of justice.

A contract by a physician for a percentage of the amount recovered for services in presenting to a railroad company the claim of a person injured by its negligence is void. *Thomas v. Caulkett* (1885) 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154. H. P. F.

CHARLES KELLEY, Plff. in Err.,

v.

STATE OF FLORIDA.

Florida Supreme Court—March 1, 1920.

(— Fla. —, 83 So. 909.)

Criminal law — Instruction — Liability for act in father's presence.

1. The charge, "Before the defendant Russell Kelley can be convicted of any crime, you, as the jury trying this case, must find from the evidence that he acted of his own volition, and not by direction and because of a fear of his father." "An unlawful act committed by a child in the presence of his father, at his direction, because of the criminal intent of the father, and not because of the wrong of the child, is the crime of the father, and not of the child,"—is erroneous, where the testimony shows the son to be over seventeen years of age, and there is nothing in the testimony to indicate that he was not in full possession of his mental and bodily faculties.

[See note on this question beginning on page 1470.]

Homicide—acquittal of principal in first degree—effect on liability of principal in second degree.

2. Where C. and R. are jointly

charged in an indictment containing two counts, C. as principal in the first degree and R. as principal in the second degree in the first count, and

Headnotes by BROWNE, Ch. J.

R. as principal in the first degree and C. as principal in the second degree in the second count, and where R. is acquitted on the ground of self-defense, C. cannot be convicted as principal in the second degree.

[See 1 R. C. L. 144.]

Criminal law—act committed by direction of father—liability.

3. Where a child commits an unlaw-

ful act in the presence of his father and at his direction, and because of the criminal intent of the father, it must appear from the testimony that the child was of immature years or mind, and entirely under the domination, direction, and control of the father, before the crime becomes that of the father, and not of the child.

(Ellis and West, JJ., dissent.)

ERROR to the Circuit Court for Madison County (Horne, J.) to review a judgment convicting defendant of murder in the second degree. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Charles E. Davis, for plaintiff in error:

The charge as to guilt of the boy defendant, for crime committed at direction of his father, was incorrect and misleading.

State v. Yeargan, 36 L.R.A. 207, note; 14 R. C. L. 265; *Whart. Homicide*, 3d ed. 212; 1 *Whart. Crim. Law*, § 71; 8 R. C. L. 65; *Collins v. State*, 97 Ga. 433, 35 L.R.A. 501, 25 S. E. 325; *Bell v. State*, 18 Tex. App. 53, 51 Am. Rep. 293; *Savage v. State*, 18 Fla. 962; *Easterlin v. State*, 43 Fla. 574, 31 So. 350; *Chapman v. State*, 43 Tex. Crim. Rep. 328, 96 Am. St. Rep. 874, 65 S. W. 1098; *White v. People*, 139 Ill. 143, 32 Am. St. Rep. 196, 28 N. E. 1083; *Connaughty v. State*, 1 Wis. 159, 60 Am. Dec. 370; *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176; *Whart. Homicide*, 3d ed. § 50, p. 64; R. C. L. 137, 140.

One person may seek an interview with another in a peaceable manner for the purpose of demanding an explanation of offensive words or conduct.

13 R. C. L. 833; *Whart. Homicide*, 3d ed. 520; *State v. Doris*, 51 Or. 136, 16 L.R.A. (N.S.) 660, 94 Pac. 44; *Beard v. State*, 47 Tex. Crim. Rep. 50, 122 Am. St. Rep. 673, 81 S. W. 33; *Gray v. State*, 55 Tex. Crim. Rep. 90, 22 L.R.A. (N.S.) 513, 114 S. W. 635; *State v. Sumner*, 74 Am. St. Rep. 732, note; *Foutch v. State*, 45 L.R.A. 687, note; *Bonnard v. State*, 25 Tex. App. 173, 8 Am. St. Rep. 431, 7 S. W. 862, 7 Am. Crim. Rep. 462; *King v. State*, 51 Tex. Crim. Rep. 208, 123 Am. St. Rep. 881, 101 S. W. 237.

A person may be in fault and an aggressor in a difficulty and still be able to avail himself of the right of self-defense.

13 R. C. L. 833; *Whart. Homicide*, 513; *Shannon v. State*, 35 Tex. Crim. Rep. 2, 60 Am. St. Rep. 17, 28 S. W. 687; *Airhart v. State*, 40 Tex. Crim. Rep. 470, 76 Am. St. Rep. 736, 51 S. W. 214; *Foutch v. State*, 45 L.R.A. 687, and note, 95 Tenn. 711, 34 S. W. 423; 13 R. C. L. 834; *People v. Button*, 106 Cal. 628, 28 L.R.A. 591, 46 Am. St. Rep. 259, 39 Pac. 1073; *State v. Gordon*, 109 Am. St. Rep. 790, and note, 191 Mo. 114, 89 S. W. 1025; *State v. Pollard*, 168 N. C. 116, L.R.A. 1915B, 529, 83 S. E. 167; *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470; *Bonnard v. State*, 25 Tex. App. 173, 8 Am. St. Rep. 431, 7 S. W. 862, 7 Am. Crim. Rep. 462; *Cox v. State*, 57 Tex. Crim. Rep. 427, 26 L.R.A. (N.S.) 621, 136 Am. St. Rep. 992, 123 S. W. 696; *State v. Shockley*, 29 Utah, 25, 110 Am. St. Rep. 639, 80 Pac. 865; *State v. Hood*, 63 W. Va. 182, 15 L.R.A. (N.S.) 448, 129 Am. St. Rep. 964, 59 S. E. 971; *State v. Sumner*, 74 Am. St. Rep. 734, note; *Foutch v. State*, 45 L.R.A. 687, and note, 95 Tenn. 711, 34 S. W. 423.

Mere words of reproach or opprobrious epithets do not constitute such a provocation as will put the speaker in the wrong, if it becomes necessary for him, in his own defense, to kill the person to whom they are addressed when he makes an attack.

State v. Gordon, 191 Mo. 114, 109 Am. St. Rep. 790, 89 S. W. 1025; *Boatwright v. State*, 89 Ga. 140, 15 S. E. 21; *Butler v. State*, 92 Ga. 601, 19 S. E. 51.

The evidence shows that if Charles Kelley had inflicted the death wound he should not have been convicted of any grade of offense higher than manslaughter.

Whart. Homicide, 3d ed. 319, 513,

§ 198; 2 Bishop, *Crim. Law*, § 702; *Adams v. People*, 47 Ill. 376; *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470; *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14.

The fact that defendant's words or conduct, if unaccompanied by a felonious intent, tended to bring on the first combat, did not deprive him of his natural right of self-defense.

Foutch v. State, 45 L.R.A. 687, and note, 95 Tenn. 711, 34 S. W. 423; *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 474.

One may not be convicted of murder, or any other crime, for aiding and abetting a justifiable act of another.

Whart. Homicide, 3d ed. 57; *Green v. State*, 40 Fla. 191, 23 So. 851; *Bryan v. State*, 19 Fla. 864; *Albritton v. State*, 32 Fla. 358, 13 So. 955; *Montague v. State*, 17 Fla. 662.

To constitute one principal in a crime he must be present, aiding by acts, words, or gestures, with full knowledge of the intent of the persons who commit the crime.

Savage v. State, 18 Fla. 909; *Easterlin v. State*, 43 Fla. 574, 31 So. 350; *Chapman v. State*, 43 Tex. *Crim. Rep.* 328, 96 Am. St. Rep. 874, 65 S. W. 1098; *White v. People*, 139 Ill. 143, 32 Am. St. Rep. 196, 28 N. E. 1083; *Connaughton v. State*, 1 Wis. 159, 60 Am. Dec. 370; *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176; *Whart. Homicide*, 3d ed. § 50, p. 64; 1 R. C. L. 137, 140.

A common purpose must be proved in order to justify conviction for aiding and abetting.

1 R. C. L. 141; *White v. People*, 139 Ill. 143, 32 Am. St. Rep. 196, 28 N. E. 1083; *State v. Hildreth*, 51 Am. Dec. 369, and notes, 31 N. C. (9 Ired. L.) 440.

Mr. J. R. Kelly also for plaintiff in error.

Messrs. Van C. Swearingen, Attorney General, and D. Stuart Gillis, Assistant Attorney General, for the State:

In criminal cases the burden is not on the state to negative beyond a reasonable doubt defensive matter, the burden of affirmatively showing which is upon the defendant.

Padgett v. State, 40 Fla. 451, 24 So. 145; *Long v. State*, 42 Fla. 509, 28 So. 775.

The jury may have found plaintiff in error guilty of murder in the

second degree under either of the counts, if, under the second count, they may or may not have reached that verdict upon the theory that the father was solely responsible for the "child's" act.

Washington v. State, 51 Fla. 137, 40 So. 765; *O'Neal v. State*, 54 Fla. 96, 44 So. 940.

It was the duty of defendant to use all reasonable means within his power and consistent with his own safety to avoid danger and to avert the necessity of taking the life of the deceased.

Peadon v. State, 46 Fla. 124, 35 So. 204; *Snelling v. State*, 49 Fla. 34, 37 So. 917.

It is futile to object that the trial court did not instruct on all the grades of homicide to which the evidence may be applicable, when no request is made to instruct on the lesser grades than that of which accused is convicted.

Copeland v. State, 41 Fla. 320, 26 So. 319; *Lindsey v. State*, 53 Fla. 56, 43 So. 807; *Lewis v. State*, 55 Fla. 54, 45 So. 998; *Andrew v. State*, 62 Fla. 10, 56 So. 681.

Where there is substantial competent evidence to support the verdict, and nothing to indicate that the jury were influenced by considerations outside the evidence, the verdict will not be disturbed.

Wallace v. State, 76 Fla. 175, 79 So. 634; *McNair v. State*, 61 Fla. 39, 55 So. 401; *Bailey v. State*, 76 Fla. 103, 79 So. 748; *Martinez v. State*, 76 Fla. 159, 79 So. 751.

Browne, Ch. J., delivered the opinion of the court:

Charles Kelley and Russell Kelley, his seventeen-year old son, were jointly indicted in the circuit court of Madison county for the murder of one Andrew Register, in an indictment containing two counts. The first charged Charles Kelley as principal in the first degree and Russell Kelley as principal in the second degree, and the second count charged Russell Kelley as principal in the first degree and Charles Kelley as principal in the second degree.

They were tried jointly. Russell Kelley was acquitted, and Charles Kelley convicted of murder in the second degree.

From the view that we take of this case we need not refer to what transpired on the night before the homicide.

On the morning of the killing Charles and Russell Kelley drove up to the gate of Mrs. Lewis Fox's home, where Register, his brother-in-law, was visiting. There seems to have been bad feeling on the part of Register of some years' standing toward Charles Kelley, of which Kelley apparently had no knowledge until the night before.

When he drove up on the morning of the homicide, he was met by Mr. or Mrs. Fox, or both of them, who say they urged him to go away, but, instead of doing so, he asked Mrs. Fox to tell Register to come out. Mrs. Fox says she went in the house and told her brother not to go out there, but that Charles Kelley called him, and he went out. They walked down the road some 30 or 40 yards, when, according to Fox's testimony, Kelley called Register a "God damn liar." Fox does not say who struck the first blow, but says, "They went together." Both the Kelleys testified that Charles asked Register what he was mad about, and that Register replied that he knew what he was mad about, and that then Charles Kelley said, "If I have done anything, I am willing to make any apology that I can;" to this Register replied, "I don't want any of your damn apologies." There was some further conversation, which Russell did not hear until Register said, "Don't you dispute it." To which Charles Kelley replied, "Not disputing your wife's word at all, but if anyone else said that it is a lie," and then Register struck him, and they clinched and fell to the ground, with Charles Kelley on top, striking Register with his fist. Charles Kelley's testimony as to what occurred between him and Register is to the same effect as that of his son, but he further testifies that Register charged him with having perpetrated a dastardly act on his sick wife, and it was then that he said: "Not disputing your wife's word, but if

anyone else tells that on me it is a lie.' With that he hit me; hit me over the eye. Then me and him went together."

They were separated, and Register walked back to the gate and through the yard and into the house, and Charles Kelley walked back to his buggy.

The affray was over. Register was safely within the precincts of the house. Neither of the Kelleys was attempting to follow him. The undisputed testimony shows that Register was very deliberate in getting his gun and going back to engage in another affray; went in the front room, opened a door and went into a shed room, from there went into the kitchen, and came back through the house with his gun, and went out, advancing towards Kelley. The testimony again differs as to who was the aggressor in this second affray. The witnesses for the state say that Charles Kelley attempted to shoot first, but his gun snapped, and that Kelley and Register shot about the same time. The Kelleys say that Register shot first, wounding Charles Kelley in the face, and then, as Charles Kelley threw up his gun, he was shot in the hand by Register, and his gun discharged in the air. He thereupon handed the gun to his son Russell Kelley, and Register at once shot at Russell, who returned the fire. Russell Kelley's second shot struck Register, causing him to fall to the ground. From the effects of this wound he died.

The testimony points to Russell Kelley as the one who fired the fatal shot. Lewis Fox says: "The last shot that was made, the boy shot Register down in the yard." The last shot the boy fired struck Register."

Mrs. Register, the wife of the deceased, says: "It was the last shot that hit my husband."

This shot was fired by Russell Kelley. Russell Kelley says that he shot Register twice, and when he shot the last time he saw his gun fall.

When Lewis Fox and Mrs. Register first testified, they stated positively that it was the last shot fired by Russell Kelley that struck Register. They were later recalled, and modified their testimony in an attempt to make the case stronger for the state, but, notwithstanding this modification, it seems quite clear from all the testimony that the last shot fired by Russell Kelley inflicted the wound from which Register died.

The testimony is uncontradicted that after Charles Kelley was shot he handed the gun to his son, but it nowhere appears in the testimony that he told him to use it, or said anything to him that could be construed into instructions or directions to shoot Register.

The fifth assignment of error relates to this charge: "Before the defendant Russell Kelley can be convicted of any crime, you, as the jury trying this case, must find from the evidence that he acted of his own volition and not by direction and because of a fear of his father." "An unlawful act committed by a child in the presence of his father, at his direction, because of the criminal intent of the father, and not because of the wrong of the child, is the crime of the father, and not of the child."

This charge submits to the jury as an issue of fact whether or not Russell Kelley shot by direction of his father, or because of fear of him, although there was absolutely no testimony from which the jury could find or even infer that the son was directed by the father to shoot

Register, or that Russell shot him because of fear of his father. There being no testimony upon which this charge could be predicated, it was harmful error.

The second part of this charge, that "an unlawful act committed by a child in the presence of his father, at his direction, because of the criminal intent of the father, and not because of the wrong of the child,

is the crime of the father, and not of the child," is not sound, as applied to the facts in this case. The principle upon which such a doctrine is predicated is that the child who commits an unlawful act at the direction of his father is one of such immature years or mind as to be entirely under the domination, direction, and control of the father. Such was not the condition here. The son was over seventeen years of age, and so far as the testimony discloses was in full possession of his mental and bodily faculties.

We can readily see how this charge induced the remarkable verdict in this case, where the son who fired the fatal shot was acquitted, and the father convicted of murder in the second degree.

The verdict of acquittal of Russell Kelley could only have been reached by the jury upon one of three hypotheses:

(1) That if Russell Kelley killed Register, he shot in self-defense.

(2) That the fatal shot was fired by Charles Kelley, and not by Russell Kelley.

(3) That his father told him to shoot Register, and he was therefore guiltless of any offense.

We dismiss the last hypothesis, because it has no support in the testimony, and is not sound in law. Not a single witness testified that Charles Kelley, when he handed the gun to his son, told him to shoot Register, or gave him any directions or instructions, or made any request of him whatsoever.

The verdict could not have been predicated upon the second hypothesis, as the testimony seems to establish very clearly, by the witnesses for the state as well as for the defense, that Russell Kelley fired the fatal shot.

This brings us to the first hypothesis, that Russell Kelley killed Register in self-defense. The testimony fully establishes this to be the case, and we can reach no other conclusion than that the jury acquitted

Criminal law—
instruction—
liability for act
in father's
presence.

Homicide—acquittal of principal in first degree—effect on liability of principal in second degree.

Russell Kelley upon the ground that his life was in imminent peril, and if he had not killed Register he was in immediate danger of being killed by him, and this, too, without his having been an aggressor in any way, or having sought or provoked the affray or taken part in any difficulty that may have occurred between his father and Register. It is true the verdict does not say upon which count of the indictment it was based. Still the testimony establishes the fact that Register was killed by Russell Kelley; it must have been on the second count, which charged Russell Kelley with having shot and killed Register, and Charles Kelley with being present, aiding, and abetting him in the commission of the crime. The verdict then presents this remarkable situation: Russell Kelley, assaulted by Register with a deadly weapon, shoots and kills him in self-defense, and Charles Kelley is convicted of murder in the second degree for being present, aiding and abetting his son in committing a justifiable homicide.

It seems quite clear that the jury acquitted Russell Kelley on the ground that he killed Register in self-defense, and, that being so, Charles Kelley could not be lawfully

convicted of any offense predicated upon his being present, aiding and abetting his son in committing a justifiable homicide.

The judgment is reversed.

Taylor and Whitfield, JJ., concur. Ellis and West, JJ., dissent.

Whitfield, J., concurring:

The testimony tends to show that the fatal shot was fired by Russell Kelley, the son, and that it was not fired by Charles Kelley, the father. As the deceased was advancing in the direction of the defendants with his gun when the shooting began, and as it is not clear that Russell Kelley shot the deceased at the instance of Charles Kelley, the acquittal of Russell Kelley may have been upon the theory of self-defense, which has some support in the evidence, and not upon the theory, also included in the charges given, that if Russell Kelley acted not of his own volition, but "by direction and because of a fear of his father, the crime is that of the father, and not of the child." If Russell Kelley fired the fatal shot, not at the instance of Charles Kelley or unlawfully, but in lawful self-defense, the conviction of Charles Kelley is erroneous. The nature of the testimony in vital particulars warrants a new trial for Charles Kelley.

ANNOTATION.

Criminal responsibility of parent or child for act of child done under fear of or compulsion by parent.

It has been stated to be a general principle that the law will excuse a person, when acting under coercion or compulsion, for committing most, if not all, crimes except taking the life of an innocent person. Even the crime of treason, if committed under the fear of death, may, it seems, be excused. 8 R. C. L. 125, § 100. The fear which the law recognizes as an excuse for the perpetration of an offense must, however, proceed from an immediate and actual danger threaten-

ing the very life of the perpetrator; the apprehension of any loss to property by waste or fire, or even an apprehension of a slight or remote injury to the person, furnishes no excuse. *Ibid.*

It seems evident that under this principle an infant acting under coercion by a parent may, in a proper case, be excused for a crime committed by him. A statute excusing from the punishment for crime persons who committed the act under threats or menaces, if sufficient to show that

such persons had reasonable cause to and did believe their lives to be endangered if they refused, was construed in a case involving a boy sixteen years of age, in *People v. Martin* (1910) 18 Cal. App. 96, 108 Pac. 1034, s. c. on subsequent appeal in (1912) 19 Cal. App. 295, 125 Pac. 919, and held to require an immediate danger in order to excuse; and the fact that the person actually committing the crime was a minor was held not to change the rule. In this case the crime of dynamiting a house was committed by the boy at the instigation of the accused, a woman, who had raised him, although not his mother.

But there is, in case of a child, no presumption of coercion such as exists at common law with reference to the commission of a crime by a woman in the presence of her husband. See note in 4 A.L.R. 266. It has been stated frequently that the mere command of a parent does not excuse. Touching the incapacities or excuses of children by reason of their civil subjection, Sir Matthew Hale tells us (1 Hale, P. C. p. 44) that it is said if he "commit an act, which in itself is treason or felony, it is neither excused nor extenuated as to the point of punishment by the command of his master or parent; for the command is void and against law, and doth not protect either the commander or the instrument that executes it by such command." According to 1 Hawkins's Pleas of the Crown, chap. 1, § 14, "neither a son nor a servant is excused the commission of any crime, whether capital or not capital, by the command or coercion of the father or master." In *People v. Richmond* (1866) 29 Cal. 414, it was held not error upon the trial of one for grand larceny to exclude a question the object of which was to show that the defendant was to a certain extent under the control of his mother and was acting under her direction, being under the age of twenty-one years, where the counsel for the defendant failed to state that his object was to prove that the defendant was under the age of fourteen. The court says that the command of a parent to a

child will not justify a criminal act done in pursuance of it. In *State v. Thrailkill* (1906) 73 S. C. 314, 53 S. E. 482, where a boy between seventeen and eighteen years of age was on trial for homicide committed when in the presence of his father, the court held it not error to refuse an instruction to the following effect: "A person required by and compelled by another to take part in the commission of a crime, or the doing of an unlawful act, is not guilty in the eyes of the law if the force or coercion, either actual or constructive, used to induce the person charged with such offense, was sufficient to compel a person of the same age and discretion and of ordinary firmness and reason to do such act of violence or other unlawful act." In holding that the denial was not error the court says: "This is a most remarkable request to charge, and was very properly refused. It had no application whatever to the case. The defendant was at the time of the homicide between seventeen and eighteen years old, and accountable for his unlawful act. It does not even appear that he acted under the command or coercion of his father, and, if he did, no command by a parent will justify a criminal act by a child, *capax doli*." In *McDaniel v. State* (1879) 5 Tex. App. 475, the prosecution of a minor for killing a dog, the court says: "The fact that the defendant was a minor, and lived at the time with and was controlled by his father, would not shield him from punishment for wilfully and wantonly killing the dog. Our statute provides that 'no person shall be convicted of any offense committed before he was of the age of nine years, nor of any offense committed between the years of nine and thirteen, unless it shall appear by proof that he has discretion sufficient to understand the nature and illegality of the act constituting the offense.' If the evidence had shown that defendant, at the time he killed the dog, was between the ages of nine and thirteen, the burden of proof would have been upon the state to have shown that he had discretion sufficient to understand the nature and illegality of the act

constituting the offense. The fact that defendant was a minor only proves that he was under twenty-one years of age, and the further fact that he was living with his father, and that he was directed by his father to kill the dog, without further evidence in regard to defendant's age at the time, would not shield him from punishment for wilfully and wantonly killing Gainer's dog." In *Carlisle v. State* (1897) 37 Tex. Crim. Rep. 108, 38 S. W. 991, in the prosecution of a woman sixteen years of age for the murder of her child, a charge to the effect that if the defendant poisoned her child on account of the request, demand, or persuasion of her mother, such request, demand, or persuasion would constitute no excuse for so doing, was held correct. The court says that the evidence showed no such acts on the part of the mother of the accused as would constitute coercion and so relieve her from liability.

See *KELLEY v. STATE* (reported herewith) ante, 1465.

An infant was held liable in an action of trespass for breaking and entering the plaintiff's close and carrying away his hay, although he committed the trespass by the express command of his father. *Scott v. Watson* (1859) 46 Me. 362, 34 Am. Dec. 457.

The fact that the offense was committed in obedience to a command of a parent, it seems, may be considered. Thus, in *Com. v. Mead* (1865) 10 Allen (Mass.) 898, the prosecution of a child under fourteen years of age living with his parents, for making sales of intoxicating liquor in the dwelling house of the parents and under the direction of the mother, to whom the liquors belonged, the court, in holding that the child could not be found guilty of being a common seller of intoxicating liquor unless he knew the unlawful character of the act with which he was charged, said that the fact that the sale was made in the presence of and in obedience to the express command of the mother had some tendency to show that the child did not understand that the act was wrong.

There is a suggestion in *Humphrey v. Douglass* (1838) 10 Vt. 71, 33 Am. Dec. 177, that compulsion by a father might excuse a child. This was an action of trespass in which the command of a father was held no defense for a boy fifteen years of age, but the court says: "An infant, acting under the command of his father, as a wife in the presence of her husband, might be excused from a prosecution for a crime if it should appear that the intent was wanting, or that he was acting under constraint; yet, he is answerable civiliter for injuries he does to another." In *Reg. v. Boober* (1850) 4 Cox, C. C. (Eng.) 272, a case in which a boy ten years of age was indicted, together with his father and mother, for having coining implements in his possession, the court says that the boy could not be convicted for the reason that he lived with his parents in the house where the coining implements were found and acted under their control, and that "it would be going too far to say that one so young was a joint possessor with them of the property." It has been held that a father who had compelled his daughter about thirteen years of age, and his son about sixteen years of age, to burglarize a store, by threats of personal injury, is liable where it was found that the daughter was under the age of discretion, and committed the act through fear of loss of life occasioned by the threats of her father. *State v. Learnard* (1869) 41 Vt. 585. A request to charge that if there was a responsible party present at the burglary, the presence of the girl, even by the direction of the respondent, would not render the respondent liable where he was not present, was refused, and its refusal held not error by the supreme court.

In *McClure v. Com.* (1883) 81 Ky. 448, it was held error, upon the trial of two boys about thirteen years of age for breaking into a store, to refuse an instruction to the effect that if they broke into the store, but did so at the request of another, and, in consequence of youth or mental in-

firmity, not perceiving the wicked character of the act or not knowing their responsibility therefor, they should be acquitted, was held error.

In this case it appears that the boys broke into the store at the instigation of the older brother of one of them.

W. A. E.

HUGH MCGUCKIAN
v.
ARTHUR H. CARPENTER.

ARTHUR H. CARPENTER
v.
HUGH MCGUCKIAN.

Rhode Island Supreme Court — June 24, 1920.

(— R. I. —, 110 Atl. 402.)

Infant — recovery of money paid for non-necessaries — effect of their dissipation.

That a minor has dissipated non-necessaries so that they cannot be returned to the vendor does not prevent him from recovering the price paid for them.

[See note on this question beginning on page 1475.]

EXCEPTIONS by plaintiff McGuckian to rulings of the Superior Court for Providence and Bristol Counties (Sweeney, J.) made during the trial of an action brought by him to recover from defendant, a minor, the amount alleged to be due on certain promissory notes given in part payment for certain chattels, and an action brought by the minor to recover the sum paid in cash by him for said chattels, which actions were tried together, and resulted in a verdict in each case for defendant. *Overruled.*

The facts are stated in the opinion of the court.

Mr. Joseph H. Coen for McGuckian.
Messrs. McGovern & Slattery for Carpenter.

Sweetland, Ch. J., delivered the opinion of the court:

The first of the above-entitled cases is an action in assumpsit to recover the amount due upon certain promissory notes given by the defendant, a minor, to the plaintiff, in part payment upon the sale by the plaintiff to the defendant of a horse, wagon, and harness. The second of the above-entitled cases is an action in assumpsit to recover the sum paid in cash by the infant plaintiff in part payment for said horse, wagon, and harness.

The cases were tried together be-

16 A.L.R.—93.

fore a justice of the superior court, sitting with a jury, and resulted in each case in a verdict for said minor, Arthur H. Carpenter. Hugh McGuckian filed his motion for a new trial in each case, and each motion was denied by said justice. Each case is before us upon the exception of McGuckian to the decision of the justice denying the motion for new trial, and also upon certain exceptions taken by said McGuckian to rulings of said justice made in the course of the trial.

At the trial McGuckian did not question the infancy of Carpenter at the time of the sale of said horse, wagon, and harness, but claimed that in the circumstances of the case

said chattels were necessities for said infant.

It appeared in evidence that Carpenter, at the time of the purchase by him of the horse, wagon, and harness, was eighteen years of age, married, with one child; that he maintained a home, and was dependent upon his weekly wages for the support of himself and family; that he used said chattels for the sole purpose of pleasure driving. The question of whether said chattels were necessities in the plaintiff's condition and station in life was submitted by said justice to the jury, with instructions that, if they found that said chattels were not necessities, they should find their verdict in favor of said infant in the action against him upon the promissory notes given by him in part payment for said chattels. The jury's verdict for the defendant in that case indicates that they found that said horse, wagon, and harness were not necessities, in the circumstances of the defendant's life. The verdict has been approved by said justice, and we find no ground for disturbing his decision in that regard. The purchase was manifestly an unwise and indiscreet transaction on the part of the defendant, quite in accord with the thoughtlessness and improvidence ascribed to youth.

At the time of the avoidance of the contract of sale by the minor, and the commencement of the action to recover the amount of cash given by him in part payment, he did not return said chattels nor any part of them to McGuckian, nor has he done so subsequently. Prior to said disaffirmance, Carpenter had sold the wagon and harness, and the horse had become so emaciated and disabled, either by disease or neglect, that in the judgment of the agent of the Society for Prevention of Cruelty to Animals it ought to be shot. From the evidence it is not entirely clear what has become of the horse, but it is manifest that it had become worthless, and had passed out of the possession of Car-

pen ter, before the commencement of these actions. In the suit against McGuckian to recover the cash paid on the purchase price, the defendant takes the position that, as Carpenter has not returned the property, he ought not to be permitted to disaffirm the sale and obtain a return of the money paid. This claim was the basis of a motion, made at the close of the evidence in the case against McGuckian, that said justice should direct a verdict for the defendant. That motion was denied by said justice, and the defendant excepted. He also excepted to that portion of the charge of said justice in which he instructed the jury "that, if Carpenter had disposed of the chattels which came to him, or if they were not in his possession or control, it would not be necessary for him to restore them to McGuckian before he could maintain the action." In support of these exceptions before us, counsel for McGuckian has called to our attention the opinion of courts in some jurisdictions that in all cases an infant, on his avoidance of an executed contract, must return the property or consideration received before he can maintain his action for the money or property which he gave in the transaction, and if he has disposed of the money or goods, or has so misused them that he cannot restore them, then he cannot be permitted to disaffirm his contract. These cases are based on the consideration that minors should not be permitted to use the shield of infancy as a cover for dishonesty and the doing of injury to others dealing with them in good faith. We do not find that this court has passed upon the exact question involved in this exception. We are of the opinion that, when an executed contract is not one for his necessities, an infant should be permitted to disaffirm it and recover the consideration moving from him, and should be required on his part to return the consideration that remains in his hands; but if he has dissipated the

consideration, or lost it, or for any reason he is unable to restore it to the other party, he none the less should be permitted to disaffirm the contract and recover back the consideration moving from him. The law gives to a minor the right to disaffirm his contracts on the ground of the disability of infancy. This has been provided as a protection to him from the consequences of his own improvidence and folly. It is the same lack of foresight that in most instances leads to his dissipation of the proceeds of his voidable contracts. To say that he shall not have the protection by disaffirmance with which the policy of the law seeks to guard him, unless he has had sufficient prudence to retain the consideration of the contract he wishes to avoid, would, in many instances, deprive him, because of his indiscretion, of the very defense which the law intended that he should have against the results of his indiscretion.

Infant—recovery of money paid for non-necessaries—effect of their dissipation.

A determination made in accordance with either view as to an infant's right of disaffirmance, when he is unable to return the consideration of the contract, will in many cases result in considerable hardship to one party or the other. Not infrequently, even in cases where the infant still has the consideration and returns it to the other party to the contract, such other party is far from being placed in statu quo. It has been said that the right of an infant to avoid his contract is absolute and paramount to all equities.

The view which we have taken appears to us to have the support of the weight of authority. In the early case of Bartlett v. Cowles, 15 Gray, 445, the court appears to have taken the contrary view, and to have held that an infant might avoid his contract only by restoring the consideration. In the later case of Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101, the doctrine of Bartlett v. Cowles, supra, was expressly repudiated, and in Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117, it was held that an infant's deed may be avoided, "without the previous return, or offer to return, the consideration paid therefor." The rule in Chandler v. Simmons has been followed in the later Massachusetts cases. Pyne v. Wood, 145 Mass. 558, 14 N. E. 775; McCarthy v. Henderson, 138 Mass. 310; Morse v. Ely, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577; White v. New Bedford Cotton Waste Corp. 178 Mass. 20, 59 N. E. 642. See also MacGreal v. Taylor, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961; Leacox v. Griffith, 76 Iowa, 89, 40 N. W. 109; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

We find no error in the refusal to direct a verdict in accordance with the motion of McGuckian, nor in that portion of the charge to which exception was taken.

All of the exceptions of McGuckian in each case are overruled. Each case is remitted to the Superior Court for the entry of judgment on the verdict.

ANNOTATION.

Return of property purchased by infant as condition of recovery of purchase money paid.

- I. Introductory, 1475.
- II. Property retained by infant:
 - a. General rule, 1476.
 - b. Application of rule, 1477.
 - c. Rule in Indiana, 1478.
 - d. Effect of depreciation in value of property, 1478.

I. Introductory.

This annotation is designed to in-

- III. Property parted with by infant:
 - a. General rule, 1479.
 - b. Application of rule, 1480.
 - c. Rule in Minnesota, 1481.
- IV. Property never received by infant, 1481.
- V. Statutory provisions, 1482.

clude those cases only wherein the court discusses the necessity of the

restoration of the property transferred to an infant on a purchase or exchange, where he later seeks to disaffirm and recover the purchase money. It excludes all cases involving the sale of property by an infant and a subsequent attempt by him to recover it. The annotation does not discuss the bare question of the right of an infant to disaffirm a contract for the purchase of property. Nor does it include cases involving the right of an infant to recover the purchase money where he tenders back the property, unless the necessity of the return of the consideration is discussed. Cases involving the recovery of gifts or the recovery of wages are expressly excluded, as are the cases dealing with the right of an infant to sue in tort after having released a claim for damages. The question of a parent's approval or sanction of an infant's contract, as affecting the latter's liability on the contract, or right to disaffirm it, is treated in an annotation in 9 A.L.R., beginning at page 1030.

II. Property retained by infant.

a. General rule.

If an infant, when he seeks to avoid a purchase of property by him, has in his possession the specific property which came to him under the contract, or any part of it, he must return it as a prerequisite to a recovery of the amount paid by him.

United States.—See *Re Huntenberg* (1907) 153 Fed. 768.

District of Columbia.—*Gannon v. Manning* (1914) 42 App. D. C. 206.

Illinois.—*Wright v. Buchanan* (1919) 287 Ill. 468, 128 N. E. 53; *Bennett v. McLaughlin* (1883) 13 Ill. App. 349; *Curry v. St. John Plow Co.* (1894) 55 Ill. App. 82. See also *Hauser v. Marmon Chicago Co.* (1917) 208 Ill. App. 171; *Wuller v. Chuse Grocery Co.* (1909) 241 Ill. 398, 28 L.R.A.(N.S.) 128, 132 Am. St. Rep. 216, 89 N. E. 796, 16 Ann. Cas. 522.

Kentucky.—*Gray v. Grimm* (1914) 157 Ky. 603, 163 S. W. 762.

Maine.—See *Robinson v. Weeks* (1868) 56 Me. 102.

Minnesota.—*Berghund v. American*

Multigraph Sales Co. (1916) 135 Minn. 67, 160 N. W. 191.

Missouri.—*Zuck v. Turner Harness & Carriage Co.* (1904) 106 Mo. App. 566, 80 S. W. 967. See also *Gordon v. Miller* (1905) 111 Mo. App. 342, 85 S. W. 943.

Nebraska.—See *Ross P. Curtice Co. v. Kent* (1911) 89 Neb. 496, 52 L.R.A.(N.S.) 723, 131 N. W. 944.

New Hampshire.—*Bartlett v. Bailey* (1879) 59 N. H. 408.

New York.—*Bartholomew v. Finnemore* (1854) 17 Barb. 428; *Gray v. Lessington* (1857) 2 Bosw. 257. See also *Pierce v. Lee* (1902) 36 Misc. 870, 74 N. Y. Supp. 926.

Ohio.—See *Lemmon v. Beeman* (1888) 45 Ohio St. 505, 15 N. E. 476.

Rhode Island.—See the reported case (*McGUCKIAN v. CARPENTER*, ante, 1473).

Texas.—*Morris v. Holland* (1895) 10 Tex. Civ. App. 474, 31 S. W. 690.

Vermont.—See *Price v. Furman* (1855) 27 Vt. 268, 65 Am. Dec. 194.

"The doctrine is now well settled by the authorities that, when a contract is avoided by an infant, he may recover back whatever he has paid or delivered on it. . . . But in all such cases, as a general rule, if the infant rescinds the contract and avoids his liability upon it, he must surrender the consideration, and return what he has received; for it would be unjust to permit him to recover back what he has paid or delivered, and at the same time permit him to retain the fruits of the contract, which he has received." *Price v. Furman* (Vt.) supra.

In *Lemmon v. Beeman* (Ohio) supra, the rule was stated as follows: "When the property received by him from the adult is in his possession, or under his control, to permit him to rescind without returning it, or offering to do so, would be to permit him to use his privilege as a sword rather than as a shield."

So, in *Robinson v. Weeks* (Me.) supra, the court stated the rule as follows: "If an infant has received anything which may have an intrinsic or a market value, by virtue of the contract which he claims to rescind,

he must return it, if it is in existence and within his control after he becomes of age, before he can be permitted to reclaim the money paid for it."

The District of Columbia courts require the restoration of the consideration, on the ground that the infant is regarded as a trustee of the retained property. *Gannon v. Manning* (D. C.) supra, wherein the court said: "Where, in an executed contract, the consideration can be restored, in whole or in part, equity will treat the infant as a trustee for the other party, and require restoration, not as a condition precedent to the right to disaffirm, but on the ground that the infant is in possession of property which, in good conscience, he will not be permitted to retain when he has elected to disaffirm."

b. Application of rule.

In *Bennett v. McLaughlin* (1883) 13 Ill. App. 349, an action of replevin by the vendor to recover a sewing machine sold on instalments to an infant who had refused to pay the instalments as they came due, the court said that the infant's right to avoid the contract could not be questioned, but, if he repudiated it, the title remained in the vendor, who was entitled to immediate possession. The court added: "Nor can she be permitted to retain the property because the partial payment made was equal to its entire value; she must either abide by the contract or rescind it, and in the latter case, if she still has the property she received under the contract in her possession, she must offer to return it, when she may recover back the payments made by her."

In *Wuller v. Chuse Grocery Co.* (1909) 241 Ill. 398, 28 L.R.A. (N.S.) 128, 132 Am. St. Rep. 216, 89 N. E. 796, 16 Ann. Cas. 522, it was held that where an infant offered to return the stock certificates which he had received under a contract, he was entitled to a return of the purchase money.

In *Gordon v. Miller* (1905) 111 Mo. App. 342, 85 S. W. 943, it was held that an infant who purchased a stock

of goods without paying all of the purchase price, and who later returned the goods in consideration of a release of all indebtedness, could not rescind the release and sue for the value of the goods without first paying the balance of the original purchase price.

In *Gannon v. Manning* (1914) 42 App. D. C. 206, wherein it appeared that the plaintiffs were in a position to place the defendants substantially in statu quo, and they tendered back possession of a theater purchased by them on their election to disaffirm, it was held that they were entitled to recover the purchase price paid to the defendants.

In *Wright v. Buchanan* (1919) 287 Ill. 468, 123 N. E. 53, wherein it appeared that an infant gave promissory notes in part payment of the purchase price of land, it was held that he could not repudiate the notes without returning the value of the property for which the notes were given.

In *Gray v. Grimm* (1914) 157 Ky. 603, 163 S. W. 762, it was held that an infant, on disaffirming a contract for the purchase of a house and lot, must restore the property in order to recover the purchase money.

In *Pyne v. Wood* (1888) 145 Mass. 558, 14 N. E. 775, wherein it appeared that an infant disaffirmed a contract for the purchase of a bicycle, it was held that he could recover the purchase money.

It appeared in *Zuck v. Turner Harness & Carriage Co.* (1904) 106 Mo. App. 566, 80 S. W. 967, that an infant purchased a buggy and harness, payment being made in promissory notes secured by a chattel mortgage on the property purchased, and also on a mare. Default being made in the payment of the notes, the vendor took possession of the buggy and mare, but not of the harness, which remained in the possession of the infant at the time of the suit brought to recover the mare. It was held that, before the infant could recover the mare, he must first restore all that he had received under the contract.

In *Curry v. St. John Plow Co.* (1894)

55 Ill. App. 82, wherein it appeared that the defendant minor had bought a plow, and had given a promissory note in part payment of the purchase price, it was held in an action on the note that the defense of infancy could not be interposed, unless the defendant returned the consideration for which the note had been given.

c. Rule in Indiana.

In Indiana, however, it is held that, though the infant has in his possession property purchased by him, he is not bound to return it in order to recover the price paid by him, but the vendor may sue in replevin to obtain a return of the property. *Carpenter v. Carpenter*, (1873) 45 Ind. 142; *White v. Branch* (1875) 51 Ind. 210. See also *Clark v. Van Court* (1884) 100 Ind. 113, 50 Am. Rep. 774; *House v. Alexander* (1886) 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891; *Shirk v. Shultz* (1888) 113 Ind. 571, 15 N. E. 12; *Story & C. Piano Co. v. Davy* (1918) 68 Ind. App. 150, 119 N. E. 177.

Thus, in *Carpenter v. Carpenter*, supra, wherein it appeared that the plaintiff exchanged a stallion for a gelding, and afterwards disaffirmed the contract, it was held that he was entitled to recover, but that, inasmuch as he still had the stallion in his possession, the title thereto reverted to the defendant.

So, in *White v. Branch* (1875) 51 Ind. 210, the court said: "The infant was not bound to return the horse which he received of the defendant, even in his damaged condition, to entitle him to recover the mare in question. Had he sold the animal in question to the defendant for money, and had he used the money, he would not, according to the decisions of this court, . . . have been bound to refund the money to enable him to disaffirm his contract. The cases are collected in *Carpenter v. Carpenter*, supra—an authority which is decisive of the case before us."

In *Stone & C. Piano Co. v. Davy* (1918) 68 Ind. App. 150, 119 N. E. 177, wherein it appeared that the vendor had retaken property sold, it was held that the infant vendee could re-

cover the instalments paid on the purchase price.

d. Effect of depreciation in value of property.

In New York, it has been held that, where an infant returns in a depreciated condition property purchased by him, he may be charged with the value of its use for the time that he has had it in his possession, where he seeks to disaffirm and recover the price paid. *Bartholomew v. Finne-more* (1854) 17 Barb. (N. Y.) 428; *Wanisch v. Wuertz* (1913) 79 Misc. 610, 140 N. Y. Supp. 573; *Rice v. Butler* (1899) 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275, reversing (1898) 25 App. Div. 388, 49 N. Y. Supp. 494; *Gray v. Lessington* (1857) 2 Bosw. (N. Y.) 257. See also *Wheeler & W. Mfg. Co. v. Jacobs* (1893) 2 Misc. 236, 21 N. Y. Supp. 1006.

Thus, in *Rice v. Butler* (1899) 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275, reversing (1898) 25 App. Div. 388, 49 N. Y. Supp. 494, supra, wherein it appeared that an infant returned a bicycle, and sued to recover the amount he had paid on the purchase price, it was held that a counterclaim of the defendant for the deterioration in value of the bicycle by reason of its use, and also the value of the use of the bicycle, should be allowed.

Likewise, in *Bartholomew v. Finne-more* (N. Y.) supra, wherein it appeared that an infant purchased a horse, and later disaffirmed the contract, tendering back the horse to the vendor, it was held that he could not recover the consideration paid without compensating the vendor for the deterioration in the value of the horse. The court said: "After he has enjoyed the benefit of it, in whole or in part, there is no equity in his avoiding his contract and reclaiming the property he delivered in exchange, without restoring the consideration; or, at least, an equivalent. This the plaintiff did not do, nor offer to do, in this case. He had the use of the horse for some time, and, probably by improper treatment, reduced him to one half of his former value; for all of which he offered no compensation."

So, in *Wanisch v. Wuertz* (1913) 79 Misc. 610, 140 N. Y. Supp. 573, it was held that where an infant repudiates a chattel mortgage given to secure the purchase price of a piano, he cannot recover the amount paid thereunder, if less than the reasonable value of the use of the piano.

But the right to charge the infant with the value of the use of the property, or the depreciation in its value from his use, has been denied in other jurisdictions. *Hauser v. Marmon Chicago Co.* (1917) 208 Ill. App. 171; *McCarthy v. Henderson* (1885) 138 Mass. 310; *Gillis v. Goodwin* (1901) 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813; *Klaus v. A. C. Thomson Auto & Buggy Co.* (1915) 131 Minn. 10, 154 N. W. 508; *Stack v. Cavanaugh* (1891) 67 N. H. 149, 30 Atl. 350; *Wooldridge v. Lavoie* (1918) — N. H. —, 104 Atl. 346; *Mast v. Strahan* (1920) — Tex. Civ. App. —, 225 S. W. 790; *Price v. Furman* (1855) 27 Vt. 268, 65 Am. Dec. 194; *Whitcomb v. Joslyn* (1878) 51 Vt. 79, 31 Am. Rep. 678.

Thus, in *McCarthy v. Henderson* (1885) 138 Mass. 310, an action in behalf of an infant to recover back what he had paid on a conditional purchase of a vehicle, it appeared that within less than a month after the sale he notified the vendors of his intention to rescind the contract, and offered to return the property. The defendants refused to receive it, but afterward, at the expiration of four months from the time of sale, took possession. It was held that the defendants could not recoup the value of the use of the vehicle. The court said: "It is clear that, if the plaintiff had made no advance, the defendants could not maintain an action against him for the use of the property. The contract, express or implied, to pay for such use, is one he is incapable of making, and his infancy would be a bar to such suit. We cannot see how the defendants can avail themselves of, and enforce by way of recoupment, a claim which they could not enforce by a direct suit."

So, in *Klaus v. A. C. Thompson Auto & Buggy Co.* (1915) 131 Minn. 10, 154 N. W. 508, it was held that an infant could recover the amount paid

on the purchase price of an automobile without accounting for its depreciation in value, due to his alleged carelessness.

Likewise, in *Hauser v. Marmon Chicago Co.* (Ill.) supra, the court, according to the abstract of the decision, said: "Minors, upon restoration of an automobile to the seller, although it has been used and has deteriorated in value, are entitled to rescind the contract of the sale, and recover back that part of the purchase price which has been paid."

In *Gillis v. Goodwin* (1901) 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813, the court said: "It is settled in this state that a minor can avoid a contract like that in this case, and is not obliged to put the other party in statu quo, or allow anything for the rent and use of the property while in his possession."

So, in *Mast v. Strahan* (1920) — Tex. Civ. App. —, 225 S. W. 790, wherein an infant sued to recover the amount paid on the purchase price of a horse, it was held that his recovery was not conditioned on the payment of the difference in value of the horse, due to its depreciation while in the infant's possession.

III. *Property parted with by infant.*

a. *General rule.*

Where property purchased by an infant has been parted with by him, on the disaffirmance of the contract he may recover the amount paid, without restoring the property.

United States. — See *MacGreal v. Taylor* (1897) 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961.

Indiana. — See *White v. Branch* (1875) 51 Ind. 210.

Kentucky. — See *Gray v. Grimm* (1914) 157 Ky. 603, 163 S. W. 762.

Maine. — *Nielson v. International Textbook Co.* (1909) 106 Me. 104, 75 Atl. 330, 20 Ann. Cas. 591.

Massachusetts. — *White v. New Bedford Cotton Waste Corp.* (1901) 178 Mass. 20, 59 N. E. 642; *Drude v. Curtis* (1903) 183 Mass. 317, 62 L.R.A. 755, 67 N. E. 317. See also *Morse v. Ely* (1891) 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577; *Gillis v. Good-*

win (1901) 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813.

New Hampshire.—Kimball v. Bruce (1878) 58 N. H. 327. See also Heath v. Stevens (1869) 48 N. H. 251.

New York.—See McCarthy v. Bowling Green Storage & Van Co. (1918) 182 App. Div. 18, 169 N. Y. Supp. 463.

Ohio.—Lemmon v. Beeman (1888) 45 Ohio St. 505, 15 N. E. 476.

Rhode Island. — See the reported case (MCGUCKIAN v. CARPENTER, ante, 1473).

Vermont.—Bombardier v. Goodrich (1920) — Vt. —, 9 A.L.R. 1028, 110 Atl. 11. See also Price v. Furman (1855) 27 Vt. 268, 65 Am. Dec. 194.

"The disaffirmance of a contract by an infant is the exercise of a right similar to that of rescission in the case of an adult,—the ground being minority, independent of questions of fraud or mistake. But in all else the general doctrine of rescission is departed from no farther than is necessary to preserve the grounds upon which the privilege is allowed, and is governed by the maxim that infancy is a shield and not a sword. He is not in all cases, as is an adult, required to restore the opposite party to his former condition; for if he has lost or squandered the property received by him in the transaction that he rescinds, and so is unable to restore it, he may still disaffirm the contract and recover back the consideration paid by him without making restitution; for, if it were otherwise, his privilege would be of little avail as a shield against the inexperience and improvidence of youth." Lemmon v. Beeman (Ohio) supra.

"To say that an infant cannot recover back his property, which he has parted with under such circumstances, because by his indiscretion he has spent, consumed, or injured that which he received, would be making his want of discretion the means of binding him to all his improvident contracts, and deprive him of that protection which the law designed to secure to him." See Price v. Furman (Vt.) supra.

Similarly, in McCarthy v. Bowling Green Storage & Van Co. (N. Y.) su-

pra, it was said: "It is well settled that the right of an infant to avoid or rescind contracts made during his minority does not depend on his ability to restore the consideration, or otherwise make restitution to the other party with whom he contracted, or whether such party can be placed in statu quo; but to the extent that he still has the consideration the other party becomes entitled thereto."

b. Application of rule.

In Bombardier v. Goodrich (1920) — Vt. —, 9 A.L.R. 1028, 110 Atl. 11, wherein it appeared that an infant rescinded a horse trade, and sued to recover the horse exchanged, it was held that he need not restore the entire boot money, it being shown that a part of it was spent for veterinary services.

Similarly, in White v. New Bedford Cotton Waste Corp. (1901) 178 Mass. 20, 59 N. E. 642, it appeared that the plaintiff, an infant, purchased stock of the defendant corporation, and subsequently, on the winding up of the corporation and the formation of a new corporation, exchanged the old stock for the stock of the new corporation, which contract the latter disaffirmed. It was held, in an action to recover the amount paid under the contract, that he could recover the purchase money, although some of the stock had gone out of his possession.

Likewise, in the reported case (MCGUCKIAN v. CARPENTER, ante, 1473), it is held that where an infant purchased a horse, wagon, and harness, and parted with them, he could recover the amount paid under the contract.

In Nielson v. International Textbook Co. (1909) 106 Me. 104, 75 Atl. 330, 20 Ann. Cas. 591, it was held that an infant might recover money paid by him on a contract with a correspondence school, it being impossible for him to restore the consideration. The court said: "It is not necessary that an infant, in order that he may recover back money paid by him in execution of a voidable contract, should place the other party in statu quo. 'If he had received property during in-

fancy, and had spent, consumed, or destroyed it, to require him to restore it, or the value of it, upon avoiding the contract, would be to deprive him of the very protection which it is the policy of the law to afford him.' . . . That plaintiff had derived some intellectual benefit from the use of the books returned by him should not place him in a worse condition than that of one who has actually consumed or destroyed tangible property."

In *Simpson v. Prudential Ins. Co.* (1904) 184 Mass. 348, 63 L.R.A. 741, 100 Am. St. Rep. 560, 68 N. E. 673, it was held that an infant could recover premiums paid on a life insurance policy, without restoring to the defendant company the expense of keeping the policy in force.

Compare *Johnson v. Northwestern Mut. L. Ins. Co.* (1894) 56 Minn. 365, 26 L.R.A. 187, 45 Am. St. Rep. 473, 57 N. W. 934, 59 N. W. 992, set out *infra*, c.

c. Rule in Minnesota.

In Minnesota, it is the rule that where a minor has parted with what he received under a contract for the purchase of property, or the benefits received are of such a nature that he cannot restore them, he may rescind and recover what he parted with under the contract, unless the other party shows that the contract was a fair, reasonable, and provident one, free from fraud or overreaching on his part. *Johnson v. Northwestern Mut. L. Ins. Co.* (1894) 56 Minn. 365, 26 L.R.A. 187, 45 Am. St. Rep. 473, 57 N. W. 934, 59 N. W. 992; *Braucht v. Graves-May Co.* (1904) 92 Minn. 116, 99 N. W. 417; *Link v. New York L. Ins. Co.* (1909) 107 Minn. 33, 119 N. W. 488. See *Klaus v. A. C. Thompson Auto & Buggy Co.* (1915) 131 Minn. 10, 154 N. W. 508.

Thus, in *Johnson v. Northwestern Mut. L. Ins. Co.* *supra*, wherein it was held that an infant could not recover premiums paid on a life insurance policy, but was limited in his recovery to the cash surrender value, the court said: "Our conclusion is that where the personal contract of an infant,

beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on the part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law."

To the same effect, and following the *Johnson Case*, see *Link v. New York L. Ins. Co.* (1909) 107 Minn. 33, 119 N. W. 488.

IV. Property never received by infant.

Where the minor receives no benefit from a purchase of property, he is not required to restore the status quo as a condition to the recovery of the amount paid by him. *Yarborough v. Yarborough* (1861) 59 N. C. (6 Jones, Eq.) 209; *Highland v. Tollisen* (1915) 75 Or. 578, 147 Pac. 558; *Shurtleff v. Millard* (1879) 12 R. I. 272, 34 Am. Rep. 640; *Jones v. Valentines' School* (1904) 122 Wis. 318, 99 N. W. 1043. See also *International Textbook Co. v. McKone* (1907) 133 Wis. 200, 113 N. W. 438; *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* [1894] 3 Ch. (Eng.) 589, 63 L. J. Ch. N. S. 795, 8 Reports, 750, 71 L. T. N. S. 325, 43 Week. Rep. 126; *Phillips v. Greater Ottawa Development Co.* (1916) 38 Ont. L. Rep. 315, 38 D. L. R. 259; *Nicklin v. Longhurst* (1916) 27 Manitoba L. Rep. 255, [1917] 1 West. Week. Rep. 439, 31 D. L. R. 398.

Thus, in *Yarborough v. Yarborough*

(N. C.) *supra*, wherein it appeared that the parents of the infant plaintiffs exchanged two slaves for others, which were immediately sold, and the infants at no time received any benefit from the transaction, it was held that they might recover the value of the two slaves, without restoring the slaves which had been received in exchange.

Likewise, in *Shurtleff v. Millard* (1879) 12 R. L. 272, 34 Am. Rep. 640, wherein a minor sued to recover an amount paid as a deposit on property purchased at an auction sale, but which he never received, it was held that he need not restore the cost of again advertising the property for sale and the expense of a subsequent auction sale.

So, in *Jones v. Valentines' School* (1904) 122 Wis. 318, 99 N. W. 1043, wherein it appeared that the plaintiff, an infant, purchased a course on telegraphy, but disaffirmed the contract before he received any benefit therefrom, it was held that he could recover back the purchase money.

In *Phillips v. Greater Ottawa Development Co.* (1916) 38 Ont. L. Rep. 315, 33 D. L. R. 259, wherein it appeared that the infant plaintiff derived no benefit from the purchase of land, he was awarded the money paid under the contract.

And in *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* [1894] 3 Ch. (Eng.) 589, 63 L. J. Ch. N. S. 795, 8 Reports, 750, 71 L. T. N. S. 325, 43 Week. Rep. 126, wherein it appeared that the plaintiff, an infant, bought stock in the defendant corporation from which she received no benefit, and later repudiated the contract, it was held that on the winding up of the company she was entitled to recover the amount she had paid.

V. Statutory provisions.

In California it is provided that, where a contract is made by a minor when he is over the age of eighteen, he must restore the consideration if he elects to disaffirm. *Flittner v. Equitable Life Assur. Soc.* (1916) 30 Cal. App. 209, 157 Pac. 630; *Maier v. Harbor Center Land Co.* (1919) 41

Cal. App. 79, 182 Pac. 345. Thus, in *Flittner v. Equitable Life Assur. Soc.* (Cal.) *supra*, it was held that an infant under eighteen years of age could recover premiums paid on an insurance policy, without restoring the consideration received. And in *Maier v. Harbor Center Land Co.* (Cal.) *supra*, wherein it appeared that the contract for the sale of a lot and the payment of the initial instalment were made before the minor became eighteen, it was held that, as the contract was void and not subject to ratification, the mere payment of instalments after the minor reached the age of eighteen did not remake the old contract, or make a new one.

In Georgia, it is provided that where "the infant receives property, or other valuable consideration, and after arrival at age retains possession of such property, or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him." Civ. Code 1910, § 4223. In *Clyde v. Steger & Sons Piano Mfg. Co.* (1918) 22 Ga. App. 192, 95 S. E. 734, the court, in an official syllabus, said: "By the terms of the Code section quoted from, no attempted repudiation of liability under such a voidable contract can be effective, unless accompanied by a surrender of such property acquired thereunder as may still remain in his hands. He cannot hold it and make use of its possession as a basis of further negotiation. In order that a tender of the property so received and held shall operate as the equivalent of its actual return, and so prevent a ratification of the voidable contract, such tender must be unconditional. Civ. Code 1910, § 4322. A tender fails to be absolute, even though the only condition accompanying it is such as to impose the performance of a duty actually owing by the one to whom the purported tender is made. . . . Thus, where a minor purchases certain personal property, and in part payment therefor turns over certain other property, and for the remainder of the purchase price executes his note, he cannot, in a suit brought on the note after he has attained his majority, dispute its valid-

ity on the ground of his minority at the time the note was executed, where it appears that he still retains possession of the property acquired under the purchase, although it be further shown that he offered, and still offers, to return the property on the condition that the other property given by him to the seller in part payment therefor should first be surrendered back. The mere proposal to rescind the contract, wherein only a conditional tender of the purchased property is made, is not tantamount to actual repudiation."

A similar rule apparently obtained before the enactment of the statute. *Strain v. Wright* (1849) 7 Ga. 568, wherein the court said: "We cannot sanction the doctrine contended for, that an infant who obtains property by virtue of a contract with an adult may, when of age, disaffirm such contract under the law made for his protection, and then refuse to restore the property thus obtained. The law, which was intended, in the language of the authorities, as a shield for the protection of the infant, would be an instrument in his hands for offensive operations. It would enable him to act aggressively upon the rights of others, instead of enabling him to guard and protect his own rights. There is no doubt, in the view we have taken of this case, that if no part of the purchase money for the negro had been paid to the vendor, and the note had been given for the entire amount thereof, that, upon the disaffirmance of the contract by the defendant, an action of trover might have been maintained at law by the vendor, for the recovery of the property; but part of the purchase money having been paid to the vendor by the defendant for the property, the remedy of the vendor at law was inadequate and difficult. The peculiar facts of the case raised such an equity in favor of the complainant as gave to the court

of equity jurisdiction for the purpose of settling the rights of the respective parties. The charge of the court to the jury was a denial of the complainant's right to the relief which he prayed,—to have the negro sold, and out of the proceeds thereof to pay the defendant the amount paid by him, and the balance to be paid to the vendor."

In Iowa, it is provided by statute that "a minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after attaining his majority." In *Childs v. Dobbins* (1880) 55 Iowa, 205, 7 N. W. 496, it appearing that an infant had disaffirmed a contract for the purchase of trees and shrubbery, and had tendered back the consideration, the court held that he was entitled to recover the amount paid under the contract. In *Leacox v. Griffith* (1888) 76 Iowa, 89, 40 N. W. 109, it appeared that the plaintiff, during his minority, had purchased a threshing machine, payment for which had been made in promissory notes, signed by the defendant as surety. It also appeared that the defendant, having paid the notes, and being administrator of an estate of which the infant plaintiff was a distributee, withheld an amount equal to the face value of the notes which he had been compelled to pay. The infant having disaffirmed the transaction within a reasonable time after having become of age, it was held, in an action by him to recover the remainder of his distributive share, that he was entitled to recover, although he was unable to restore the status quo, no reference to the statute being made in the opinion. A. S. M.

COSMOPOLITAN TRUST COMPANY

v.

AL A. ROSENBUSH et al,

Massachusetts Supreme Judicial Court—June 30, 1921.

(— Mass. —, 131 N. E. 858.)

Bank — set-off of deposit against note transferred to savings department.

1. Where by statute investments of the savings department of a trust company are to be made in accordance with the investment of deposits in savings banks, and not to be liable for obligations of the commercial department, a depositor in a trust company which becomes insolvent cannot set off the amount of his deposit upon his note given for money borrowed from the trust company, which the trust company had, without his knowledge, transferred to the savings department as an investment.

[See note on this question beginning on page 1487.]

— right to notice of transfer.

2. A depositor in a trust company who borrows money from its commercial department is not entitled to notice when it transfers a note given for the loan to its savings department, the effect of which will be to prevent a set-off against the deposit account in case of the insolvency of the trust company.

Set-off — as against assignee of creditor.

3. The defense of set-off or counterclaim which is available to a debtor as against an assignee of his creditor must have existed as a present right when the assignment was made.

[See 24 R. C. L. 841.]

REPORT by the Superior Court for Suffolk County (McLaughlin, J.) upon an agreed statement of facts, for determination by the Supreme Court of an action brought to recover the amount alleged to be due and unpaid upon a promissory note. *Judgment for plaintiff and for defendants in set-off.*

The facts are stated in the opinion of the court.

Messrs. Henry O. Cushman and Daniel L. Smith, for plaintiff:

There is no right of set-off at common law.

Hallowell & Augusta Bank v. Howard, 13 Mass. 235.

A set-off cannot be allowed where one of the parties holds the claim in a representative capacity and owes the debt against which set-off is claimed in an individual capacity.

Com. v. Phoenix Bank, 11 Met. 129; Seaver v. Weston, 163 Mass. 202, 39 N. E. 1013; Jump v. Leon, 192 Mass. 511, 116 Am. St. Rep. 265, 78 N. E. 532.

The statute under which the plaintiff maintains its savings department provides that special deposits placed in the savings department shall not be mingled with the investments or capital stock or any other money or property belonging to, or controlled by, such corporation, or liable for the

debts or obligations thereof, until after the deposits of said savings department have been paid in full.

Old Colony Trust Co. v. Com. 220 Mass. 409, 107 N. E. 950; Greenfield Sav. Bank v. Abercrombie, 211 Mass. 253, 39 L.R.A. (N.S.) 173, 97 N. E. 897, Ann. Cas. 1913B, 420.

Messrs. Friedman & Atherton and Paul D. Turner for defendants.

Pierce, J., delivered the opinion the court:

This is an action on a promissory note brought by the plaintiff to recover the sum of \$8,000 alleged to remain unpaid on the defendants' note for \$25,000 held by the plaintiff. The defendants' answer is a general denial, a claim of recoupment, and a declaration in set-off. The case is before this court on a re-

port by a justice of the superior court without decision upon an agreed statement of facts. From these facts it appears that the defendants, a copartnership, on their unsecured, single-name firm note dated July 25, 1920, borrowed of the Cosmopolitan Trust Company the sum of \$25,000, which became due and payable at the plaintiff's bank on November 10, 1920. The note was discounted on the day of its date by the trust company in the course of its general banking business. On that day the defendants had and continued to have at all times thereafter large sums of money on deposit with the trust company in connection with its general banking business. When the note was discounted by the trust company it had and ever since has maintained a savings department, in which deposits were made under the authority of and subject to Stat. 1908, chap. 520, now Gen. Laws, chap. 172, §§ 60-72. On September 20, 1920, without the knowledge or consent of or notice to the defendants, the trust company placed the defendants' note in the investments held by the savings department, without any indorsement thereof or other formality, and transferred \$25,000, the face value of the note less the legal discount for the period that the note had to run, from the funds of its savings department to its general funds. The trust company carried the note as a part of the assets of its savings department until September 23, 1920, when it indorsed the note and transferred it with a large amount of other notes, including many notes held in its savings department, to the Irving National Bank as security for a loan from that bank to the trust company. The trust company in no way indicated, in connection with said transfer, that the notes belonged to or were a part of the assets of the savings department. On December 18, 1920, after said loan had been paid in full, and discharged, the note in suit was returned by the bank to the plaintiff trust company and

thereafter held by it in its savings department. The committee on investments of the savings department was made up of a committee of the trust company directors. The same vaults were used by the savings department as were used by the plaintiff in its commercial business, and the business of the savings department was conducted by the same officers as conducted its other business, although clerks were specially assigned to the detail work of the savings department. On September 25, 1920, Joseph C. Allen as commissioner of banks of the commonwealth of Massachusetts, acting under the authority of Stat. 1910, chap. 399, now Gen. Laws, chap. 167, § 22, took possession of the property and business of the Cosmopolitan Trust Company, and has since retained and still retains the same under the provisions of said statute.

On September 25, 1920, the defendants had on deposit in the commercial department of the trust company \$7,901.87. At or soon after November 10, 1920, the date of the maturity of the note, the defendants paid the sum of \$17,000 on account of the note. About the same time the defendants tendered the sum of \$98.13, which, with the amount of the deposit in the trust company, \$7,901.87, made \$8,000, the amount then due for the said note. This tender has ever since been maintained and said amount has been paid to the court by the defendants, but the plaintiff has refused to accept the same. It is further agreed that "the deposits in said savings department have not been paid in full."

Upon the foregoing facts the question presented is, whether a depositor in a trust company can set off the amount of his deposit in the commercial department against the balance due from the depositor on a note held as an investment in the savings department of the same trust company.

Under the circumstances of this

case we do not think the defendants have a right of set-off. Stat. 1908, chap. 520, § 2, now Gen. Laws, chap. 172, § 61, under

Bank—set-off of deposit against note transferred to savings department.

which the plaintiff maintains its savings department, provides that all such deposits shall be special deposits, and shall be placed in said savings department, and all loans or investments thereof shall be made in accordance with the law governing the investment of deposits in savings banks. Section 3 of Stat. 1908, chap. 520, and § 62 of Gen. Laws, chap. 172, provide that "such deposits and the investments . . . thereof shall be appropriated solely to the security and payment of such deposits, and shall not be mingled with the investments of the capital stock or other money or property belonging to or controlled by such corporation, or be liable for the debts or obligations thereof until after the deposits in said savings department have been paid in full."

When the trust company transferred the note of the defendants to the savings department and received of the savings department from its deposits the discount value of the note on September 20, 1920, the savings department held the note as assignee with the same authority and subject to the same obligations to its depositors as it would have held any commercial paper which it had purchased without indorsement from a holder thereof who was not connected in any

—right to notice of transfer.

manner with its commercial department, and the defendants were no more entitled to a notice of such transfer than they would have been if the trust company had sold the note to a stranger. As assignee the savings department took the note subject to all equities and defenses existing between the commercial department and the defendants. But no claim is made that the note was not in all respects genuine and free from defenses. The note was not due when transferred to the savings department, and so far as appears

the defendants then had no claim or demand against the commercial department which was incidental to the note or to any independent contract for breach of which the defendants had a cause of action against the trust company.

The defense of set-off or counterclaim which is available to a debtor as against an assignee of a creditor must have existed

Set-off—as against assignee of creditor.

as a present right when the assignment was made, and this is especially true where the right arises out of an independent contract in this case to pay on demand the deposits of the defendants in the trust company bank which were subject to check.

This conclusion is not affected by the fact that the note may have been an investment illegal for the savings department. There is every reason why investments made of funds in the savings department should be shielded so far as possible from the illegal acts of those charged with the duty of caring for those funds. The plain and paramount purpose of the statute is to protect so far as practicable depositors in the savings departments of trust companies, many of whom may be poor people with small resources, against the risks of commercial banking. The seeming hardship of this result from the point of view of the defendant arises from the statute which permits corporations organized primarily for commercial banking also to transact a savings business. That is a matter of legislative policy with which the courts have nothing to do.

We think the allowance of a set-off would be contrary to the letter and spirit of Stat. 1908, chap. 520, § 2 (Gen. Laws, chap. 172, § 61), above quoted. Indeed the statute makes no provision for set-off against claims of the savings department of trust companies as it does in the case of savings banks. Gen. Laws, chap. 168, § 35; Stat. 1878, chap. 261, § 1.

This case is governed by *Kelly v.*

(— Mass. —, 131 N. E. 855.)

Allen, — Mass. —, 131 N. E. 855, and for the reasons there stated judgment should be entered for the plaintiff for \$8,000 and interest

thereon from November 10, 1920; and judgment should be further entered for the defendants in set-off. So ordered.

ANNOTATION.

Right of set-off by or against bank or trust company as affected by division of its business departments.

Search has disclosed, in addition to the reported case (COSMOPOLITAN TRUST CO. v. ROSENBUSH, ante, 1484), but one case in point on the right to set off a debt due by or to one of the business departments of a trust company against a claim owed to or due from another department.

In the reported case (COSMOPOLITAN TRUST CO. v. ROSENBUSH), it appeared that the defendants borrowed on their note from the plaintiff trust company, a sum of money. The note was discounted in the course of the company's general banking business, and placed among the investments held by the savings department of the company, without any indorsement thereof or other formality, money representing the face value of the note less the legal discount for the period that the note had to run being transferred from the funds of the savings department to its general funds. The borrower had a sum on deposit in the commercial department, which was tendered as a set-off against a balance due on the note. It is held that there was no right of set-off, under a statute (Gen.-Laws, chap. 172, §§ 61, 62) providing that deposits in the savings department shall be special deposits, and all loans or investments thereof shall be made in accordance with the law governing the investment of the deposits in savings banks, and shall be appropriated solely to the security of such deposits, and shall not be mingled with the capital stock or other money belonging to or controlled by such corporation, or be liable for the debts or obligations thereof until after the deposits in said savings department are paid in full. It is said, further, that the conclusion of the court was not affected by the fact that the note was an investment illegal for the

savings department, if the note was not due when transferred to that department, and the defendants had no claim against the commercial department which was connected with the note or with any independent contract for the breach of which the defendants had a cause of action against the trust company. See also Kelly v. Allen (1921) — Mass. —, 131 N. E. 855.

In Lippitt v. Thames Loan & T. Co. (1914) 88 Conn. 185, 90 Atl. 369, it was held that, since a charter authorizing a loan and trust company to conduct a savings department did not separate or distinguish that department as an independent institution, a borrower from the commercial department might set off against his indebtedness to that department, the amount of his deposit in the savings branch, the court saying: "We are also asked whether the borrower from the commercial department may set off against his loan his deposit in the savings department. At the beginning of the opinion we adopted the view that the savings depositor is a creditor of the company for the whole of his deposit, and that he is additionally protected by the statute, which provides that the investments of the savings department shall be first used to pay savings depositors. These conclusions might suggest a result that the depositor in the savings department should first exhaust his deposit and then set off merely the balance remaining due him against his debt to the commercial department. But the only practicable and workable rule compels the set-off of the savings deposit against the loan from the commercial department. Such a rule may benefit the savings depositor by

increasing his proportion in the savings assets, although diminishing his dividend from the assets of the commercial department. Likewise it may benefit this borrower and deplete the assets of the commercial department. But this result to the borrower and to the commercial department is what will happen where the deposit of a borrower in the commercial department is set off against his loan. If the rule should be adopted that the set-off allowed should only be the amount of the balance due after receipt of the dividend from the savings department, the company could not collect such loans until all the savings investments were liquidated and paid over. This would prejudice the borrower, as the interest upon his loan would continue. And it would delay the settlement of the estate, add to the administration and accounting burdens of the receiver, and, by deferring the payment of dividends to the depositors, in all likelihoods, lose the gain to them from the adoption of this rule in place of that adopted by us. The rule we adopt is far simpler and better adapted to the purposes of business. The simpler the rules of law affecting business relations can be made, the better for business. We can see no adequate reason for creating out of this situation an exception to the ordinary rule permitting the set-off, unless it be held that the savings de-

partment and the commercial department were in fact separate and independent institutions. In some respects the relation between these depositors is not unlike that of depositors in separate institutions. The law required the funds from the savings department to be kept separate, and invested in investments required by law for savings-bank deposits, and required the company to pay the same tax as paid by savings banks, but it did not require it to maintain the same statutory reserve as they were required to. In other features fundamental differences appear. The trustees, and not the depositors, control and manage the savings-department fund. We have seen that under the charter the savings depositors may, if the assets set apart in the savings department are not sufficient to pay their deposits, share, as to the balance, with the commercial depositors. If these departments constituted separate institutions, the savings depositors would be confined to the assets of their own department. We do not think the charter creates, or the law providing for the setting apart of savings funds and investing them in savings-bank investments intended to make of these departments, independent institutions. The savings deposits . . . can be set off against . . . loans in the commercial department."

L. F. C.

MITCHELL GRAIN & SUPPLY COMPANY

v.

MARYLAND CASUALTY COMPANY OF BALTIMORE, Appt.

Kansas Supreme Court — February 12, 1921.

(108 Kan. 379, 195 Pac. 978.)

Principal and surety — bond — embezzlement — construction.

1. In a bond insuring an employer against losses sustained by reason of conduct of an employee constituting embezzlement, the word "embezzlement" is to be construed broadly in its general and popular sense, rather than in a narrow and technical spirit with specific reference to the local statute; and a loss occasioned by the employee's speculating on the market

Headnotes by MASON, J.

in the name of the employer, but without his knowledge or consent, is within the protection of the bond.

[See note on this question beginning on page 1493.]

Master and servant — shortage of accounts — method of accounting.

2. The evidence as a whole is held not to show that the report of an accountant as to a shortage of an employee was arrived at upon an improper basis.

Insurance — fidelity — inspection of books — warranty.

3. Where a contract of insurance against losses through the embezzlement of an employee contains a warranty on the part of the employer that the books shall be inspected, audited, and verified at least once in three months, this requirement is met by an examination conducted by the officers of the employing company, and does

not involve the employment of an expert accountant for the purpose; nor does the fact that the examinations that were made failed to disclose shortages that were afterwards found to have existed necessarily show any breach of the warranty.

[See 14 R. C. L. 1150.]

— time for discovery of loss.

4. The requirement of a bond of indemnity against the results of embezzlement by an employee, that losses to be covered by it must be discovered within six months after his discharge, is met, where, within that period, the fact of a shortage becomes known, although its exact amount is not ascertained until later.

APPEAL by defendant from a judgment of the District Court for Rice County (Banta, J.) in favor of plaintiff in an action brought to hold defendants liable as surety for a shortage in the accounts of plaintiff's employee. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. C. M. Williams and D. C. Martindell for appellant.

Messrs. Samuel Jones and Ben Jones, for appellee:

The court had before it all the evidence, exhibits, books, and accounts, as well as the testimony of the witness Grant.

2 Wigmore, Ev. § 1230; Bourquin v. Missouri P. R. Co. 88 Kan. 183, 127 Pac. 770; Horwitz's Jones, Ev. § 206; Jones v. Boatmen's Bank, 66 Kan. 808, 72 Pac. 391.

The act of Biesemeyer in taking the money of the plaintiff corporation and paying it to the Kemper Grain Company, and his refusal to pay it back on demand, constituted an embezzlement.

Fidelity & D. Co. v. Colorado Ice & Storage Co. 45 Colo. 443, 103 Pac. 383; Vilm Mill. Co. v. Kansas Casualty & Surety Co. 104 Kan. 790, 180 Pac. 782; Delaware State Bank v. Colton, 102 Kan. 365, 170 Pac. 992; Champion Ice Mfg. & Cold Storage Co. v. American Bonding & T. Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197; State v. Ross, 55 Or. 450, 44 L.R.A. (N.S.) 601, 104 Pac. 596, 106 Pac. 1022; Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

The warranty as to the auditing of 16 A.L.R.—94.

the books was sufficiently complied with.

Southern Surety Co. v. Tyler & S. Co. 30 Okla. 116, 120 Pac. 936; American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613.

Defendant cannot rely on the defense that "proof of loss" was not made within the time limited.

Delaware State Bank v. Colton, 102 Kan. 365, 170 Pac. 992; Redinger v. Jones, 68 Kan. 627, 75 Pac. 997; Sandefur v. Hines, 69 Kan. 168, 76 Pac. 444.

Mason, J., delivered the opinion of the court:

The Mitchell Grain & Supply Company, a corporation dealing in grain, live stock, and coal, employed F. H. Biesemeyer as its manager, the Maryland Casualty Company executing a bond for him. He served in that capacity for about four years. His employer brought an action against the surety company, alleging that he was short in his accounts. The plaintiff recovered judgment, and the defendant appeals.

1. The trial was had without a ju-

ry. The court found a shortage evidenced by the difference between the cash shown by the books kept by the manager to have been received by him and that accounted for therein. In the finding the amount was stated to be \$1,758.38. The evidence showed it to be \$1,788.16, but the difference in the figures is not material to the present inquiry. The defendant argues that the finding is without support. The argument, however, is based upon the assumption that the amount was arrived at by taking the difference between the total cash received and the total amount of cash deposited in the bank. The accountant upon whose investigation and report the plaintiff relied made statements in his cross-examination which, taken by themselves, tended to support that theory. But his testimony as a whole made it reasonably clear that what he deducted from the cash receipts was not the bank deposits alone, but a sum which included all the cash shown by the books to have been paid out in any way.

The situation in this regard is shown by this extract from the cross-examination:

You go to work to see how much money he has deposited in the bank on the theory that all the cash which he has received has been deposited in the bank?

No; on the theory that it has been deposited in the bank less what he has paid out.

Now, you took the deposits in the bank and what he has paid, and what does that show?

\$40,305.63.

And you deduct \$40,305.63, being the amount that he has deposited in the bank as shown by his deposit slips and pass book, from \$42,093.79, and you conclude that the difference is a shortage which he has appropriated. Is that your proposition?

Yes, sir; that is my proposition.

Now, you say that his cash book

shows items of cash that was not deposited? Did I understand you to say that?

No; I don't believe I did.

Well, does it?

His cash book shows items in this way that are not deposited—that he has received \$1,788.16 more than he has deposited.

But how do you know that all the cash that he has received has been deposited in the bank?

It has not been all deposited.

Suppose a man comes in with a small parcel of wheat or oats, and he pays for it out of the drawer from cash received. That never goes into the bank?

He has no record of paying it out.

Have you a record of what has been paid out?

We have made a schedule showing the actual cash that has been paid, according to his cash book.

In the redirect examination the witness said: "This record of investigation shows the cash that he paid out that never went into the bank. If a man came along and sold something for cash, and he paid him cash out of the drawer, he has made a record of that. We have the cash-book pages and the amounts that he has taken credit for, and I have given him credit for that in the deduction amount."

2. The other item of shortage upon which the judgment was based is a loss of \$1,600, made by the manager in a speculation on the pork market conducted in the name of the grain company, the transaction, however, not being shown upon its books. The bond executed by the defendant undertook to reimburse the plaintiff "for such loss of money, securities, and the personal property belonging to or in the possession of the employer . . . which the employer shall have sustained by reason of any act or acts constituting larceny or embezzlement committed by the employee." The defendant contends that the act of the employee in investing the plaintiff's money in a losing venture on the market did not constitute

Master and
servant—
shortage of
accounts—
method of
accounting.

embezzlement. This court has already held that a bond indemnifying an employer against loss due to the "fraud or dishonesty" of an employee "amounting to embezzlement" is to be construed as covering acts of the general character indicated; and that in an action thereon it is not necessary to a recovery to prove embezzlement with technical accuracy. *Delaware State Bank v. Colton*, 102 Kan. 365, 170 Pac. 993; *Vilm Mill. Co. v. Kansas Casualty & Surety Co.* 104 Kan. 790, 180 Pac. 782. It is true that in the bond now under consideration the words "fraud and dishonesty" do not appear, and the phrase "constituting embezzlement" is used instead of "amounting to embezzlement," so that its language is not exactly the same as that passed upon in the cases cited. However, the substantial similarity of the question involved is shown by these quotations from the opinions:

"Without regard to the statutory definition of these offenses [larceny and embezzlement], the facts established by the evidence justified the conclusion of law that the cashier's conduct amounted to embezzlement within the meaning of that term as used in the bond. To hold otherwise would defeat the purpose for which the bond was given and the premiums accepted by the surety company. We think the term 'embezzlement' as used in the bond has a generic, and not a specific, meaning." 102 Kan. 368.

"In the bond the defendant undertook to reimburse the plaintiff for any pecuniary loss which it might sustain by reason of the fraud or dishonesty of the agent in connection with the duties and obligations of his position, and, in withholding the property and money of the plaintiff, and the fraudulent appropriation of the same to his own use, he violated his duty and obligation to the plaintiff, which substantially amounted to embezzlement and constituted a manifest breach of the fidelity bond." 104 Kan. 793.

As used in this connection, "constituting embezzlement" must be regarded as essentially the equivalent of "amounting to embezzlement." The bond is to be interpreted in the light of its nature as a contract of insurance, in view of its purpose as such, and with a considerable degree of liberality in favor of the insured and against the insurer by reason of its having framed the contract. A risk fairly within its contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words. The term "embezzlement" must be deemed to have been used in its general and popular sense, rather than with specific reference to the precise definition of the local statute. One who unlawfully makes way with the property of his employer intrusted to his care may be an embezzler, even although he derives no personal benefit from the transaction. 20 C. J. 427-429; 9 R. C. L. 1275, 1276. The manager claimed that in the pork deal he acted with the advice of the vice president of the grain company, but the court obviously disbelieved his statement. He also asserted that he had previously made money for the company by hedging on wheat deals, and that the purpose of the pork transaction was to hedge against loss through the government fixing the price of wheat. The trial court found specifically that the company had no knowledge of any such speculation in wheat; and selling pork for future delivery in the expectation that the government would likewise regulate its price can hardly be seriously considered as a justifiable hedge against a loss in wheat.

Principal and surety—bond—embezzlement—construction.

3. The application to the defendant for the making of the bond sued upon contained a warranty that the manager's books, accounts, and securities would be inspected and audited, and the outstanding accounts verified at least once in three months. The defendant urges that

if the books had been audited in accordance with this agreement the plaintiff would necessarily have discovered at once that the manager had been speculating upon grain futures; that if it did not make such a discovery there must have been such a breach of the warranty as to constitute a defense to the action on the bond; and that if it did learn of the manager's misconduct in this regard its failure to inform the defendant (as the contract also required) must likewise interpose a bar to its recovery. It was shown, however, that a meeting of the directors was held each month, at which a statement was submitted by the manager, and the trial court specifically found, upon what we regard as sufficient evidence, that at least once in every three months the officers made an examination of his books, but that they were so kept that they were unable to ascertain the real condition of his accounts, and could not and did not discover any misappropriation until about the time of his discharge. These considerations sufficiently dispose of the contention referred to. The warranty in question cannot fairly be construed as requiring a periodical examination by an expert accountant, or by anyone who, from

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an inspection of the books, could be certain of detecting any misappropriation of funds. 14

R. C. L. 1150; Prosser Power Co. v. United States Fidelity & G. Co. 73 Wash. 304, 132 Pac. 48. In behalf of the defendant it is urged that the plaintiff must have known that the manager was speculating in wheat. The trial court, however, found to the contrary, and the question was one of fact. Moreover a distinction might be drawn between hedging with respect to wheat on hand, and held for want of cars in which to ship it, and a pure gambling transaction in pork.

4. The bond insured the plaintiff only against such losses as should be discovered "within six months after the expiration or cancellation

of this bond, or any renewal thereof, or, in case of the death, resignation, or removal of the employee prior to such expiration or cancellation, then within six months after such death, resignation, or removal." The bond was given May 15, 1914, covering a period of one year, and was renewed several times, the last renewal expiring May 15, 1918. One of the plaintiff's witnesses testified that Biesemeyer was discharged in April, 1918. A final ground upon which a reversal is asked is that the employer's loss was not discovered within six months of that time. The basis of this contention is an allegation in the petition in these words: "That plaintiff did not discover said abstractions of its money and the wrongful taking thereof by said Biesemeyer and the full nature thereof until about the middle of December, 1918, when plaintiff caused its books and accounts kept by said Biesemeyer to be audited by one John A. Grant, an auditor employed by plaintiff when plaintiff learned for the first time of the nature and amount of said claim, and of the nature and amount of said sums so wrongfully appropriated and converted by said Biesemeyer."

There was evidence that in May, 1918, the existence of a shortage was suspected and an expert accountant was employed to examine the books for that reason; that the pork transaction was discovered in this month and acknowledged by Biesemeyer in the following October, in which month the first report of the accountant was made; that the full report of the final result of the examination was made in the following December. The allegation quoted from the petition may reasonably be interpreted as meaning merely that the exact amount of the shortage was not finally determined until December. No point appears to have been made by the defendant in the district court with respect to this feature of the case. The answer contained an allegation that in May, 1918, the plaintiff informed Biesemeyer of all the shortages

which were afterwards set out in the petition. The requirement that the loss occasioned to the employer should be discovered before the expiration of six months after the discharge of the

time for
discovery of
loss.

employee is sufficient fact of the existence becoming known at the time, although it may not have been discovered until later.

The judgment is

ANNOTATION.

What amounts to embezzlement or larceny within §

- I. Generally, 1493.
- II. Acts amounting to larceny or embezzlement, 1494.
- III. Acts not amounting to larceny or embezzlement, 1498.

I. Generally.

It seems to be conceded that a fidelity bond conditioned to indemnify the employer against larceny or embezzlement by the bonded employee does not cover acts of mere negligence or bad judgment. See the cases cited *infra* in subd. III. There is, however, a conflict of opinion as to whether such a bond covers dishonest acts of the employee which do not constitute the precise technical offense of larceny or embezzlement. In some cases it has been held that the bond covers only those acts which amount to one of the crimes named. *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* (1900) 40 C. C. A. 542, 100 Fed. 559; *Williams v. United States Fidelity & G. Co.* (1907) 105 Md. 490, 66 Atl. 495; *Farmers State Bank v. Title Guaranty & T. Co.* (1908) 133 Mo. App. 705, 113 S. W. 1147; *Granger v. Empire State Surety Co.* (1909) 132 App. Div. 437, 116 N. Y. Supp. 973; *Reed v. Fidelity & C. Co.* (1899) 189 Pa. 597, 42 Atl. 294. And see *Milwaukee Theater Co. v. Fidelity & C. Co.* (1896) 92 Wis. 412, 66 N. W. 360.

Other cases have taken the view that the terms "larceny" and "embezzlement" are used in a fidelity bond in a broad sense, covering any fraudulent appropriation of the property of the employer, though it may not amount to a crime. *Fidelity & D. Co. v. Colorado Ice & Storage Co.* (1909) 45 Colo. 443, 103 Pac. 383; *American Bonding & T. Co. v. New Amster-*

dam Casualty Co. (1911) 133; *Champion Ice Storage Co. v. American* (1903) 115 Ky. 868, 356, 75 S. W. 197; *States Fidelity & Ohio St.* 267, 99 N. Alabama Fidelity & Penny Sav. Bank (1876) 76 So. 103; *Illinois Donaldson* (1918) 667.

In *Fidelity & D. & Storage Co. (C)* said: "We are further of the view that, in a civil action, an instruction which requires the jury to find that the employee was guilty of embezzlement or larceny is sufficient, and, as the cases above cited propose for which such a stipulation is made, the term 'embezzlement,' as used, is intended to mean larceny, and that a refusal to give an instruction in substance, requiring the plaintiff to establish this fact, is a reasonable doubt, as in the cases cited, that the proper language of the stipulation is not contemplated, in order to avoid the conclusion, that the evidence is sufficient in all respects to warrant a conviction of the employee of the crime named in the case."

It has been held that the stipulation guaranteeing the employee against embezzlement sustained through fraud of the employer

larceny or embezzlement, the qualifying phrase, "amounting to larceny or embezzlement," qualifies only the word "fraud" and not the word "dishonesty," and that, therefore, the bond covers acts which are not technically larceny or embezzlement, provided they are dishonest. *City Trust, S. D. & Surety Co. v. Lee* (1903) 204 Ill. 69, 68 N. E. 485, wherein the court said: "The loss guaranteed was that sustained by the appellee through the dishonesty or any act of fraud of Morrow amounting to larceny or embezzlement, and it is argued that the conversion of the rents collected by Morrow did not amount to larceny or embezzlement, under the authority of *McElroy v. People* (1903) 202 Ill. 473, 66 N. E. 1058, 14 Am. Crim. Rep. 331, as he had an interest in the funds to the extent of his commissions, hence it is said there could be no recovery on the bond. We do not agree with such contention, as we think it clear the phrase, 'amounting to larceny or embezzlement,' does not qualify the word 'dishonesty,' and that the appellant is liable upon the bond for any financial loss sustained by the appellee through the dishonesty of Morrow, even though the conversion of the rents collected by him to his own use would not subject him to an indictment and conviction for larceny or embezzlement. It is apparent the appellee, by the bond, sought to protect himself from financial loss from the dishonesty of Morrow even though the act by which the loss was occasioned was not criminal. The bond was prepared by the appellant, and under a well-settled rule of construction will be most strongly construed against it, and in our view was intended to protect appellee from financial loss from just such dishonest acts of Morrow, namely, the failure to account for and pay over rents collected, as the proof in this record shows him to have been guilty of, and the fact that he could not be convicted of larceny or embezzlement for the conversion of said rents will not relieve the appellant from liability on the bond."

Although not technically embezzlement, it is fraud and dishonesty

amounting to embezzlement, as the meaning of that expression must be taken in a policy of fidelity insurance, for a bank cashier to cause his checks and a small note, totaling \$15,574, to be certified as accepted by the ledger keeper of the bank, the cashier having no deposit balance. *London Guarantee & Acci. Co. v. Hochelaga Bank*, Rap. Jud. Quebec 3 B. R. 25, wherein the court said: "In the next place the appellant pretends that under the terms of the policy it is not responsible for the loss of \$15,574 sustained by the bank from Parent having caused his checks and the small note for \$250 to be accepted by the ledger keeper. Its pretension is that it is only answerable for losses resulting from the fraud or dishonesty of Parent amounting to embezzlement, and that the obtaining of this sum in the manner mentioned did not constitute an embezzlement. It is true that, technically speaking, the obtaining of this money by the device used by Parent did not constitute the crime of embezzlement. The terms of the policy are that 'the appellant would make good and reimburse' to the bank, to the extent of the sum of \$10,000, such pecuniary loss as might be sustained by the bank by 'reason of fraud or dishonesty amounting to embezzlement on the part of Parent in connection with his duties.' These words have to be taken in their ordinary or vulgar sense, as otherwise the words 'fraud or dishonesty' are without effect, and should not have been used. We can apply here the rules to be found in articles 1014 and 1015 of the Civil Code: 'When a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none,' and 'expressions susceptible of two meanings must be taken in the sense which agrees best with the matter of the contract.' We have, therefore, to see what in popular parlance is understood by the word 'embezzlement.'"

II. Acts amounting to larceny or embezzlement.

It has been held that an employee

engaged in the collection or receiving of money belonging to his employer, who fails to account for the money so collected or received, is guilty of larceny or embezzlement within the meaning of a fidelity bond.

Alabama.—*Illinois Surety Co. v. Donaldson* (1918) 202 Ala. 183, 79 So. 667.

Colorado.—*Fidelity & D. Co. v. Colorado Ice & Storage Co.* (1909) 45 Colo. 443, 103 Pac. 383.

Illinois.—*City Trust, S. D. & Surety Co. v. Lee* (1903) 204 Ill. 69, 68 N. E. 485, affirming (1903) 107 Ill. App. 263; *American Bonding & T. Co. v. New Amsterdam Casualty Co.* (1906) 125 Ill. App. 33; *National L. Ins. Co. v. Title Guaranty & Surety Co.* (1914) 185 Ill. App. 221.

Kentucky.—*Champion Ice Mfg. & Cold Storage Co. v. American Bonding & T. Co.* (1903) 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197; *United States Fidelity & G. Co. v. Overstreet* (1905) 27 Ky. L. Rep. 248, 84 S. W. 764.

Maryland.—*American Bonding & T. Co. v. Milwaukee Harvester Co.* (1900) 91 Md. 733, 48 Atl. 72.

New York.—*Granger v. Empire State Surety Co.* (1909) 132 App. Div. 437, 116 N. Y. Supp. 973.

"Where the officers of an insurance company, on declaring the accounts of a general agent, discovered a shortage, which was admitted by the agent, who stated that the amount of the admitted shortage covered all collections up to the time of the examination, whereas the actual collections were \$2,000 in excess of that amount, it was held that a felonious intent on the part of the agent was shown, with-in a fidelity policy protecting the company against larceny or embezzlement on the part of the company." *National L. Ins. Co. v. Title Guaranty & Surety Co.* (Ill.) *supra*.

By the terms of the bond involved in *American Bonding & T. Co. v. New Amsterdam Casualty Co.* (1906) 125 Ill. App. 33, the bonding company agreed to indemnify the employer for loss sustained by acts of fraud or dishonesty amounting to larceny or embezzlement committed by an employee

while in the performance of his duties. The employee collected certain premiums which belonged to the employer, for which he failed to account. It was held that the acts were within the terms of the bond, and the bonding company was liable. And see *Granger v. Empire State Surety Co.* (N. Y.) *supra*, wherein the same rule was applied under a similar state of facts.

In *Illinois Surety Co. v. Donaldson* (Ala.) *supra*, it appeared that a surety company bound itself to indemnify the employer for any act of larceny or embezzlement of an employee whose duty it was to collect insurance premiums on a commission amounting to 20 per cent of the premium. The employee converted a whole premium to his own use. The court held the surety company to be liable.

In *American Bonding & T. Co. v. Milwaukee Harvester Co.* (Md.) *supra*, the bond in suit purported to indemnify the plaintiff against any loss resulting from any fraudulent or dishonest acts of his agent amounting to larceny or embezzlement. The agent's duty was to collect money for his principal from certain debtors. During the period covered by the bond the agent collected money which he turned over to the principal, but directed that the money be applied to accounts which he had collected for his principal prior to the giving of the bond, and the proceeds of which he had converted to his own use. It was held that the acts constituted embezzlement, and the bonding company was held to be liable under the bond.

It was held in *United States Fidelity & G. Co. v. Overstreet* (Ky.) *supra*, that a bond indemnifying against loss by fraud or dishonesty of the employee amounting to larceny or embezzlement covered acts of an advertising solicitor in failing to turn over and account for amounts collected by him on contracts for the newspaper.

Where a bookkeeper is authorized to fill out and cash checks, but not to sign them, his act in drawing money from the bank by check and failing

to turn over or account therefor is an act of dishonesty or fraud amounting to embezzlement within the purview of those terms in a fidelity bond. *Champion Ice Mfg. & Cold Storage Co. v. American Bonding, & T. Co.* (1903) 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197, wherein the court said: "There can be no doubt, under the evidence in this case, but that Weitkamp was authorized by appellant, and that it was a part of his duty, to receive money due it from its customers, and to draw money from the bank in which appellant's account was kept; and it was also his duty to account to appellant for the moneys thus received. His failure to do so was dishonest and fraudulent, and, in fact, constituted an act of embezzlement; and, for the loss resulting to his employer thereby, appellee's liability is fixed by the terms of the bonds."

In *Fidelity & D. Co. v. Colorado Ice & Storage Co.* (1909) 45 Colo. 443, 103 Pac. 383, it appeared that the bonding company agreed to indemnify the employer against any loss occasioned by the larceny or embezzlement of one who was employed to collect money. It was shown that the employer was short a certain sum of money in his accounts. The company was held to be liable.

Likewise, it has been held that where an employee fraudulently misappropriates, or assists in misappropriating, funds or property belonging to his employer, he is guilty of larceny or embezzlement within the meaning of a fidelity bond.

Florida.—*National Surety Co. v. Williams* (1917) — Fla. —, 77 So. 212.

Illinois.—*Tonsor v. Fidelity & D. Co.* (1910) 158 Ill. App. 515.

Kansas.—*Delaware State Bank v. Colton* (1918) 102 Kan. 365, 170 Pac. 992; *Vilm Mill. Co. v. Kansas Casualty & Surety Co.* (1919) 104 Kan. 790, 180 Pac. 782. And see the reported case (*MITCHELL GRAIN & SUPPLY CO. v. MARYLAND CASUALTY CO.* ante, 1488).

New York.—*J. W. Matthews & Co. v. Employers' Liability Assur. Corp.*

(1908) 127 App. Div. 195, 111 N. Y. Supp. 76, affirmed without opinion in (1909) 195 N. Y. 593, 89 N. E. 1102.

Ohio.—*Livingston v. Fidelity & D. Co.* (1905) 27 Ohio C. C. 662; *Rankin v. United States Fidelity & G. Co.* (1912) 86 Ohio St. 267, 99 N. E. 314.

Oklahoma.—*Oklahoma Sash & Door Co. v. American Bonding Co.* (1915) — Okla. —, 153 Pac. 1151.

Texas.—*Griffin v. Zuber* (1908) 52 Tex. Civ. App. 288, 113 S. W. 961.

Wisconsin.—*Goldman v. Fidelity & D. Co.* (1905) 125 Wis. 390, 104 N. W. 80.

Canada.—*London Guarantee & Acci. Co. v. Hochelaga Bank* (1898) Rap. Jud. Quebec 3 B. R. 25.

Thus, in *National Surety Co. v. Williams* (Fla.) supra, the bond in suit stipulated that the surety company should make good the losses of the bank resulting from any act of fraud and dishonesty, including larceny or embezzlement, etc., of its cashier. The cashier purchased shares of stock in a certain company with the funds of the bank, and placed his note, which was valueless, in the bank for the funds he had used in purchasing the stock, and as a result the bank sustained a loss. The court held the surety company to be liable, saying: "Where it is proven that a cashier of a bank has 'loaned' to himself, without authority, excessive amounts of the bank's funds, without taking security therefor, and that his bills receivable are considerably less in their aggregate amount than his bills receivable account carried on the books of the bank, it cannot be said that it has not been proven that he misappropriated the funds of the bank. The fact that he placed his worthless notes in the bank for the amount of the funds used or taken by him does not affect the substance of the transaction, nor change its real character."

So, where the cashier of a bank appropriates rents and securities of the bank to his own use, he is guilty of embezzlement within the meaning of a fidelity bond given to indemnify the bank against loss occasioned by the fraud or dishonesty of the cashier amounting to larceny or embezzle-

ment. *Delaware State Bank v. Colton* (Kan.) *supra*.

A postmaster who fails to account for money-order funds and postage stamps is guilty of embezzlement as defined by the laws of the United States, so as to hold a surety company on a bond given to indemnify certain sureties of the postmaster for any losses sustained by reason of any act of larceny or embezzlement committed by the postmaster in the discharge of his duties. *Griffin v. Zuber* (Tex.) *supra*.

In *Rankin v. United States Fidelity & G. Co.* (Ohio) *supra*, it appeared that the cashier of a bank, by virtue of an agreement between himself and a third person, certified as good certain valueless checks of the third person, from which he derived a financial benefit. The transaction resulted in a loss to the bank. It was held that for such acts the fidelity company was liable upon a bond to indemnify the bank for losses resulting from fraud or dishonesty of the cashier amounting to larceny or embezzlement.

The issuance by a bank cashier of checks as loans to fictitious persons, and the use of the funds derived therefrom, is embezzlement within the meaning of a fidelity bond. *Livingston v. Fidelity & D. Co.* (1905) 27 Ohio C. C. 662, wherein the court described the acts of the employee as follows: "Blodt's plan of operation was to buy cheap vacant lots in Cleveland under divers fictitious names, and in the same names to apply to his company for loans wherewith to erect buildings thereon. His board of directors granted the loans, on his recommendation, and issued checks therefor to the order of the fictitious applicants. Blodt was intrusted with these checks, and it was his duty to see to their application to the intended purposes, according to the usual custom of building and loan associations. Blodt, however, collected or deposited the checks for his own behoof, after indorsing them in the names of the fictitious payees."

For a bank cashier to substitute \$5 bank notes for \$10 notes in making

up bundles of currency, thus extracting \$8,140 from the bundles, but leaving them of the correct thickness is fraud and dishonesty amounting to embezzlement, within the terms of a policy of guaranty insurance. *London Guarantee & Acci. Co. v. Hochelaga Bank* (1893) Rap. Jud. Quebec 3 B. R. 25.

In the reported case (*MITCHELL GRAIN & SUPPLY CO. v. MARYLAND CASUALTY CO.* ante, 1488) it is held that the act of an employee in speculating in the pork market with money of his employer without his knowledge, whereby a loss occurred, was embezzlement of the employer's money within the meaning of a fidelity bond.

For a salesman to deduct, from moneys collected by him for his employer, the amount of false claims of shortages in salary, is larceny, and is an act covered by his fidelity bond stipulating to bind the obligors for losses occasioned by his fraud or dishonesty amounting to embezzlement or larceny. *J. W. Matthews & Co. v. Employers' Liability Assur. Corp.* (1908) 127 App. Div. 195, 111 N. Y. Supp. 76, affirmed without opinion in (1909) 195 N. Y. 593, 89 N. E. 1102, wherein it was said: "The findings of fact sufficed to support the legal conclusion of larceny under the law of this state. Section 528 of our Penal Code makes it larceny for an agent or servant to appropriate to his own use any money or property which he has in his possession as such agent or servant, 'with the intent to deprive or defraud the true owner of his property or of the use and benefit thereof.' Section 548 provides that it is a sufficient defense that the 'property' was 'appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable.' But the referee found on sufficient evidence that the appropriation in this case was in bad faith. Moreover, such appropriation did not come under this latter provision. The money was not appropriated under a claim of title, but under a claim of indebtedness by the plaintiff to the agent; and it is provided by the last sentence of this same section, that the

said section 'shall not excuse the retention of the property of another to offset or pay demands held against him.'"

For an employee to raise pay-roll checks is embezzlement within the meaning of that term as used in a fidelity bond. *Oklahoma Sash & Door Co. v. American Bonding Co.* (1915) — Okla. —, 153 Pac. 1151. In that case it was said: "The petition then sets out in detail in what the defalcation consisted, part in depositing in the bank a less amount than the cash book showed he should have deposited, and also contained the following: 'Raised pay-roll checks,'— and set out a number of instances in which the bookkeeper had raised the pay-roll checks, appropriating to himself the difference. We think this sufficiently alleges embezzlement."

In *Tonsor v. Fidelity & D. Co.* (1910) 158 Ill. App. 515, it was held that if the person to secure whose fidelity the bond is given takes money with a felonious intent to convert it to his own use, it is larceny within the meaning of a bond securing the employer against loss for any act amounting to larceny or embezzlement.

The withholding of money and property of an employer by an employee, and fraudulently appropriating the same to his own use, amount to embezzlement within the meaning of a fidelity bond given to reimburse the employer for any loss sustained by reason of the fraud or dishonesty of an employee amounting to larceny or embezzlement. *Vilm Mill Co. v. Kansas Casualty & Surety Co.* (1919) 104 Kan. 790, 180 Pac. 782.

It was held in *Goldman v. Fidelity & D. Co.* (1905) 125 Wis. 390, 104 N. W. 80, that where an agent who was intrusted with goods and money belonging to his principal failed to account for all the goods and money coming into his possession, he could properly be found guilty of embezzlement within the meaning of a fidelity bond given to reimburse the principal for losses resulting by an act of larceny or embezzlement on the part of the agent.

III. Acts not amounting to larceny or embezzlement.

It has been held that an employee who becomes indebted to his employer through mistake or carelessness, or by using funds of the employer for his personal use with no intent to defraud, is not guilty of embezzlement within the meaning of a fidelity bond. *Monongahela Coal Co. v. Fidelity & D. Co.* (1899) 36 C. C. A. 444, 94 Fed. 732, writ of certiorari denied in (1899) 175 U. S. 727, 44 L. ed. 339, 20 Sup. Ct. Rep. 1023; *United States Fidelity & G. Co. v. Bank of Batesville* (1908) 87 Ark. 348, 112 S. W. 957; *United States Fidelity & G. Co. v. Overstreet* (1905) 27 Ky. L. Rep. 248, 84 S. W. 764; *Williams v. United States Fidelity & G. Co.* (1907) 105 Md. 490, 66 Atl. 495; *Dixie F. Ins. Co. v. Nelson* (1913) 128 Tenn. 70, 157 S. W. 416; *Milwaukee Theatre Co. v. Fidelity & C. Co.* (1896) 92 Wis. 412, 66 N. W. 360.

Thus, in *United States Fidelity & G. Co. v. Bank of Batesville* (1908) 87 Ark. 348, 112 S. W. 957, the court held that the use of certain funds for personal expenses, by a bank employee, was not proved to be an act of fraud or dishonesty amounting to larceny or embezzlement, by evidence which the court outlined as follows: "The evidence shows that, commencing in May, 1903, and continuing up to the time his employment was terminated in 1904, Smith drew, on his account as agent in the Bank of Yellville, checks in favor of various parties. The aggregate amount of these checks was \$817.53. Smith attempts to account for these amounts. He accounts for about one half of it as being used in the business of the company, and the remainder seems to have been used for his own personal expenses and for the purchase of some jewelry. The record does not disclose that the rest of the money found to be due the bank by Smith has been accounted for in any way. The bank contends that the fact of Smith drawing these checks on this account as agent at the Bank of Yellville is evidence of appropriation of its funds, amounting to larceny and embezzlement under the

terms of the bond. The plaintiff bank and the Bank of Yellville during this period exchanged statements according to the usual course of business. A comparison of the monthly statement received by the plaintiff bank from the Bank of Yellville with that received from Smith at the end of the month would have disclosed what items, if any, Smith had drawn and not used in the business with which he was intrusted. Smith made no attempt to conceal these amounts, or the fact that he drew on his agent's account in favor of the various persons. A comparison of these checks or drafts with the time checks would have disclosed whether or not they were given in discounting the amounts to become due the laborers; for the time checks given the laborer contained his name and the amount due him on pay day. A checking up with Smith of his expense account would have shown whether these checks were a part of it. He was allowed to draw on his account as agent for its expense fund, and was not required to itemize it. After Smith was notified by the bank that his account was short, he assisted in every way possible to discover the discrepancy in his accounts. A part of it, amounting in the aggregate to over \$1,000, was found. Smith is not shown to have any money or to have made any investments. True, there is some testimony to show that he was extravagant, but it must be remembered that he was allowed a liberal expense account, which was not confined to his actual expenses, and that the opportunity to spend money on a line of railroad not in operation, and being constructed through a country containing only small towns, could not have been great. There is some testimony that he gambled. This he denies. But in any event it is not shown that he gambled habitually, but only occasionally, and then with men who could not afford to play for high stakes. The law presumes every man honest until the contrary is shown. We do not think the evidence establishes that the discrepancy arose from the fraud or dishonesty of Smith

amounting to larceny or embezzlement."

Mere proof of a balance due to the employer from the employee is not sufficient on which to predicate liability under a fidelity bond indemnifying the obligee against loss by the larceny or embezzlement of the employee. There must be proof of dishonest acts of the employee. *Williams v. United States Fidelity & G. Co.* (1907) 105 Md. 490, 66 Atl. 495.

An agent of several insurance companies who deposits collections of the different companies in the bank to his individual account, and checks on it to meet the needs of the business, without any objection by the companies, is not guilty of embezzlement on failing to account for premiums collected and deposited in the bank, within a bond given to indemnify one of the insurance companies against such appropriations of money by the agent as amount to larceny or embezzlement. *Dixie F. Ins. Co. v. Nelson* (1913) 128 Tenn. 70, 157 S. W. 416, wherein the court said: "He drew on the general fund composing his deposit account for the conduct of his business as a general agent for all the companies. He could not be justly charged with conscious wrongdoing when his principals, by their silent acquiescence in this course of business, gave their sanction to the hazard which it entailed. In this view, the corrupt motive necessary to make out a case of embezzlement did not exist."

A mere indebtedness of a bonded employee to his employer, on a settlement of accounts, is not a sufficient basis for liability of the surety company, the bond limiting liability to losses by the dishonesty of the employee amounting to larceny or embezzlement. *Monongahela Coal Co. v. Fidelity & D. Co.* (1899) 36 C. C. A. 444, 94 Fed. 732, writ of certiorari denied in (1899) 175 U. S. 727, 44 L. ed. 339, 20 Sup. Ct. Rep. 1023. In that case the court said: "These provisions all relate to the obligations of the company. From them it appears that the liability of the company is restricted to claims based upon the

larceny, embezzlement, or at least the dishonesty, of the employee. The obligation of the company does not cover every liability or claim which might accrue in favor of the employer and against the employee. A loss by carelessness or inattention to business might be the foundation of a just claim against the employee by the employer, which would impose no liability on the company by the terms of its obligations in the bond. If, with the consent of the employer, expressed, or implied from the course of dealings between it and the employee, the latter used or retained moneys, charging itself with them, it would be no obligation covered by the insurance or indemnity of the company. It follows, therefore, that the fact that the account between the employer and the employee shows an indebtedness from the latter to the former is not sufficient of itself to support a claim on the bond against the company. To recover in an action on a bond, defense being made, there must be an allegation of a breach of it, sustained by evidence. There is neither allegation nor proof that the employee has, through fraud or dishonesty, diverted from the employer moneys, securities, or other property, nor that it has committed larceny or embezzlement of such property."

The turning over by a corporation of funds to its treasurer, to be held by him at interest, creates a relation of debtor and creditor, and not a trust relation, between him and the corporation, so that his failure to pay the funds over to his successor is not embezzlement within the meaning of that term in a fidelity bond. *Milwaukee Theatre Co. v. Fidelity & C. Co.* (1896) 92 Wis. 412, 66 N. W. 360, wherein it was said: "The defendant corporation did not contract to pay any more debts which Obermann might owe to the theater company, but only to reimburse it for pecuniary loss resulting from embezzlement or larceny. The question, therefore, is whether the evidence shows that Obermann has been guilty of embezzlement of the \$6,000. So far as necessary to define embezzlement for the purposes of this

case, it may be defined as the fraudulent conversion of the money or personal property of another, which is in the possession of a trustee, servant, agent, or bailee in a trust capacity. There can be no embezzlement unless the property charged to have been embezzled was, at the time of conversion, held in trust. A mere debtor does not embezzle the money of his creditor by failing to pay the debt when due. Did Oberman hold the money in question in a trust capacity, or was he simply the debtor of the plaintiff to that amount? The trial court evidently thought that he had become a mere debtor, and with that conclusion we agree. Interest is compensation for the use of money. When the theater company resolved that Obermann should pay them interest on moneys in his hands, and charged him with such interest, and Obermann assented, the necessary implication resulting from the arrangement was that he was to have the use of the money. He was to pay for the use of it. Why should he not have what he paid for? We could not sustain a conviction for embezzlement on these facts, nor have we been referred to any case where such a conviction on similar facts has been sustained."

It has been held that a bond indemnifying against loss by the fraud or dishonesty of the employee, amounting to larceny or embezzlement, does not cover acts of an advertising solicitor for a newspaper in failing to turn over moneys advanced to him for the prosecution of his work, or in failing to repay amounts paid his creditors by the newspaper, to enable him to work. *United States Fidelity & G. Co. v. Overstreet* (1905) 27 Ky. L. Rep. 248, 84 S. W. 764.

It has also been held that an employee is not guilty of larceny or embezzlement within the meaning of a fidelity bond, who, with no wrongful intent, but, by mistake, disobedience of orders, or bad judgment, does an act which results in a loss to his employer.

United States.—Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. (1900) 40 C. C. A. 542, 100 Fed.

559, reversed on other grounds in (1902) 183 U. S. 402, 46 L. ed. 254; 22 Sup. Ct. Rep. 124; *Dominion Trust Co. v. National Surety Co.* (1915) 137 C. C. A. 842, 221 Fed. 618, Ann. Cas. 1917C, 447.

Kansas.—*Kansas Flour Mills Co. v. American Surety Co.* (1916) 98 Kan. 618, 158 Pac. 1118.

Missouri.—*Farmers State Bank v. Title Guaranty & T. Co.* (1908) 133 Mo. App. 705, 113 S. W. 1147.

North Dakota.—*Fidelity & D. Co. v. Nordmarken* (1915) 32 N. D. 19, 155 N. W. 669.

Pennsylvania.—*Reed v. Fidelity & C. Co.* (1899) 189 Pa. 596, 42 Atl. 294.

Washington.—*Clarke v. Fidelity & D. Co.* (1913) 73 Wash. 62, 131 Pac. 468.

Canada.—*Gray v. Employers' Liability Assur. Corp.* (1913) 23 West. L. R. 527, 4 West. Week. Rep. 106, 10 D. L. R. 369.

Thus, in *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* (Fed.) supra, it appeared that a surety company bound itself to make good any loss which might be occasioned to a bank from the acts of its cashier equivalent to embezzlement or larceny. The cashier paid overdrafts on the bank without authority from the bank, but received no benefits therefrom. It was held that the surety company was not liable, the court saying: "The cashier's bond stipulated that the appellant, as surety, should make good those losses of the bank which might result from such fraudulent actions of Schart, the cashier, as were equivalent to embezzlement or larceny. The obligation of the surety, by its express terms, was limited to that character of wrongdoing upon the cashier's part. The evidence in the case is very explicit that the defalcation of Schart during the period when the cashier's bond was in force, namely, from January 1, 1893, to April 17, 1893, was \$22,964.17, of which the sum of \$5,992.35 was on account of overdrafts paid by him, but not authorized by the bank. This defalcation, even if it had been in some respects fraudulent, must necessarily

have been on account of moneys paid out on the checks of customers who had no funds to their credit to meet them; but it is not shown that Schart embezzled or appropriated any part of the proceeds of these overdrafts, or received any benefit therefrom. If this be true, it is manifest that while Schart was individually responsible for it to the bank, as his principal, no act was done by him which was either embezzlement or larceny, and consequently that the loss was not one which, by any fair interpretation, would bring it within the obligation of the surety on the bond of the cashier."

The acts of a bank cashier in crediting a depositor with the amount of a draft, letting it take the place of a former dishonored draft, and marking the latter "Paid," have been held not to constitute fraud amounting to embezzlement or larceny. *Farmers State Bank v. Title Guaranty & T. Co.* (Mo.) supra. The facts in that case were as follows: "It was shown that Woolf [the cashier] counseled and advised Myers in relation to these partnership affairs. On October 9, 1905, Myers made a draft for \$1,500 on B. W. Redfern & Company, St. Louis, which was deposited to his credit and upon which he was allowed to check before any returns were received from the draft. On October 17th, Myers drew another draft on the St. Louis concern for \$1,200, which was also deposited to his credit and upon which he was allowed to check before any returns from the same had been received. Both these drafts were indorsed, 'No protest.' The second draft was accepted by the drawee on October 19, 1905. Both were returned unpaid. The first was returned to and received by the bank on October 20, 1905, and the second on October 28, 1905. On the return of the first draft for \$1,500, Woolf, upon the assurance of Myers that there was some mistake about the matter, allowed Myers on October 26th to draw and deposit another draft on the same concern for \$1,500, and canceled the first draft, crediting the same by the second one for that amount. On October

28th, Woolf allowed Myers to draw another draft for \$1,200 to take the place of the former one for an equal amount, marking the first 'Paid' and crediting the same by the second, and allowed Myers to check upon the same. These last two drafts were also returned unpaid. On November 6, 1905, these transactions left Myers's account overdrawn to the extent of \$2,700. Subsequently, Myers made sundry deposits which reduced the amount overdrawn on his account with the bank to the sum of \$1,886.29. This suit on the bond is to recover the balance. The defense is that defendant is not liable by the terms of the bond for the shortage." The court said: "So considering the interpretation to be put upon the meaning of the language of the instrument, the question remaining is, whether the evidence tended to show that Woolf had been guilty of such fraud or dishonesty in his capacity as plaintiff's cashier as to constitute embezzlement, there being no question of larceny. The evidence falls short of showing that the acts of Woolf constituted embezzlement. It was not shown that the drafts drawn on the St. Louis company were wrongful. So far as the record shows, Myers may have had the right to make the drafts. The refusal of the drawee to pay the drafts may have arisen out of some dispute as to the quality or quantity of the produce shipped, or of inability to pay them. There is an entire absence of proof as to whether or not Redfern & Company was indebted to Myers, except the statement of Woolf that Myers told him the produce had been shipped. There was no evidence of an intent upon the part of Woolf to convert the funds of the bank to his own use or to the use of his firm."

For the president of a trust company to surrender certificates of stock owned by him, and, in his capacity as president of the firm, to reissue them for a greatly increased number of shares, and to sell and pledge the reissued shares, does not constitute dishonesty amounting to larceny or embezzlement. *Dominion Trust Co. v. National Surety Co.* (1915) 187 C. C.

A. 342, 221 Fed. 618, Ann. Cas. 1917C, 447.

A salesman who sells machinery and takes in return therefor certain stock, which stock is immediately turned over to and retained by the employer, is not guilty of embezzlement within the meaning of a bond which is given to protect the employer against loss sustained by reason of the larceny or embezzlement of the employee, though the stock subsequently becomes worthless. *Fidelity & D. Co. v. Nordmarken* (1915) 32 N. D. 19, 155 N. W. 669.

The act of an agent who has authority to draw checks on his principal, and who, by an unintentional mistake and without fraud, gives a check greatly in excess of the proper amount, is not embezzlement or larceny within the meaning of a bond indemnifying the principal against loss sustained by "any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, or misapplication" on the part of the agent. *Kansas Flour Mills Co. v. American Surety Co.* (1916) 98 Kan. 618, 158 Pac. 1118.

A fidelity bond to protect an employer against loss by "any act of larceny or embezzlement" of an employee engaged to sell goods on consignment does not cover the act of the employee in expending money in removing the location of the business to a different neighborhood, which proves to be poor business judgment. *Clarke v. Fidelity & D. Co.* (1913) 73 Wash. 62, 131 Pac. 468, wherein it was said: "It is not disputed that the rock that wrecked this business was the move to Second avenue, with its enlarged rental and amount expended in making store changes. Miss Churchill may have used poor business judgment in making this move, but it is another thing to say that, because she lost money in attempting to put the business on a better paying basis, she was guilty of larceny or embezzlement. She appropriated the money to what she deemed to be the demands of the business, for the mutual benefit of herself and respondent. She did not misap-

propriate it to her own use, or make such a conversion of it as to subject her to a charge of larceny. Larceny is to take the money or property of another, with criminal intent to deprive the true owner of its use and benefit. There is nothing of that kind disclosed in this record, and this bond covers nothing else. It does not cover the indebtedness of Miss Churchill to respondent, or the balance due it on its consigned account. It protects respondent against the dishonesty of Miss Churchill, but not against her lack of business acumen. Nor does it guarantee the success of her adventure. . . . Larceny and embezzlement are terms well defined in law, and any obligation insuring against the commission of these offenses cannot be extended to cover pecuniary losses occurring from other causes. The bond as written was a fidelity risk, insuring the honesty of Miss Churchill, and not a financial risk guaranteeing her ability to pay her indebtedness as assumed or contemplated as a liability under her contract with respondent."

In holding that acts of an employee which are not fully disclosed in the

opinion did not amount to embezzlement, in *Gray v. Employers' Liability Assur. Corp.* (1913) 23 West. L. R. (Can.) 527, 10 D. L. R. 369, the court said: "Furthermore, the conduct of the business was not such, from the evidence before me, as to constitute fraud or dishonesty which amounts to embezzlement or larceny. There was no concealment of his methods; he was drawing moneys out by check as required, and was occasionally paying money in that came from sources other than the plaintiff's business. He was in receipt of a salary, from the start of \$150 a month, in addition to which he was entitled to one half the profits; and it appears that they were doing a profitable business. He might reasonably set up a right to use the moneys on the strength of these profits; and, however improper this might have been, it would not amount to embezzlement."

In *Reed v. Fidelity & C. Co.* (1899) 189 Pa. 596, 42 Atl. 294, it was held that, for an agent to send out goods on credit instead of sending them C. O. D., as he was required to do by his contract, was not embezzlement within a fidelity bond. L. W. B.

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